ADVISORY COMMITTEE
ON
CIVIL RULES

October 17, 2023

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Meeting of the Advisory Committee on Civil Rules
October 17, 2023

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RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Washington, DC

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
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	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
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	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
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ADVISORY COMMITTEE ON CIVIL RULES

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	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

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Honorable Jennifer C. Boal United States District Court Boston, MA	Honorable Brian M. Boynton Principal Deputy Assistant Attorney General (ex officio) United States Department of Justice Washington, DC
David J. Burman, Esq. Perkins Coie LLP Seattle, WA	Professor Zachary Clopton Northwestern University Pritzker School of Law Chicago, IL
Honorable David C. Godbey United States District Court Dallas, TX	Honorable Kent A. Jordan United States Court of Appeals Wilmington, DE
Honorable M. Hannah Lauck United States District Court Richmond, VA	Honorable R. David Proctor United States District Court Birmingham, AL
Joseph M. Sellers, Esq. Cohen Milstein Sellers & Toll PLLC Washington, DC	Honorable Manish S. Shah United States District Court Chicago, IL
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Consultant
Professor Edward H. Cooper University of Michigan Law School Ann Arbor, MI

Clerk of Court Representative
Carmelita Reeder Shinn, Esq. Clerk United States District Court Oklahoma City, OK

Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Date
Robin L. Rosenberg Chair	D	Florida (Southern)	Member: 2018 Chair: 2022	---- 2025
Cathy Bissoon	D	Pennsylvania (Western)	2021	2024
Jane Bland	JUST	Texas	2022	2025
Jennifer C. Boal	M	Massachusetts	2018	2024
Brian M. Boynton*	DOJ	Washington, DC	----	Open
David J. Burman	ESQ	Washington	2021	2026
David C. Godbey	D	Texas (Northern)	2020	2026
Kent A. Jordan	C	Third Circuit	2018	2024
M. Hannah Lauck	D	Virginia (Eastern)	2022	2025
R. David Proctor	D	Alabama (Northern)	2021	2024
Joseph M. Sellers	ESQ	Washington, DC	2018	2024
Manish S. Shah	D	Illinois (Northern)	2023	2025
Zachary Clopton	ACAD	Illinois	2023	2026
Ariana J. Tadler	ESQ	New York	2017	2024
Helen E. Witt	ESQ	Illinois	2018	2024
Richard Marcus Reporter	ACAD	California	2023	2028
Andrew Bradt Associate Reporter	ACAD	California	2023	2028

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ADVISORY COMMITTEE ON CIVIL RULES
SUBCOMMITTEES
(2023–2024)

Discovery Subcommittee Judge David Godbey, Chair Judge Jennifer Boal David Burman, Esq. Joe Sellers, Esq. Ariana Tadler, Esq. Helen Witt, Esq. Carmelita Shinn, Clerk Rep	**E-Filing Deadline Joint Subcommittee** Judge Jay Bybee, Chair Judge Catherine McEwen Judge Cathy Bissoon Judge Carl Nichols Catherine Recker, Esq. Jeremy Retherford, Esq. Joshua Gardner, Esq.
Multidistrict Litigation Subcommittee Judge R. David Proctor, Chair Judge M. Hannah Lauck David Burman, Esq. Joe Sellers, Esq. Ariana Tadler, Esq. Helen Witt, Esq.	**Rule 41 Subcommittee** Judge Cathy Bissoon, Chair Professor Zachary Clopton Ariana Tadler, Esq. David Burman, Esq.
Rule 7.1 Subcommittee Justice Jane N. Bland, Chair Judge Manish S. Shah David Burman, Esq.	**Unified Bar Admission Joint Subcommittee** Judge J. Paul Oetken, Chair Judge Andre Birotte Judge Michelle Harner Judge M. Hannah Lauck David Burman, Esq. Catherine Recker, Esq. Carmelita Shinn, Clerk Rep

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Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. Daniel A. Bress *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Hon. D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*)

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TAB 1

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 6, 2023

The Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") met in a hybrid in-person and virtual session in Washington, D.C., on June 6, 2023. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Robert J. Giuffra, Jr., Esq.
Judge William J. Kayatta, Jr.
Judge Carolyn B. Kuhl
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.[*]
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Judge D. Brooks Smith
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 Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

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

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox, Rules Committee Staff; Demetrius Apostolis, Rules Committee Staff Intern; Christopher I. Pryby, Law Clerk to the Standing Committee; Hon. John S. Cooke, Director, Federal Judicial Center ("FJC"); and Dr. Tim Reagan, Senior Research Associate, FJC.

[*] Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice ("DOJ") on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order and welcomed members of the public who were attending in person. He also welcomed new Standing Committee member Judge Paul Barbadoro and bade farewell to two members soon to depart the committee, Robert Giuffra and Judge Carolyn Kuhl. Judge Kuhl and Mr. Giuffra gave brief departing comments, and Judge Bates thanked them for their service.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the January 4, 2023, meeting.**

Judge Bates remarked that a chart tracking the status of rules amendments commenced on page 52 of the agenda book. Mr. Thomas Byron, Secretary of the Standing Committee, noted that the latest set of proposed rule amendments had been transmitted from the Supreme Court to Congress in April.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Catherine Struve reported on this item, which is under consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Professor Struve recalled that this project had benefited from discussions in the advisory committees, from which important questions arose about the practical logistics of electronic access to the courts. Armed with those questions, she and Dr. Tim Reagan of the FJC held conversations with 17 court personnel in nine districts that had broadened electronic access for self-represented litigants. Professor Struve expressed appreciation for Dr. Reagan's expert guidance concerning these inquiries.

One of their primary areas of inquiry was whether there is any reason to require traditional service by a self-represented litigant on other litigants who already receive notices of electronic filing ("NEFs"). Among the districts whose personnel they interviewed, seven districts exempt self-represented litigants from making such traditional service on CM/ECF participants: the District of Arizona, the Northern District of Illinois, the Western District of Missouri, the Southern District of New York, the Western District of Pennsylvania, the District of South Carolina, and the District of Utah.

In those districts, exempting self-represented litigants from paper service added no burden on the courts' clerk's offices. When self-represented litigants file non-electronically, the clerk's offices already scan those paper filings and upload them to CM/ECF. There are some exceptions to the exemption from making traditional service; notably, filings under seal that are not available to other litigants via CM/ECF must be served on the other litigants by traditional means, but in those circumstances the courts require paper service by anyone making such a sealed filing. That would be true for either a self-represented litigant or a CM/ECF participant.

Professor Struve observed that the exemption from making traditional service exists only when the recipient is receiving NEFs (because they are enrolled either in CM/ECF or in a court-

provided electronic-noticing system). A self-represented litigant who does not receive NEFs will need to be served by traditional means. A filer who is receiving NEFs will learn from the NEF who, if anyone, must be served by traditional means. But if a paper filer is not receiving NEFs, one must ask how that filer will know whether any other litigants in the case are also not receiving NEFs. The universal answer from court personnel was that it just is not an issue.

She thought that this question would likely be an issue only in a vanishingly small number of cases—in part because there would need to be multiple self-represented litigants in the case. She also believes there are ways to craft an exemption from the traditional service requirement to take care of that situation and to ensure that anybody who needs traditional service does get it without burdening non-CM/ECF-filing self-represented litigants with superfluous paper service. She plans to convene a Zoom working-group meeting over the summer to discuss a potential amendment about an exemption from service.

Interviewees were also asked whether and how self-represented litigants obtain access to CM/ECF. About six or seven of the districts covered in the interviews offer some degree of access to CM/ECF for self-represented litigants. At least two of those districts do not require any special permission from the court, and the other districts allow it with court permission. Interviewees from those districts identified a number of benefits from providing that access. It decreased the number of paper filings, saved the court time from scanning documents, avoided the need to have the court serve orders in paper, and averted disputes about what was actually filed and whether a filing had all its pages. There were some reports of burdens as well as notes about the need to make sure there is adequate staffing for technical support and training. There were also some interesting anecdotes about how the courts deal with inappropriate filings. But overall, the report from these districts was positive. As one respondent put it, the benefits outweigh the risks.

Professor Struve further reported that courts are experimenting with increasing electronic access by disaggregating the elements of access via CM/ECF and providing them "à la carte." For example, some courts permit other means of electronic submission through upload or through email, and interviewees from those courts listed a number of benefits from those programs. One prominent benefit was not having to scan paper filings. She noted that many of the respondent districts also provided their own electronic-noticing systems, which benefited the courts because the recipients of NEFs no longer need to receive paper copies of court orders.

Electronic-Filing Deadline

Judge Bates reported on this item.

Judge Michael Chagares, currently the Chief Judge of the Third Circuit, first raised this suggestion some years ago in his capacity as Chair of the Appellate Rules Committee. The suggestion was to change the presumptive electronic-filing deadline set by the time-counting rules to a time earlier than midnight. The objective was to promote a positive work environment for young associates who were working until midnight to get court filings done. A joint subcommittee considered this suggestion, but it did not take any action at the time.

Recently, the Third Circuit adopted a local rule making the filing deadline earlier in the day. The Standing Committee has therefore referred the matter back to the joint subcommittee,

which needs to be recomposed. The joint committee will re-examine the issue and decide whether to propose a rules amendment or perhaps whether it might be better to let the experiment in the Third Circuit run its course for a couple of years to see how things go.

A judge member noted that the Third Circuit's new local rule has elicited an almost entirely negative reaction from members of the bar. A practitioner member argued that this rule change, though well-intentioned, would not make people's lives better. Moving the deadline earlier will simply ruin the night before. Setting the deadline at five o'clock will really wreak havoc for many practitioners. Moreover, even if this deadline is not so bad for appellate lawyers—whose briefing schedule is more predictable and who are not engaged in fact development—it would play out differently in the district courts.

District-Court Bar Admission Rules

Judge Bates reported on this item. Several of the advisory committees received a proposal from Alan Morrison and others on a unified bar-admission rule. The proposal would make admission to one federal district court good for all federal district courts. It would also centralize the disciplinary process that goes along with court admissions.

A joint subcommittee has been formed with representatives from the Advisory Committees on Civil, Criminal, and Bankruptcy Rules to review the proposal over the course of the next year or two. That review may also require some work by the FJC. Professors Struve and Andrew Bradt will be the reporters for the joint subcommittee. Judge Bates thanked them and the members of the joint subcommittee for their work.

An academic member commented that a similar proposal had come up in the past and had a very fraught life. A consultant agreed with the academic member's remarks. A previous proposal had managed to unify all the local and state bar associations in America against it.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Jay Bybee and Professor Edward Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met in West Palm Beach, Florida, on March 29, 2023. The advisory committee presented three 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 70.

Action Items

Amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) and Conforming Changes to Rule 32 (Form of Briefs, Appendices, and Other Papers) and the Appendix of Length Limits. Judge Bybee introduced this item. The advisory committee sought final approval of these proposed amendments, which appeared starting on page 103 of the agenda book.

The advisory committee had received a handful of public comments, which were listed in pages 72–75 of the agenda book. The advisory committee did not recommend any changes in response to those comments.

The proposal consolidates Rule 35 into Rule 40. It does not make any substantive changes to the basis for seeking rehearing from the panel or rehearing en banc. The proposal tries to simplify and clarify the rules, particularly in response to several comments received about the multitude of pro se filings.

A judge member agreed with the rule's statement that rehearing en banc is disfavored. The member asked for additional background on that language. Judge Bybee noted that the language was already in the rule; the proposal did not add it. The judge member observed that some of the public comments had disagreed with that language. Professor Hartnett responded that the advisory committee had been unmoved by those comments because they were at such odds with the usual, uncontroversial practice in the courts of appeals.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 32, 35, and 40 and the Appendix of Length Limits.**

Amendment to Rule 39 (Costs). Judge Bybee introduced this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting at page 149 of the agenda book.

In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court invited the advisory committee to clarify what costs are recoverable on appeal and who has the responsibility for allocating those costs. This proposed amendment does so. It makes a change in nomenclature by clarifying the distinction between "allocating" costs and "taxing" costs. "Allocating" means deciding who is going to pay, and "taxing" means deciding how much is going to be paid. The responsibility for taxing is divided, under the rules, between the district courts and the courts of appeals. The proposed amendment also clarifies the procedure for asking the court of appeals to reconsider the question of allocation.

A question not addressed by the proposed rule is what to do about requiring disclosure of the costs associated with a supersedeas bond, which was the context for *Hotels.com*. In that case, there was a very large bond, whose costs were shifted from one party to the other after the case was over. It was possible that the party that had not sought the bond was going to end up with significant costs that it may not have anticipated.

As the advisory committee considered this rule, it could not come up with a good mechanism within the appellate rules for ensuring that disclosure, so the proposed amendment does not address it. It is fairly rare, but when it does come up, it can be a serious problem, so the advisory committee recommended that the Civil Rules Committee consider whether an amendment to Civil Rule 62 might address disclosure.

An academic member asked whether any thought had been given to whether the change in terminology ("allocating" versus "taxing") might cause confusion. Judge Bybee reported that the advisory committee had carefully considered potential transition costs and had concluded that clarifying the terminology is worthwhile.

A judge member expressed concern that the phrasing "allocated against" (e.g., "if an appeal is dismissed, costs are allocated against the appellant") did not sound right. A style consultant

agreed, saying that the usual expression would be "allocated to." Professor Hartnett responded that "against" is in the existing language (e.g., "costs are taxed against the appellant"), and he explained that the advisory committee wanted to make clear who is on the hook to pay. Allocating something "to" someone might suggest that that person is receiving money rather than having to pay it. Judge Bybee agreed, and he suggested that if the public comments push back against the phrasing, the advisory committee could look for an alternative.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 39 for public comment.**

Amendment to Rule 6 (Appeal in a Bankruptcy Case). Judge Bybee introduced this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting at page 128 of the agenda book.

Judge Bybee explained that appeals from the bankruptcy court generally go either to the district court or to the bankruptcy appellate panel ("BAP") in those circuits that have established one. But under 28 U.S.C. § 158(d)(2), a party may instead petition for direct review by the court of appeals.

Judge Bybee turned first to the proposed amendment to Rule 6(a), governing direct appeals from a district court exercising original jurisdiction in a bankruptcy matter. He drew attention to an important difference between bankruptcy appeals practice and ordinary civil appeals practice – namely, that the bankruptcy rules set a markedly shorter deadline (14 days instead of 28 days) for certain postjudgment motions that reset the appeal time. The proposed amendment to Rule 6(a) provides fair warning that the bankruptcy rules govern. The proposed committee note also provides a chart setting out relevant Bankruptcy Rules and applicable motion deadlines.

Judge Bybee next highlighted the proposed amendment to Rule 6(c), which governs permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Alluding to the fact that current Rule 6(c)(1) renders most of Rule 5 applicable to such appeals, Judge Bybee stated that Rule 5 did not fit this context very well. Instead, the advisory committee proposes amending Rule 6(c) to address petitions for review in the court of appeals. The changes are fairly extensive. The advisory committee had a subcommittee with specialists in bankruptcy appellate work who have carefully reviewed the proposal.

The representatives of the Bankruptcy Rules Committee said that they supported the proposal.

Professor Struve thought the proposal would helpfully address some real difficulties and complexities. She thanked the Appellate Rules Committee chair and reporter and also their colleagues on the Bankruptcy Rules Committee for their superb work. Judge Bates echoed that sentiment.

Judge Bates asked why the proposed amendments would change "bankruptcy case" to "bankruptcy case or proceeding" and whether that change should be explained in the committee note. Professor Hartnett responded that the advisory committee wanted to ensure that the rule would cover appeals from both bankruptcy cases and adversary proceedings within those cases.

He suggested that the proposed committee note's reference to "clarifying changes" encompassed this feature of the proposed amendments.

Judge Bates then asked whether the phrase "motions under the applicable Federal Rule of Bankruptcy Procedure" in proposed Rule 6(a) should say "Rules" because motions may be made under more than one rule. Professor Hartnett deferred to the style consultants on that, and the change was made.

An academic member asked whether the advisory committee had discussed and decided to endorse the First Circuit's position in *In re Lac-Mégantic Train Derailment Litigation*, 999 F.3d 72, 83 (1st Cir. 2021) (holding that "the Bankruptcy Rules"—including their shorter postjudgment motion deadlines and the implications of those deadlines for resetting appeal time—"apply to non-core, 'related to' cases adjudicated in federal district courts under section 1334(b)'s 'related to' jurisdiction"). Professor Hartnett responded that, leaving aside whether that case was correctly decided under the current rules, the advisory committee had been informed by bankruptcy specialists that the First Circuit reached the right outcome, so the advisory committee wanted to make that position explicit in the rule going forward.

Professor Hartnett noted one edit: in the committee note to subdivision (b), removing "(D)" in the sentence "Stylistic changes are made to subdivision (b)(2)(D)," on page 90, line 209, of the agenda book.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 6 for public comment with the above-noted changes to the text of subdivision (a) ("Rules") and the committee note to subdivision (b).**

Information Items

Amicus Disclosures. Judge Bybee reported on this item. The advisory committee again sought advice from the Standing Committee. The feedback received at the Standing Committee's January 2023 meeting was helpful. The proposal was still a working draft and not yet ready for the Standing Committee's full consideration.

On behalf of the advisory committee, Judge Bybee posed two questions for the Standing Committee. The first question related to draft Rule 29(b)(4) on page 99 of the agenda book. The draft rule required disclosure of any party, counsel, or combination of parties and counsel who contributed 25% or more of the gross annual revenue of an amicus filer in the prior 12-month period. At the January discussion, the Standing Committee asked whether the advisory committee should use a lookback period of the last 12-month period or the prior calendar year. Contrary to what appeared to be the Standing Committee's sentiments in January, the advisory committee believed that the prior 12-month lookback period works better because, although using the calendar year would be easier, disclosure could also be more easily avoided using a calendar year.

The second question related to draft Rule 29(d), governing disclosure of relationships between *nonparties* and an amicus filer. The advisory committee drafted two alternatives, labeled alpha and beta. Option alpha would require an amicus to disclose a contribution by anyone, including a member of an amicus organization, of over $10,000 that was earmarked for the

preparation of an amicus brief. Option beta would carry forward the existing rule, which requires disclosure of a contribution of earmarked funds but exempts contributions by members of the amicus. The thinking behind option alpha is that option beta makes it too easy to evade disclosure—someone who wants to fund an amicus brief need only become a member of the amicus group. In exchange, the floor for requiring disclosure of a contribution is increased to $10,000 under option alpha. That amount avoids requiring disclosure for a brief crowdfunded by many small contributions.

A practitioner member supported the advisory committee's rationale for the 12-month lookback period. The member also suggested that another option might be to require disclosure of contributions made *either* in the year the brief is filed or the year immediately prior. That way, the amicus could look at annual figures instead of having to create a new lookback window for each brief. Judge Bates asked whether that proposal would make the process of checking and making disclosures overly complicated. Professors Beale and Hartnett raised the question of what the right denominator for calculating the fraction of revenue contributed would be. Professor Bartell suggested using the entire period beginning January 1 of the calendar year before the date of filing.

A judge member preferred option alpha because option beta allowed someone to join an amicus and make a substantial contribution without disclosure being required.

Another judge member wondered whether trade associations keep clear demarcations of funds that are going to amicus work as opposed to general activities and how a donor would know to which of those uses its donations were directed. The member also thought that $10,000 in option alpha was a very high number. The member could understand not wanting to capture small amounts from crowdfunding, but why not a $5,000 or $7,500 floor?

On the first point, Professor Hartnett responded that the subdivision (b)(4) exception hinged more on the phrase "received in the form of investments or in commercial transactions in the ordinary course of business" than on the phrase "unrelated to the amicus curiae's amicus activities." A trade association's members' contributions are not generally thought of as investments or commercial transactions in the ordinary course of business.

As to the second point, the advisory committee had not settled on $10,000—that amount was set forth in brackets, along with $1,000 as another bracketed alternative. Advisory committee members who supported using $10,000 argued that, once the contribution reaches that number, the contributor is very likely to be driving the effort or at least to have a significant hand in it. Instead of funding coming from a broad membership base, it is coming from a small number of people who may not be representative of the entire membership. Some alternatives, such as a percentage of the cost of the brief, were also considered, but they were considered too difficult to implement.

The judge member again indicated a preference for a lower floor, something like $5,000 or $7,500, in case a small number of entities are pooling resources to be a collective driving force behind the brief. The member was also unsure what counted as a commercial transaction in the ordinary course of business. Funds could go into an entity, on a routine basis, to fund all of its activities, including the activities of its general counsel. The member was concerned that there would not be an administrable distinction between money to fund an amicus brief and money to fund the amicus's legal office.

Judge Bates remarked that the goal should be a rule that is clear to those subject to it. If it is unclear what funds do or do not trigger disclosure, the advisory committee should continue to talk about that.

A practitioner member thought that over-regulation of this area would be a big mistake. The committee seemed to be bringing into the realm of amicus briefs concepts that applied instead to lobbying a legislature. The best form of amicus-brief regulation is the discretion of Article III judges to read them or not read them. The advisory committee also ought to talk with at least the big trade associations to see whether the proposed requirements are feasible and how complicated it would be to implement them. And the proposed requirements will hurt smaller organizations.

The member asserted that proposed Rules 29(d) and (e) were a mistake. For example, lawyers who write amicus briefs for big trade associations do so for free or for a discounted amount—say, $5,000, $10,000, or maybe $20,000. They work on these briefs to be able to say that their work influenced a Supreme Court decision.

Judge Bybee asked the member to clarify whether the member was opposed to the beta alternative version of Rule 29(d), which tracked what is already in the current rule. The member responded that it was fine if it was already there, but the member would not try to set dollar or percentage thresholds.

Another practitioner member argued that proposed (b)(4) addressed a real concern—that is, situations in which big players in an amicus control its filings. As to the exception in proposed (b)(4), the member read it to exclude ordinary commercial transactions between the trade association and its members, such as renting space. If that reading is wrong, the member would view that as a problem.

As to (d), the practitioner member thought option alpha was both over- and underinclusive. A big problem with alpha was that it permitted nonmembers to contribute anything below $10,000 without triggering disclosure. The member thought that the concern was about background players who orchestrate large amicus campaigns by donating to many different organizations. The key control existing today (and in option beta) is that the organization can be seen as credibly speaking for its members—if a nonmember makes a contribution, the nonmember has to be disclosed.

The practitioner member said, though, that he is skeptical of tying disclosure requirements to contributions that are earmarked for a particular brief. Large organizations with large budgets will allocate a portion of annual dues to amicus briefs in general; no funds will ever be targeted to a single brief, so no disclosure will need to be made. Smaller groups or groups that do not regularly file amicus briefs probably will not have an allocation for those briefs in their budgets. If a case comes along that is important to them, they will have to "pass the hat" among their members, and they will have to disclose. So the rule's burden then falls disproportionately on different amicus groups. For many companies, disclosure will mean they will not contribute because they will not want to be singled out; and amici will be less willing to file if they will have to make a disclosure because they will believe disclosure will make the brief seem less credible. If the concern is with those who join just before or after contributing, perhaps the rule should expressly target that behavior.

Judge Bybee asked what contribution floor this practitioner member favored for option alpha. The member did not think crowdfunding was such a big issue, so the member suggested perhaps a $10 floor. Amicus briefs are not big profit centers, so they often do not cost that much. If the limit is $7,500, then four contributors who give $7,400 each can provide close to what the brief will cost without triggering disclosure. The contributors need not have anything to do at all with the amici, and that seems to be a problem. This member preferred option beta over option alpha.

A judge member remarked that the underlying concern is the opportunistic arrival of somebody who wants to control or have a voice in a particular case. Although having a set dollar amount might be attractive because it's arguably objective, the member did not know that it would address the concern.

Another judge member stressed the need for clarity, expressed doubt about how to apply a disclosure standard that hinges on the intent behind a contribution, and stated that requiring disclosure of an amicus's membership raises First Amendment issues. This member favored option beta.

Another judge member noted that in the courts of appeals, where amicus briefs are less common, those briefs may be more influential than they are in the Supreme Court. Anecdotally, amici can be very important and influential; this member reads amicus briefs. The member stressed once again that the committee should consider a lower dollar-amount threshold in option alpha. Another important reason to know about who is behind the brief is for recusal reasons—to ensure that a party for whom a judge should not decide cases does not come to the court through a third party instead. Asked for a preference between options alpha and beta, the member preferred option alpha because there needs to be an understanding of who is really driving amicus briefs; the member acknowledged the need for careful drafting of option alpha given, inter alia, potential First Amendment concerns. The member separately reiterated doubts about the meaning of the exception in proposed paragraph (b)(4).

Another judge member agreed that it was not clear what the exception in (b)(4) meant or how it would be calculated. That member also did not think that the courts of appeals were expressing a need for a change to Rule 29. The member has not sensed any problem with amicus briefs. Some members of Congress appear to be concerned about undisclosed backers funding multiple amicus briefs. By contrast, the problem that the member, as a judge, would be worried about is whether an amicus was merely another voice for a party in the case. The portion of the existing rule that would become proposed paragraph (b)(1) is aimed at the latter problem. Subdivision (d) instead tries to get at the concern voiced by the members of Congress. To solve that problem (and this member was not sure it was a problem in the courts of appeals), the existing language may be inadequate because it is limited to those who contribute or pledge money intended to fund the particular brief, as opposed to amicus briefs generally. Someone could set up arrangements so as not to pay for any particular brief; instead, they could just fund several organizations that file amicus briefs in dozens of cases. The member was not sure how best to address the concern voiced by the legislators.

Judge Bybee thanked the Standing Committee for its helpful input on these difficult problems.

Intervention on Appeal. Judge Bybee reported that the advisory committee will consider whether to add a new rule governing intervention on appeal. There currently is no rule, but the issue has come up several times in the courts of appeals. The issue was also recently briefed in the Supreme Court in a case that later became moot.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Rebecca Connelly and Professors Elizabeth Gibson and Laura Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met in West Palm Beach, Florida, on March 30, 2023. The advisory committee presented eight 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 179.

Action Items

The Restyled Bankruptcy Rules. Judge Connelly introduced this item, and Professor Bartell reported on it. The advisory committee sought final approval of the fully restyled bankruptcy rules, which appeared starting on page 190 of the agenda book.

The restyling project had been an immense effort by the Restyling Subcommittee (chaired by Judge Marcia Krieger), the style consultants, and Rules Committee Staff. The total number of bankruptcy rules exceeded that of all the civil, appellate, criminal, and part of the evidence rules, combined. It was a major project.

Parts VII through IX of the restyled bankruptcy rules were published for public comment in August 2022. There were five sets of comments. The comments and any changes made since publication were shown in the agenda book starting on page 429.

The advisory committee was also asking for approval of Parts I through VI of the restyled rules. The Standing Committee had approved them already over the past two years with the understanding that the rules would return for approval after the entire restyling was completed.

There have been some modifications to the restyled Parts I through VI since those approvals were given. Some of the bankruptcy rules have been substantively amended since then, and the restyled rules now reflect those amendments. The style consultants also did a "top-to-bottom" review of all the rules, making additional stylistic and conforming changes. And the Restyling Committee also made corrections and minor changes.

The advisory committee did not believe that any of these updates to the proposed restyled Parts I through VI were substantive enough to warrant republication for public comment.

Judge Bates commented that the restyling project reflected a monumental collaborative effort by past and present members of the advisory committee, the leadership of the advisory committee and its Restyling Subcommittee, and the reporters and the style consultants on a sometimes-thankless yet important task.

Professor Kimble added that this is the fifth set of restyled rules over 30 years. The rules committees are done with comprehensive restyling, and that is cause for celebration.

Professor Garner noted that this is probably the most ambitious project in law reform and legal drafting that a rulemaking body like the Standing Committee had undertaken in the past 30 years. He noted that the late Judge Robert E. Keeton should be remembered for starting the restyling project in 1991–92. This could be the culmination of his ambition to see simpler, more straightforward rules.

An academic member commented that, as a prior reporter to the Bankruptcy Rules Committee, he participated in a minor restyling of the Part VIII rules. On account of that experience, he had dreaded the prospect of a complete restyling of the rules, and he wanted to congratulate everyone involved with this process. It went more smoothly than anyone could reasonably have hoped, so it really is a cause for celebration.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the restyled bankruptcy rules.**

Amendment to Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), Conforming Amendments to Rules 4004, 5009, and 9006, and Abrogation of Form 423. Judge Connelly reported on this item. The advisory committee sought final approval of these proposed amendments, which appeared on pages 687–95 and 703–05 of the agenda book, and the accompanying form abrogation.

Rule 1007 sets deadlines for filing items in bankruptcy court. The change pertains to a requirement for individual debtors in Chapter 7 and Chapter 13 cases. To receive a discharge, a debtor must complete a course in personal financial management. The current Rule 1007 provides a deadline for the debtor to file a statement on an official form (Form 423) that describes the completion of the course. The proposed amendment would instead require that the course provider's certificate of course completion be filed.

Rules 4004, 5009, and 9006 would all need to be changed because they refer to a "statement" of completion, and they would need to refer to a "certificate" of completion. Further, Official Form 423 would be abrogated because it would no longer serve a purpose.

Professor Bartell noted that the provider of the course furnishes the certificate of course completion. Many of the course providers actually file the certificates directly with the court. But if a provider does not, then the debtor would have to file it instead. The advisory committee received no public comments on this set of proposed amendments.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendments to Rules 1007, 4004, 5009, and 9006, and the abrogation of Official Form 423.**

Amendment to Rule 7001 (Types of Adversary Proceedings). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 696 of the agenda book.

Rule 7001 lists the types of proceedings that count as adversary proceedings in a bankruptcy case. The amendment would exclude from the list of adversary proceedings actions

filed by individual debtors to recover tangible personal property under section 542(a) of the Bankruptcy Code.

This amendment responds to a suggestion by Justice Sotomayor in her concurrence in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021). In that case, the Court decided that the automatic stay set by 11 U.S.C. § 362(a)(3) did not prohibit the city's retention of the motor vehicle of a consumer in a Chapter 13 bankruptcy case. Justice Sotomayor noted that a debtor could use a turnover action to recover such property, and opined that if the problem with bringing a turnover action is the delay and cumbersome nature of doing it as an adversary proceeding under Rule 7001, the rules committee could consider amending the bankruptcy rules. *Id.* at 594–95 (Sotomayor, J., concurring).

The amendment was published for comment this past year. The advisory committee received only one comment, which supported the amendment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 7001.**

New Rule 8023.1 (Substitution of Parties). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed new rule, which appeared starting on page 698 of the agenda book.

Rule 8023.1 would govern the substitution of parties when a bankruptcy case is on appeal to a district court or BAP. It had not been addressed previously in the rules. The rule is modeled after Federal Rule of Appellate Procedure 43.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved proposed new Rule 8023.1.**

Amendment to Official Form 410A (Mortgage Proof of Claim Attachment). Judge Connelly reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 706 of the agenda book.

This proposal amends a provision of the attachment for mortgage proofs of claim. The change would require that the principal amount be itemized separately from interest. Currently the form allows them to be combined on one line item, and the amended form would require separate lines. The advisory committee received one comment on the proposed amended form; it made no change to the proposed amendment after considering that comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Official Form 410A.**

Amendment to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). Judge Connelly reported on this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared starting on page 709 of the agenda book.

Rule 3002.1 pertains to cases involving individuals who have filed for Chapter 13 bankruptcy. Because of the structure of Chapter 13, mortgage debt is generally not discharged; but Chapter 13 debtors can cure mortgage defaults during the case. Even though a default can be cured, there can be confusion about the accounting of payments during a case and the status of the mortgage claim at the end of the case. That was the impetus behind the rule—to provide more information to the borrower and the lender about the status of mortgage claims in these cases.

Judge Connelly reminded the committee about the proposed amendments to Rule 3002.1 that had been published for comment in 2021. Those proposed amendments would have provided for a mandatory midcase notice issued by the Chapter 13 trustee and would have set a motion procedure for assessing a mortgage's status at the end of a Chapter 13 case. The advisory committee received numerous public comments, and the committee further revised the proposed amendments in response to those comments.

Although the revisions respond to comments submitted during the public-comment process, the advisory committee determined that the changes are significant enough to warrant republication. This is partly because the advisory committee has switched from a mandatory-notice scheme by one party, the Chapter 13 trustee, to optional motion practice throughout the case, by either the debtor or the trustee.

The end-of-case procedure is also changed to address concerns about the consequences for either failing to respond or failing to comply. The consequences are different enough that the committee thought it would benefit from additional public comments and also thought it was important to provide notice of the proposed changes.

Professor Gibson added that the advisory committee's years-long experience with this rule illustrates the value of notice and publication. Two organizations had suggested significant amendments to Rule 3002.1: the National Association of Chapter 13 Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy. Both organizations advocated a midcase assessment of the mortgage's status—the thought being that, if the debtor and the trustee found out then that, according to the creditor, the debtor had fallen behind in mortgage payments, there would be time to cure that before the case was over.

But the comment process revealed a lot of concern with that idea, especially from Chapter 13 trustees. A midcase review may not always be needed; there are other ways to get the information. And different districts handle postfiling mortgage payments differently—the debtor might continue to pay them directly to the mortgagee, or the trustee might make those mortgage payments. In districts with the former procedure, the trustee would not have information about payments made by the debtor. The biggest change is therefore that the midcase review is not mandatory anymore. It can occur at any time during the case, and either the debtor or the trustee can ask for it by motion. The subcommittee feels that these changes have improved the proposed amendments.

A judge member observed that the revised proposal adds a provision for noncompensatory sanctions. When the claim holder does not comply, there were already remedies making the other party whole, including attorney's fees, which would come at a cost to the claim holder. It is not clear why there should also be noncompensatory sanctions. The member also said that, if

something more like punitive sanctions were meant, a notice requirement should be considered, as is usually provided by the rules in such situations.

Judge Connelly said that the proposal for noncompensatory damages was in part a response to *In re Gravel*, 6 F.4th 503 (2d Cir. 2021), which held that current Rule 3002.1 does not authorize punitive sanctions. The new language was intended to clarify that the bankruptcy court could in appropriate circumstances assess noncompensatory damages. Public comment on this provision would be useful.

Professor Gibson added that these are cases where the mortgagees are repeat players and that the failure to comply with the rule in multiple cases might create a need for declaratory, injunctive, and punitive relief to address the problem. Another judge member stated, however, that punitive relief seems qualitatively different from declaratory and injunctive relief. Notice should be required before imposing punitive relief, and consideration should be given to the scope and framework for such relief. Judge Connelly responded that the rule reflects the approach taken in Civil Rule 37, and stressed the need for judges to be able to address willful noncompliance with court orders. The judge member suggested the value of seeking comment specifically on whether notice should be required before an award of punitive fines.

On the issue of prior notice, Professor Gibson raised the possibility of prefacing the provision with "if, after notice and a reasonable opportunity to respond," which Rule 11 uses. Although this would not spell out all the procedure, Professor Gibson did not think the rule needed to do so. Professor Struve quoted Rule 3002.1(h)—"If the claim holder fails to provide any information as required by this rule, the court may, after notice and a hearing, do one or more of the following:"—which is followed by paragraph (h)(2). She wondered if this provision addressed the concern with notice.

A judge member thought it did address the notice issue but that it did not explain the need for the punitive sanction. If a mortgage holder was noncompliant, couldn't it end up not only paying attorney fees but also taking a haircut on its claim? Judge Connelly responded that there would not be a haircut on the claim, because the mortgage would survive the discharge. The member rejoined that proposed (h)(1) authorizes precluding the claim holder from presenting information that should have been produced, and argued that this could affect the claim. Judge Connelly responded that the rule would prevent the claim holder from presenting the omitted information as a form of evidence in a contested matter or an adversary proceeding in the bankruptcy case, but that is different from making the debt unenforceable after the case ends. Although the claim holder might not be able to present the evidence in the bankruptcy case the rule would not prevent use of the evidence in state-court foreclosure proceedings.

A judge member stressed that adequate notice would require specific mention of punitive relief if that was under contemplation. "Noncompensatory sanctions," this member suggested, was unduly vague. Judge Bates asked what was contemplated by "noncompensatory sanctions" beyond declaratory and injunctive relief. Professor Gibson and Judge Connelly responded that it would include punitive damages payable to a party.

As to rules that authorize noncompensatory sanctions, Professor Gibson suggested, for example, that under Civil Rule 11 a lawyer could be required to attend continuing legal education.

A practitioner member read the text of Civil Rule 11(c)(4) and pointed out that payments to a party under that rule seemed to be limited to reasonable attorney's fees and other expenses; the potential "penalty" contemplated by that rule is paid to the court. The practitioner member further agreed with previous comments that nobody would read "noncompensatory sanctions" to mean equitable relief. If there is a desire that equitable relief be available, it should be spelled out and, as under Civil Rule 11(c)(2), there should be an opportunity to cure.

An academic member offered background about why courts occasionally need "baseball bats" in these cases. This rule goes back to the mortgage crisis in 2007–08. Many people filed for Chapter 13 bankruptcy in large part to save their homes by curing a default on a mortgage in Chapter 13, while also maintaining their ongoing monthly payments. But it was a huge problem to figure out the exact amount owed on the mortgage, and it was extremely difficult to get mortgagees to give that information in a way that could be processed by trustees, debtors, and the courts. Ongoing compliance was also often an issue because there were not deep-pocketed lawyers on the debtor's side. The Chapter 13 trustee is often, but not always, in the mix, and the court has a huge flow of information that it has to track. The amounts of money in these cases are just not enough, even if clawed back, to get a mortgagee's attention, so a stronger measure is necessary to get that attention.

A judge member questioned whether, if there is no precedent under Rule 11 for imposing punitive damages payable to another party, there were any authority for a bankruptcy court to impose such a sanction. Does that need to be authorized by Congress? Is it implicit in the statute? Such an award, this member suggested, was not a traditional kind of ancillary relief used to enforce court powers, unlike a fine to the court or contempt.

Another judge member suggested that Rule 11 could provide a model for potential language—perhaps "reasonable expenses and attorney's fees caused by the failure, nonmonetary directives, and, in appropriate circumstances, an order to pay a penalty into court." (A practitioner member later made a similar suggestion.)

Judge Bates remarked that there is nothing in the committee note that explains what "noncompensatory sanctions" means or how declaratory or injunctive relief fits into the scheme. After looking at Rule 11, which is much more elaborate in terms of certain requirements than this rule would be, he wondered whether more thought needed to be given to it.

Judge Connelly explained that the proposed amendment responded to the *Gravel* opinion. The idea was to allow the bankruptcy court to award something beyond attorney's fees. The advisory committee did not specify what that would be—the language "noncompensatory sanctions" was meant to be general. Judge Connelly agreed that there should be something in the committee note about that language.

After further discussion, Judge Connelly asked whether, if the language "in appropriate circumstances, noncompensatory sanctions" were removed, the Standing Committee would give approval to publish the rest of the rule. Professor Gibson said she would prefer to go forward without the change to (h)(2) because the rest of this amendment is important. Deferring a vote on the rest of the rule would delay those changes for another year.

Professor Capra remarked that the approval is only for public comment. He further suggested that, in the future, the advisory committee say "award other appropriate relief," period, and then add all the explanation in the committee note. The Standing Committee even has the authority to put the language in brackets and then invite comments on it.

A judge member expressed support for shortening the provision to "award other appropriate relief." Professor Bartell expressed concern that if the "including" clause is removed, an unintended negative inference is created that other appropriate relief no longer includes an award of expenses and attorney's fees. Judge Bates expressed concern about whether this suggestion could increase the likelihood of needing to republish again later.

A practitioner member thought it seemed riskier to take out (h)(2) and not make it an issue if the Standing Committee would still have to discuss it again in six months. Having public comment helps the committees improve the rule. Also, in approving something for publication, the Standing Committee does not necessarily give that same language approval. It is worth seeing what the reaction to it would be. A judge member demurred to that suggestion, arguing that a proposal should not be sent out for comment if the committee knows it could not accept that proposal as drafted.

Professor Hartnett asked whether, if the advisory committee had in mind Civil Rule 37, the rule could cross-reference Bankruptcy Rule 7037. For example, "any of the sanctions permissible under Rule 7037." Professor Gibson responded that some of the sanctions under Rule 37 would not be applicable here; she would be reluctant to have only a general reference to Rule 7037. Professor Hartnett said that he thought "appropriate circumstances" might cover that problem.

Professor Cooper asked whether it would work to publish the rule as proposed and specifically invite comment on the issue. Judge Bates asked what risks would be involved with that approach and whether it would lessen the risk of having to do any republication. Professor Gibson thought it would lessen the likelihood of coming back with another amendment. Judge Bates thought that that approach would give the impression the Standing Committee has approved that language, and he did not have the sense that the Standing Committee is prepared to give approval to that language.

Professor Coquillette noted that, in the past, there has been concern when the Standing Committee permits publication of something that it really would not ultimately approve. The harm is that people might wonder about the rules process. Simply putting something out to attract comment when the committee really will not do it is not a good idea. It is different if there is a real possibility that reading the comments during the comment period could convince the committee to approve the proposal.

Professor Struve agreed with Professor Gibson that, leaving aside (h), the rest of the rule seemed likely to provide significant benefit to a population that is a concern for the whole bankruptcy structure. That benefit has already been delayed past one publication cycle. She also agreed with those who said it would be peculiar to send something out for comment that the Standing Committee could not see a way to approve. She also saw the point about flagging that a piece of the rule may be subject to change in the future; but she was not sure that sending out the proposal currently in the agenda book could avoid the need for republication in the event that the

process ends up putting forward some very different proposal. It might be cleaner, if the Standing Committee agrees that there is a strong normative case for doing so, to publish the rest of the rule without (h).

An academic member remarked that, although the Standing Committee is historically reluctant to change a rule and then immediately afterward publish an additional change, doing so in this case may not pose a serious problem because the sanctions piece is separable. And it would show that the rules process takes seriously concerns about authority, notice, and operation.

Professor Gibson noted that there was relatively little discussion by the advisory committee of (h)(2) as opposed to the rest of this rule. So the advisory committee would likely be satisfied with that outcome.

Judge Bates asked whether a change to the committee note would be needed as well because the note refers to (h)(2). Professor Gibson answered in the affirmative. A judge member asked whether it is typical or permissible to issue a committee note on a provision without amending the provision's text. The judge member wondered if the advisory committee could issue a committee note that "other appropriate relief" should be interpreted broadly to include more than just attorney's fees, instead of adding "noncompensatory sanctions" to the text. Professor Gibson responded that a change to a committee note cannot be made by itself.

A style consultant suggested adding the word "any" before "other appropriate relief" and deleting "and, in appropriate circumstances, noncompensatory sanctions." The committee note would then state that "any" was added to show that the advisory committee did not intend to limit the recovery to reasonable expenses and attorney's fees—a diplomatic way of saying that the amendment was intended to address the Second Circuit's erroneous decision.

Professor Marcus observed that the 2015 committee note to the amendment of Civil Rule 37(e) stated that the amendment rejected certain Second Circuit caselaw.

Judge Bates asked the advisory committee's representatives whether that kind of change would be consistent with what the Bankruptcy Rules Committee decided to do here and whether it would simply ignore the issues raised with respect to what the further relief is, instead letting the courts deal with that. Professor Bartell responded that it would be consistent with the advisory committee's decision and that it would also be consistent with other bankruptcy rules that also call for other appropriate relief upon a violation. Those rules do not say what procedural mechanisms must be adopted to impose that other relief, but that is consistent with how the phrase is treated in other bankruptcy rules. Judge Bates then asked whether there had been discussion of whether punitive damages fell within "other appropriate relief." Professor Bartell said that she had not researched the question, and Judge Connelly said that the advisory committee had not discussed it.

Professor Struve admired the elegance of the proposal to add "any" and a change to the committee note. But she did wonder, if there are instances of "other appropriate relief" sprinkled throughout the bankruptcy rules, whether adding "any" to this one would create an unwanted negative inference. The style consultant responded that the committee note's express statement about why "any" was added would be the reason for the difference. Judge Bates noted that some

judges look at only the text of the rules to determine what they mean, not the committee notes—would that lead to a possible view that they have two different meanings?

A judge member commented that, if the committee note only disapproves of the *In re Gravel* decision, it is not clear what the note actually does. If the note is going to say that certain actions are authorized, the member would want to know what those actions are. Judge Bates agreed that a vague committee note that does not say expressly what the amendment authorizes would lead to divergent comments that the advisory committee would ultimately have to resolve.

A judge member was leery of making any substantive changes or hints right now. Normally in the rules process, this would have been a proposal, and then the Standing Committee would give feedback to the advisory committee. People would have talked about Civil Rules 11 and 37. If there is a Rules Enabling Act obstacle to creating a punitive damage remedy, that would have been discussed. But all of that was skipped because of how this issue, through no one's fault, has arisen. The member would rather hold off six months or a year and then deal with this issue separately rather than today without any preparation.

Another judge member agreed and added that, depending on what the scope of the relief under paragraph (h)(2) is, there may be a need to change the procedural protections. Just changing a word is not going to deal with the problem.

Judge Connelly thanked the Standing Committee for the helpful discussion. The proposed changes to Rule 3002.1 apart from proposed subdivision (h)(2) create a new, necessary, and beneficial mechanism, one in which there has been an interest for a while. Seeking republication of those provisions, excepting those in paragraph (h)(2), is warranted now. Given the comments today, it would be more appropriate to return to the advisory committee for more robust, thorough evaluation of Rule 3002.1(h)(2). It is unclear whether that will result in a proposed amendment at some point. An amendment may even be premature in light of the developing caselaw.

A member moved to approve the proposed amendment, without the proposed changes to paragraph (h)(2), for publication, and another member seconded the motion. Judge Bates opened the floor to further discussion.

Professor Struve asked whether, despite omitting the proposed changes to paragraph (h)(2), the semicolon and word "and" at the end of paragraph (h)(2) would remain. Judge Connelly answered that, yes, the semicolon and "and" would remain.

An academic member encouraged the committee members to read the Second Circuit's *In re Gravel* case, both the majority opinion and the dissent (with which the member agreed). As far as the member knew, that is the first appellate decision with that particular holding. The member also thought the committee members should congratulate themselves because the rules process was working well. The *Gravel* decision was driven in part by *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), which potentially destabilized a bankruptcy court's ability to enter sanctions. It would be appropriate to give greater and deeper thought to *Taggart*'s implications when considering a potential sanctions regime.

After further discussion it was clarified that the committee note would be modified by deleting the third sentence in the last paragraph—"It also expressly states that noncompensatory sanctions may be awarded in appropriate circumstances."

Upon a show of hands, with no members voting in the negative: **The Standing Committee gave approval to republish the proposed amendment to Rule 3002.1 for public comment with the following changes: No amendments to (h)(2) were retained, except for adding a semicolon and the word "and" at the end; and the third sentence in the last paragraph of the committee note was struck.**

Amendment to Rule 8006(g) (Request for Leave to Take a Direct Appeal to a Court of Appeals After Certification). Judge Connelly reported on this item. The advisory committee sought approval to publish this proposed amendment for public comment. The proposed amendment appeared on page 728 of the agenda book.

The proposed amendment would amend subdivision (g) so as to dovetail with the proposed amendments to Appellate Rule 6(c) approved for publication for public comment earlier in the meeting.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 8006(g) for public comment.**

Official Forms Related to Rule 3002.1. Judge Connelly reported on this item. The advisory committee sought approval to publish these proposed official forms for public comment. The proposed official forms appeared starting on page 729 of the agenda book.

Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R are the companion official forms to proposed amended Rule 3002.1. None of these forms was affected by the decision (described above) to withdraw the request to publish the Rule 3002.1(h)(2) proposal.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R for public comment.**

Information Items

Suggestion to Require Complete Redaction of Social Security Numbers from Filed Documents. Professor Bartell reported on this item.

Senator Ron Wyden of Oregon sent a letter to the Chief Justice of the United States in August 2022, in which he suggested that federal-court filings should be scrubbed of personal information before they are publicly available. Portions of the letter suggested that the rules committees reconsider a proposal to redact entire Social Security numbers from court filings.

The Bankruptcy Code requires that Social Security numbers be included on certain documents either in whole or only partially redacted. *See* §§ 110, 342(c)(1). The advisory

committee cannot change those requirements because they are statutory, but there may be some circumstances where full redaction is possible and appropriate.

But the Advisory Committee has become aware that the Judicial Conference's Committee on Court Administration and Case Management ("CACM") has asked the FJC to design and conduct studies regarding the inclusion of certain sensitive personal information in court filings. Those studies would update the privacy study issued by the FJC in 2015. They would gather information about compliance with privacy rules and the inclusion of unredacted Social Security numbers in court filings. The advisory committee has decided to defer consideration of the suggestion while those new studies are underway.

Suggestion to Adopt a National Rule Addressing Debtors' Electronic Signatures. Professor Gibson reported on this item.

An attorney suggested the adoption of a national rule to allow debtors to sign petitions and schedules electronically without requiring their attorneys to retain the original documents with wet signatures.

But only a year ago, in its Spring 2022 meeting, the advisory committee decided not to take further action on a suggestion by CACM to consider a national rule on electronic signatures of non-CM/ECF users. The advisory committee decided then that a period of experience under local rules addressing e-signatures would help inform any national rule, and it reasoned that e-signature technology would also probably develop and improve in the meantime.

In light of that recent decision, the advisory committee decided to defer further consideration of this suggestion to a later date. Nothing has changed since a year ago. Also, the project on electronic filing by self-represented litigants may also have implications for the e-signature issue.

Suggestions Regarding the Required Course on Personal Financial Management. Professor Gibson reported on this item.

The advisory committee continues to consider suggestions concerning the course on personal financial management discussed earlier.

Professor Bartell's research has shown that, in a single year, thousands of debtors' cases were closed without a discharge because of the debtors' failure to file proof that they have taken this course. Debtors in that situation have to pay to reopen their cases to file the certificates. The Consumer Subcommittee has been considering whether and how the rules might be amended to decrease that number.

One question is whether to change the deadlines for the filing of those forms—now certificates of completion—or perhaps to require simply that they be filed by the point at which the court rules on discharge. There is also a rule that requires the court to remind debtors of this requirement if they haven't filed it within 45 days after the petition. Another question is whether the date for that notice reminder should be changed or whether more than one notice should be given.

Proposed Amendment to Rule 1007(h) to Require Disclosure of Postpetition Assets. Professor Gibson reported on this item.

The advisory committee continues to consider requirements to disclose assets acquired after a petition is filed in an individual Chapter 11 case or in a Chapter 12 or 13 case. In such cases, which may last several years, the Bankruptcy Code specifies that the property acquired by the debtor during that period is property of the estate.

The current rule requires filing a supplemental schedule for only certain postpetition assets obtained within 180 days after filing the petition. Judge Catherine McEwen, a member of the advisory committee, suggested an amendment to cover all postpetition property in individual Chapter 11, Chapter 12, and Chapter 13 cases.

The Consumer Subcommittee thought that one of the problems with such a rule is how to capture what property needs to be disclosed. It would be impossible to report everything that comes into a debtor's ownership over a three-to-five-year period. Should the rule mandate disclosing only certain types of property, such as only property that has a substantial impact on the estate? Also, courts that currently impose a disclosure requirement by local rule do so in different ways, so there is a lack of uniformity.

The Consumer Subcommittee was not sure there was a problem that needed to be solved. The issue was further discussed at the advisory committee meeting. There, Judge McEwen noted that the Eleventh Circuit has strong case law about judicial estoppel when a debtor has not revealed property in the bankruptcy case. Debtors can lose the right to pursue an undisclosed claim, such as a tort action based on a postpetition injury, and creditors can lose the benefit of such claims. By requiring disclosure, that problem could be avoided. So the advisory committee asked the subcommittee to consider the matter further.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robin Rosenberg and Professors Richard Marcus, Andrew Bradt, and Edward Cooper presented the report of the Advisory Committee on Civil Rules, which last met in West Palm Beach, Florida, on March 28, 2023. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 784.

Action Items

Amendment to Rule 12(a) (Time to Serve a Responsive Pleading). Judge Rosenberg reported on this item. The advisory committee sought final approval of this proposed amendment, which appeared starting on page 826 of the agenda book.

The amendment makes clear that the times to serve a responsive pleading set by Rules 12(a)(2)–(3) are superseded by a federal statute that specifies another time. It came about because some litigants in Freedom of Information Act cases had difficulty obtaining summonses that called for responsive pleadings within the statute's 30-day deadline; without the amendment, it was not clear if a statute prescribing a different time would apply to the United States under this rule.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 12(a).**

Amendments to Rules 16(b)(3) (Scheduling and Management) and 26(f)(3) (Discovery Plan) Related to Privilege Logs. Judge Rosenberg reported on this item. The advisory committee sought approval to publish these proposed amendments for public comment. The proposed amendments appeared starting on pages 828 and 846 of the agenda book.

These amendments deal with the privilege-log problem and address early in the case how the parties will comply with the requirements of Rule 26(b)(5)(A). The goal is to get the parties to address issues pertaining to privilege logs during their Rule 26(f) conference, in order to reduce burdens while still providing sufficient information about documents being withheld and to reduce the number of unexpected problems at the end of discovery.

The proposed amendments were presented for approval for publication at the Standing Committee's January 2023 meeting. There were concerns about the committee notes' length, so the advisory committee took the amendments back for further consideration. The notes are now half as long.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish for public comment the proposed amendments to Rules 16(b)(3) and 26(f)(3).**

New Rule 16.1 (Multidistrict Litigation). Judge Rosenberg reported on this item. The advisory committee sought approval to publish for public comment this proposed new rule, which appeared starting on page 831 of the agenda book.

Since 2017, the Multidistrict Litigation ("MDL") Subcommittee and the advisory committee have considered whether to propose a rule to govern MDLs. The MDL Subcommittee has heard many times from attorneys in both the plaintiffs' and defense bars, experienced and first-time transferee judges, and groups including Lawyers for Civil Justice and the American Association for Justice. Judge Rosenberg thanked them for all of the time and meaningful input that they have given the subcommittee. The proposed rule has been well received by all of these groups and was overwhelmingly supported by the transferee judges at the recent transferee-judge conference last fall.

Judge Rosenberg addressed a common question: why is an MDL rule needed? MDLs account for a large portion of the federal docket: 69.8% as of May 2023, up from about 1.3% in 1981. Many judges will be assigned MDLs and will look to the rules for guidance. The Judicial Panel on Multidistrict Litigation is making a concerted effort to expand assignments of MDLs to new judges, and there are more leadership appointments to diverse groups of lawyers. From January 1, 2019, to May 31, 2023, out of 96 new MDLs, 40 went to first-time transferee judges. In 2023 alone, the panel has centralized eight MDLs before eight different judges, six of whom are first-time transferee judges.

The advisory committee and the groups with which it has been working feel it is essential for the court to take an active and informed role early in an MDL proceeding. There are issues that become problematic unless addressed at the outset of the action, particularly in large MDLs.

Transferee judges have also expressed concern that they lack clear, explicit authority for some of the things that they are doing, which most agree are necessary to manage an MDL.

Rule 16 just addresses two-party litigation, and Rule 23 addresses class actions, but we have nothing for MDLs. Managing an MDL is broader than managing a non-MDL proceeding. It is critical for a transferee judge to have a more active management role in an MDL.

The advisory committee used a three-part test to determine whether to go forward with this new rule. First, is there a problem? Yes, there are circumstances in which courts start off on the wrong foot in an MDL and that could cause many problems down the road. Second, is there a rules-based solution? Yes, this proposed rule helps solve the problem by addressing issues early and laying the groundwork for effective case management. Third, would a rules-based solution avoid causing harm? Yes, the advisory committee believes that the proposed rule avoids harm by using the word "should" (with respect to the court's management of MDLs).

Rule 16.1 focuses the court and the parties on the management issues that can effectively move an MDL forward from an early point, yet the rule recognizes that not all MDLs are alike, that no one size fits all. So the rule is drafted to provide both helpful guidance and flexibility in managing the proceeding.

The advisory committee carefully considered the helpful comments of the Standing Committee at its January 2023 meeting, and many of those comments were incorporated into the revised rule.

In subdivision (a), the advisory committee settled on the word "should"—in most but not all MDLs, the court should schedule an initial management conference. The term "should" indicates that reality, while still providing some flexibility. "Should" has been interpreted as a clear directive in many instances and several of the civil rules already use it.

As for subdivision (b), the advisory committee's view is that appointing coordinating counsel helps the court get the case moving. The role of coordinating counsel is limited to the initial conference. The rule provides flexibility both to the court, to determine what issues coordinating counsel should address, and to the parties, to inform the court about the case's status. The advisory committee settled on "may" because an MDL may or may not need coordinating counsel for the initial management conference.

For subdivision (c), the advisory committee chose the first of the two alternatives of the version of Rule 16.1(c) presented at the January 2023 Standing Committee meeting. Most comments preferred this alternative, which lists a cafeteria-style menu of options (reflecting that there is no one-size-fits-all framework for an MDL). It is not a mandatory checklist. Paragraph (c)(1) was modified to say "whether leadership counsel should be appointed" rather than assuming they would be. More specifics were added to the subparagraphs and the committee note to clarify the issues to consider at the initial stages of the MDL. The committee note to paragraph (c)(1)(A) lists factors to consider when selecting leadership counsel. Paragraph (c)(4) was revised in direct response to comments from the Standing Committee about identifying issues, vetting claims, and exchanging information early in the case. Rather than the previous reference to "whether" the parties will exchange information, (c)(4) now refers to "how and when" they will do so. Paragraph

(c)(6) (concerning discovery) was modified to eliminate the word "sequencing" and make it more general. Paragraph (c)(9) is newly added. The court can play a significant role in making sure the settlement process is fair and transparent. Rule 16 already authorizes the court to play some role in the process. In paragraph (c)(12), the advisory committee did not include the word "special" with "master." It recognizes that the court may make decisions and appointments using its inherent authority. The committee note, in its opening paragraph, uses the phrase "just and efficient conduct" in response to a comment from the Standing Committee about directing the parties to adhere to the Rule 1 principles of just, speedy, and inexpensive determinations.

Professor Marcus added that this draft rule is the product of long deliberations, and the advisory committee needs public comment on it. Professor Bradt, as both an outsider and a recent insider to the process of developing the rule, thought it extraordinary how much information and outreach and response from interested parties there has been. He thought it an extensive and admirable process.

A practitioner member expressed continuing concerns about the proposal. The member's primary concern was with the committee note, which the member felt was doing the rulemaking rather than the rule. The member gave several examples of portions of the committee note that caused the member concern. These included examples of sentences that the member felt could be omitted as superfluous or confusing, language in the note indicating that a single management conference might suffice for a given MDL, a sentence discussing individual-class-member discovery in class actions, and language suggesting that the court may have a right to know about the status of settlement negotiations. The most important issue for the member was the standard for selecting leadership counsel. The committee note to subdivision (c)(1)(A), this member argued, should not require each leadership counsel to responsibly and fairly represent *all* plaintiffs, because there can be conflicts among the plaintiffs. Further, the criteria should include the number and value of claims that counsel represents in the MDL; when the leadership counsel include those representing the greatest financial interests, that can help avoid a problem with opt-outs.

Another practitioner member countered that the proposed Rule 16.1 fills an important gap. This member, too, could suggest specific changes, but would resist the temptation to do so because the proposed rule was ready for publication. The newer judges and practitioners who are playing important roles in contemporary MDL practice need such a rule, particularly in the absence of an updated version of the Manual for Complex Litigation. This member felt it was useful for the committee note to mention discovery in class actions, because MDLs often encompass class actions. Judge Bates responded that the other member had raised legitimate questions whether the committee note to a rule on MDLs should address discovery in class actions, and also whether the list of criteria for leadership counsel should include the size and number of claims represented.

A judge member stated that the rule is ready for publication. An effort is ongoing to broaden the MDL bench, and training for new judges is important. Professor Coquillette agreed that the rule was ready for publication and he congratulated the advisory committee, though he also expressed concern that committee notes should not try to fill the role of a treatise. Another judge member praised the rule for setting a conceptual framework and focusing on the basics. This member suggested requesting comment on the compensation of counsel. Taken together, this member said, the rule text and committee note might be read to authorize the use of common benefit funds, and there is debate on whether that mechanism can be used in an MDL. Another

judge member predicted that the rule would be very helpful but also warned that the committee note would be cited more often than the rule, because the note addresses the most nettlesome issues; if the committee wished to deal with those issues, this member suggested, it should do so in rule text. Judge Bates predicted that the committee would receive disparate comments on the notes' best practices advice, and wondered how it would address those contending viewpoints. Another judge member said that the rule was ready for publication, and it would help to protect district judges from being reversed on appeal, but this member voiced some uneasiness about the committee notes.

Judge Bates commented that the rule's title, "Managing Multidistrict Litigation," promises more than the rule delivers. The rule really concerns just the initial management conference.

The practitioner member who had initially raised several concerns asked to change, in the second paragraph of the committee note to paragraph (c)(1), the phrase "responsibly and fairly represent all plaintiffs" to "adequately represent plaintiffs." In the same paragraph, the member also asked to replace "geographical distributions, and backgrounds" with "geographical distributions, backgrounds, and the size of the financial interests of plaintiffs represented by such counsel." The member further suggested, in the second paragraph of the portion of the committee note to paragraph (c)(4), striking the third sentence (concerning discovery in class actions).

A judge member asked whether the practitioner member's suggested term "adequately" was intended to incorporate adequacy as the term is understood in Rule 23(a)(4)? In doing so, a lot of the class-action case law might implicitly be incorporated. The practitioner member responded that he found the terms "responsibly and fairly" problematic because those words do not appear anywhere else and their meaning is unclear. He also objected to addressing the appointment of leadership counsel in the committee note instead of in rule text. Judge Rosenberg confirmed that the advisory committee stayed away from "adequately" because it did not want there to be confusion with Rule 23.

As to the practitioner member's suggestion that the note to (c)(1) should advise the judge when selecting leadership counsel to keep in mind "the size of the financial interests of plaintiffs represented by … counsel," Judge Rosenberg noted that the next sentence, beginning with "Courts have considered the nature of the actions and parties," showed that the nature of the actions is contemplated as a factor, though perhaps it is not clear enough for the point being made about the size of the financial interest. She also did not know how a judge would know the size of the plaintiffs' financial interests. An early census might disclose the *number* of claims represented by someone under consideration for leadership, but would not disclose their size. The practitioner member responded that, in securities cases, it is done all the time for appointing lead counsel at the start of a case. Professor Marcus interjected that securities cases are different. An article by Professor Jill E. Fisch in the *Columbia Law Review* contrasted them with mass torts in particular. And some of the people attending this meeting had previously urged that it was important not to accept numbers as indicative of valid claims, whatever the size of the claims.

The practitioner member responded that, rather than having rules to deal with all of these difficult issues, the committee is burying those issues in the committee note. These topics are contentious, and the financial interest is a factor that a judge could take into account in a products-liability case or in any other MDL. If one lawyer represents $5 billion in claims and another

represents $100 million in claims, and the judge selects as lead counsel the one with $100 million, there will be opt-outs.

Judge Rosenberg still was not clear how a judge would know the financial value. And including language like that could encourage people to simply get lots of claims filed, even nonmeritorious ones, if the word on the street is that, if the judge sees that someone has a lot of dollars and a lot of claims, that person will get leadership. She understood the practitioner member's point and wondered if there were a way to word the committee note to capture it. The language was intended to be comprehensive and to take a lot of factors into account. The closest the committee note got was referring to the nature of the actions—looking at what the applicant for leadership has in the way of actions. Are there a lot of them? Are they high-enough value such that the applicant should be in leadership?

Judge Bates thought this to be a debatable point with merit to each side. There has not yet been a suggestion of language that resolves the debate; public comment may help.

A judge member remarked that mass-tort cases are not the same as securities cases. If a judge goes with the number or value of claims, that will favor those plaintiffs' counsel who have advertiser relationships. In the member's state, in coordinated proceedings in which counsel organize themselves, counsel do not always select as leaders the lawyers with the biggest numbers—they may not be the ones who will make the best presentation on the issues that will decide the case. The member agreed with Judge Rosenberg that relying on claim numbers or value could incentivize putting in massive numbers of cases. Further, a judge may not always know at the beginning who will have the most clients. Sometimes, particularly if there are both a federal and a state MDL, parties wait for the initial rulings to see where they want to file.

Professor Bradt observed that MDLs vary and are fluid. An MDL may be created at different times in a controversy's lifecycle. Sometimes an MDL is created after it is already known who will be involved, and sometimes an MDL is created very early in anticipation of the filing of a lot of future cases. Moreover, one of the things that the rule anticipates is that leadership is also fluid. As the circumstances of the case change, the transferee judge may find it necessary to change the leadership structure. The leadership piece of the rule is capacious in order to account for that.

The practitioner member who had been proposing revisions to the committee note suggested that, if the committee note stopped after paragraph one or paragraph two, the rule would then do what it was intended to do—identify topics for the initial conference. It would be a modest rule, not an attempt to cover the waterfront. But right now, the note is trying to cover the waterfront. Instead, a rule on each one of these topics should be made.

Judge Bates asked the advisory committee's representatives what changes, if any, they would like to adopt before asking the Standing Committee to approve the proposal for publication.

As to the rule's title ("Managing Multidistrict Litigation"), Judge Rosenberg remarked that the advisory committee had gone back and forth. Although the lion's share of the proposed rule is about the initial management, the rule does address later proceedings as well. For example, paragraph (c)(8) speaks of a schedule for additional management conferences with the court. So the advisory committee had stuck with "Managing Multidistrict Litigation" instead of "Initial

Management." A judge member suggested changing the rule's title to simply "Multidistrict Litigation." Rule titles usually do not include gerunds. Judge Rosenberg accepted this suggestion on behalf of the advisory committee.

Professor Marcus responded to a previous remark that there is always more than one management conference. He noted that the rule is not a command to have more than one. Paragraph (c)(8) lets the judge order the lawyers to provide a schedule for further management meetings. Subdivision (d) also advises the judge to be more flexible than under Rule 16 in making revisions to the initial management program. Of the two kinds of issues raised about the rule at today's meeting—smaller wording issues versus more fundamental issues about what should be included in the rule—the wording issues seemed more promising to look at today. Professor Marcus suspected that there would be a long compilation of public comments if the rule were published.

In response to a suggestion by Judge Bates, Judge Rosenberg stated that subdivision (c)'s text would say simply "any matter listed below" rather than "any matter addressed in the list below."

Professor Marcus agreed with Judge Bates that the reference to Rule 16(b) in the fourth paragraph in the committee note on paragraph (c)(1) should instead be a reference to Rule 16.1(b).

Judge Bates had asked whether paragraph (c)(6) should say "to handle discovery efficiently" instead of "to handle it efficiently"; after discussion with the style consultants, the advisory committee representatives decided not to make that change.

Judge Rosenberg agreed with Judge Bates that "Even if the court has not" in the committee note to paragraph (c)(9) should be changed to "Whether or not the court has."

A practitioner member asked if the advisory committee wanted to retain (in the second paragraph of the committee note to paragraph (c)(4)) the sentence about discovery from individual class members. Another practitioner member supported deleting that sentence because it concerned class actions, not MDLs. The practitioner member who had previously expressed support for keeping the sentence suggested that the problem with the sentence was its statement that "it is widely agreed" that such discovery is often inappropriate. There is nothing in Rule 23 law about this, but there is a lot of caselaw. This member suggested that perhaps better language would be, "For example, it may be contended that discovery from individual class members is inappropriate in particular class actions." An academic member questioned why the example should be included in the note. Whether it is accurate or not, it may be better to take it out or find another example. The practitioner member responded that it comes up in hybrid class MDLs in which there are both class actions and individual claims arising from the same product or course of conduct. The example is a way of reminding courts that they may be dealing with different standards, issues, terminology, and decisions based on whether they are dealing with the individual component or the class component of an MDL.

A practitioner member again raised the question whether all leadership counsel must responsibly and fairly represent all plaintiffs. Another practitioner member responded that it might be wiser to say that they will fairly and reasonably represent the plaintiffs or the group of plaintiffs they are appointed to represent. The reason there are diverse leadership groups in MDLs is that

some will represent class plaintiffs, for example, while others will represent a particular type of claim. "All" plaintiffs may be too literal.

Judge Rosenberg agreed that the proposed committee note should be modified to remove the word "all" in the phrase "responsibly and fairly represent all plaintiffs" in the second paragraph of the committee note to paragraph (c)(1). She also agreed that the second paragraph of the committee note to paragraph (c)(4) should be modified to remove the sentence about class-member discovery.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed new Rule 16.1 for public comment with one change to the title of the proposed rule (striking "Managing"), one change to the text of subdivision (c) (replacing "any matter addressed in the list below" with "any matter listed below"), and the following changes to the committee note as printed in the agenda book:**

- In the second paragraph of the note to paragraph (c)(1), "all" was struck from the phrase "responsibly and fairly represent all plaintiffs."

- In the fourth paragraph of the note to paragraph (c)(1), "Rule 16(b)" was changed to "Rule 16.1(b)."

- In the second paragraph of the note to paragraph (c)(4), the third sentence (which concerned class-member discovery and began "For example, it is widely agreed") was struck.

- In the note to paragraph (c)(9), the phrase "Even if the court has not" was changed to "Whether or not the court has."

Information Items

Discovery Subcommittee Projects. Professor Marcus reported on this item. This subcommittee is considering four issues, of which one may not pan out, and the others are in various states of evolution.

One issue is how to serve a subpoena. Rule 45(b)(1) says that service requires "delivering" the subpoena to the witness. Does that mean in-hand? By Twitter? Perhaps there are amendments that could improve the rule. Rules Law Clerk Chris Pryby wrote an excellent memorandum on state practices for serving subpoenas. The subcommittee will consider that new information.

Second, the subcommittee is considering whether to make rules about filings under seal. The agenda book shows how the subcommittee's thinking has evolved. When the subcommittee first learned about an Administrative Office project on sealed filings, the subcommittee thought it should wait for that project to finish; now the subcommittee has been told it should not wait. One question is: what standard should be used? The subcommittee's initial effort provides simply that the standard is not the same as that governing issuance of a protective order for information exchanged through discovery. Another question is: what procedures should be used? The subcommittee identified a wide variety of procedural issues, listed on pages 810–11 of the agenda book, that could be addressed by a uniform national rule. But the scope of what would ultimately

be addressed is uncertain. Professor Marcus asked for input on whether clerk's offices would welcome a national rule on this.

Third, Judge Michael Baylson submitted a proposal concerning discovery abroad under Rule 28 (Persons Before Whom Depositions May Be Taken). This is not a rule that most attorneys often deal with. The subcommittee is beginning to look at this proposal.

Finally, the FJC has completed a thorough study of the mandatory-initial-discovery pilot project. Its findings do not appear to support drastic changes to the rules. The subcommittee will consider whether any changes to the rules are warranted in light of the study.

* * *

After the Civil Rules Committee delivered this information item, it temporarily yielded the floor to the Evidence Rules Committee. The Report of the Civil Rules Committee continued after the conclusion of the Evidence Rules Committee presentation.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Patrick Schiltz and Professors Daniel Capra and Liesa Richter presented the report of the Advisory Committee on Evidence Rules, which last met in Washington, D.C., on April 28, 2023. The advisory committee presented five action items and one information item. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 910.

Action Items

New Rule 107 (Illustrative Aids). Judge Schiltz reported on this item. The advisory committee sought final approval of new Rule 107, which appeared starting on page 920 of the agenda book.

Illustrative aids are not themselves evidence. They are instead devices to help the trier of fact understand the evidence. Illustrative aids are used in virtually every trial, but the Federal Rules of Evidence do not address them. Nor do the other rules of practice and procedure. The new rule would fill this gap.

The rule as published would do five things. First, it would define illustrative aids, and it would give judges and litigants a common vocabulary and at least a touchstone in trying to distinguish illustrative aids from admissible evidence.

Second, it would provide a standard for the judge and the parties to apply in deciding whether an illustrative aid may be used: the utility of the aid in assisting comprehension must not be substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time. The advisory committee specifically asked commentators to address whether it should be just an "outweighed" standard or a "substantially outweighed" standard.

Third, the new rule as published provided a notice requirement. Before showing the jury an illustrative aid, a litigant would first need to show it to the other side and give the other side a chance to object.

Fourth, the rule bars illustrative aids from going to the jury room unless the parties consent to it or the court makes an exception for good cause.

Finally, the rule would require that, where practicable, illustrative aids be made part of the record so that, if an issue about an illustrative aid comes up on appeal, the appellate court has it in the record.

Professor Capra listed several changes to the proposed rule's committee note made since its publication for public comment but not noted in the agenda book. (These changes are among those listed at the end of this section.) He then discussed the public comments on the proposed new rule. There were many comments and much opposition to the notice requirement. Commenters gave various arguments against the notice requirement, including that it would make litigation more expensive, that it was unnecessary, and that it would steal attorneys' thunder. The advisory committee decided to delete the notice requirement from the proposed rule and instead discuss the issue of notice in the committee note.

Professor Capra also discussed the advisory committee's decision to use the "substantially outweighed" standard. This standard tracks that in Rule 403, and it is geared toward admitting illustrative aids. Based on the public comment, the advisory committee decided that it did not make sense for different tests to apply to evidence and illustrative aids.

Public comment also led the advisory committee to choose the new rule's location within the Federal Rules of Evidence. The rule was published for public comment as Rule 611(d) because Rule 611(a) is frequently used by courts to regulate illustrative aids. But Rule 611, which is in Article Six, is about witnesses, and illustrative aids are not really about witnesses. The new rule fits better in Article One, which is about rules of general applicability. Therefore the proposed rule was designated as new Rule 107.

Last, Professor Capra noted that a new subdivision (d) was added to new Rule 107 to direct courts and litigants to Rule 1006 for summaries of voluminous evidence because there is a lot of confusion in the courts about the difference between summaries and illustrative aids.

A practitioner member observed that he, like other members of the trial bar, had been very concerned about the proposed rule as published. He supported the deletion of the notice requirement and the use of "substantially outweighed" as the standard; he hoped that the latter would encourage the use of illustrative aids. The member stressed that some illustrative aids equate to a written version of the lawyer's actual presentation, such that providing advance notice of the aid would equate to a preview of that presentation. Such disclosures, he argued, would impair truth-seeking and increase the number of objections. So this member had concerns about the seventh paragraph of the committee note (shown on page 923 of the agenda book), which addressed the question of notice in a way that this member thought put too much of a thumb on the scale in favor of advance notice. The member suggested adding the following as the penultimate sentence of the paragraph: "In addition, in some cases, advance disclosure may

improperly preview witness examination or attorney argument or encourage excessive objections." Asked to explain what number of objections would be optimal, the member modified his suggested sentence by deleting "or encourage excessive objections." The member also suggested revising the last sentence of the paragraph to reflect the fact that often the parties will resolve issues concerning advance notice by agreement; Professor Capra expressed reluctance to make that change because the potential for the parties to resolve an issue by agreement exists for many types of disputes.

A judge member suggested cutting the entire paragraph discussing notice. The member thought that the paragraph reflected an increasingly outdated view, and it was heavily leaning in a direction objected to by so many commenters. At the least, this member argued, the sentence beginning with the word "ample" should be replaced with the sentence suggested by the practitioner member.

Another judge member likened issues surrounding the definition of "illustrative aid" to issues prevalent in disputes about summary witnesses. The member suggested refining the definition of illustrative aid so that it cannot be used as a vehicle to bring in extra-record information. Professor Capra thought that such a situation would be prevented by Rule 403: if an aid contained additional evidence not yet in the record, that additional evidence would be evaluated under Rule 403. The practitioner member suggested that the "substantially outweighed" standard would address this problem; a purported aid that contained evidence not in the record would be subject to multiple objections, including that it would create unfair prejudice. Professor Capra noted that the Rule 403 and Rule 107(a) balancing tests would work the same way.

Judge Bates asked what would happen if someone used some type of illustrative aid containing certain terms and added a definition not in evidence—supplying additional information beyond what had been admitted into evidence in the case. Professor Capra thought that Rule 403 would prevent that from happening because of the added information's prejudicial effect.

Judge Schiltz remarked that it is difficult to define illustrative aids to exclude those sorts of situations. The rule gives a negative definition of illustrative aids—that they are not evidence. The rule has to state the idea fairly generally and let trial judges apply it. For instance, the rule cannot say illustrative aids are limited to summaries or compilations because they are much broader than that.

The judge member who had raised the concern about the inclusion of extra-record information again suggested stating explicitly that an illustrative aid cannot include information not already in the record. Professor Capra asked if putting "admissible" on line 4—"understand *admissible* evidence or argument"—would be satisfactory. The judge member responded that, no, someone could help the trier of fact understand admissible evidence by introducing extra-record evidence, as in Judge Bates' earlier illustration. The judge member also thought that whether the aid's utility in assisting comprehension is substantially outweighed by the danger of unfair prejudice is not the correct test for introducing unadmitted evidence through illustrative aids; rather, the presence of that unadmitted evidence should disqualify the aid from being used altogether. But the rule currently does not have anything that prevents that.

The judge member further commented that it might be worth adding a requirement in (b) to tell the jury that illustrative aids are not evidence. Professor Capra responded that it was in the committee note instead because most rules of evidence do not address jury instructions in the text.

A practitioner member commented that it was important to keep in mind that the rule as it now stood encompassed illustrative aids used throughout a trial, including during opening and closing arguments. An illustrative aid during a closing argument will typically include argument; it may for example include headings that characterize evidence a certain way.

Professor Bartell suggested taking the fourth sentence of the first paragraph of the committee note and placing it in the rule text to define "illustrative aid." A judge member expressed support for that suggestion. Professor Capra said that the advisory committee, after repeated consideration, felt that the definition did not work as well in the rule text as in the committee note.

A judge member expressed appreciation for the proposed new rule, and predicted that it would clear up confusion concerning when an exhibit goes back to the jury. The rule does a good job of balancing the interests on that issue. The member also thought that attorneys would generally use common sense to know not to add unadmitted evidence to an illustrative aid. One textual addition that might help reinforce that behavior could be to add the word "the" before the word "evidence" in line 4 of Rule 107(a) as shown on page 920 of the agenda book—"understand *the* evidence or argument." The member further noted that it would probably be necessary to give limiting instructions to ensure that the jury uses illustrative aids properly. Professor Capra accepted the proposed edit of adding the word "the" before "evidence."

Judge Bates wondered if the concern about adding extra-record information evidence could be addressed by adding to the first paragraph of the committee note: "An illustrative aid may not be used to bring in additional information that is not in evidence." Judge Schiltz responded that that would limit argument too much—a lot of argument brings in information not technically in evidence. Judge Bates amended the suggested addition to refer to "additional factual information." Professor Capra reiterated his belief that if there is other evidence offered in the guise of an illustrative aid, it would be analyzed under Rule 403, not 107.

A judge member understood the concern raised about adding unadmitted evidence to an illustrative aid but thought it was not worth worrying about. It is like closing arguments—there is not a rule saying that something not in evidence cannot be mentioned in closing argument, yet any attempt to do so is met with an objection.

An academic member worried about the possibility that confusion about exactly what an illustrative aid is—how it is different, what it captures, what it does not capture, and how it is implemented—would create a flurry of objections and litigation. The answer might be to monitor the caselaw and anecdotal reports so as to learn how the rule is implemented.

Ms. Shapiro commented that the DOJ trial attorneys with whom she had spoken were thrilled to have a rule like this because the courts' treatment of illustrative aids—even their vocabulary—has been inconsistent.

Judge Bates asked whether the last sentence of the third paragraph of the committee note should be revised by adding "or argument" after "evidence" on page 922. Professor Capra accepted this change.

As to the seventh paragraph of the committee note (on page 923), Judge Bates also pointed out that a decision had to be made concerning the suggestions to delete or amend that paragraph's discussion of advance notice. Judge Schiltz recalled that a majority of the advisory committee members had favored a notice requirement; the committee understood the opposition to such a requirement, and had meant to accomplish a compromise by deleting the requirement from the rule text but including the notice discussion in the committee note. He was concerned about changing the committee note too much after achieving that compromise. He thought that adding the sentence about the possible downsides of advance notice and maybe other modest changes would be acceptable, but cutting the paragraph altogether would go too far.

A judge member suggested cutting the sentence that was the penultimate sentence of the seventh paragraph as shown on page 923 (the sentence that began "Ample advance notice"). Judge Schiltz agreed to that change. A judge member expressed support for retaining that sentence because it helpfully illustrated different scenarios for the use of illustrative aids; Professor Capra added that the sentence presented a balanced viewpoint. Another practitioner member, though, supported deleting the sentence because it focused on whether requiring advance notice *can* be done rather than whether it *should* be done—the latter being, in this member's view, the more important question. Judge Schiltz agreed that he would rather take out the sentence than possibly lose the support of those concerned about the notice issue.

A judge member questioned the use of the term "infinite variety" in the fourth sentence of the note paragraph concerning advance notice. Professor Garner suggested "wide variety," which Professor Capra accepted.

Professor Capra summarized the amendments to the proposal. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed new Rule 107 with one change to the proposed rule to add "the" before "evidence" on line 4 on page 920 of the agenda book, and the following changes to the committee note as printed on pages 921–24 of the agenda book:**

- In the first paragraph, fifth line, in the phrase "as that latter term is vague and has been subject," the language "is vague and" was struck.

- In the second paragraph, third line, the word "factfinder" was changed to "trier of fact."

- In the second paragraph, last line, the language "to study it, and to use it to help determine the disputed facts" was changed to "and use it to help determine the disputed facts." The comma preceding this line was also struck.

- In the third paragraph, third line, the word "factfinder" was changed to "trier of fact." In the third paragraph, second-to-last line, the phrase "finder of fact" was changed to "trier of fact," and the phrase "or argument" was added after "understand evidence."

- In the fourth paragraph, second line, the word "information" was changed to "evidence."

- In the seventh paragraph (which commences "Many courts require"), the sentence "That said, there is an infinite variety of illustrative aids, and an infinite variety of circumstances under which they might be used," was changed to "That said, there is a wide variety of illustrative aids and a wide variety of circumstances under which they might be used."

- In the seventh paragraph, the sentence beginning "Ample advance notice" was struck and replaced with the sentence: "In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument."

Amendment to Rule 1006 (Summaries to Prove Content). Judge Schiltz reported on this item. The advisory committee sought final approval for an amendment to Rule 1006, which appeared on page 965 of the agenda book.

Rule 1006 allows a summary of voluminous admissible evidence to be admitted into evidence itself. Unlike an illustrative aid, these summaries are evidence and may go to the jury room and be used like any other evidence. The summary may be used in lieu of the voluminous underlying evidence or in addition to some or all of that voluminous underlying evidence.

Courts have had a great deal of difficulty with Rule 1006. Some incorrectly say that a Rule 1006 summary is not evidence; some incorrectly say that a Rule 1006 summary cannot be admitted unless all the underlying voluminous evidence is first admitted; and some incorrectly say that a Rule 1006 summary cannot be admitted if any of the underlying evidence has been admitted.

The proposed amendment would not change the substance of Rule 1006. It would instead clarify the rule in order to reduce the likelihood of errors.

Professor Richter reported that the advisory committee received seven public comments on the proposed amendment. Those comments were largely supportive. There was one note of criticism. A longstanding part of the foundation for a Rule 1006 summary is that the underlying voluminous materials must be admissible in evidence, even though they need not actually be admitted. Courts were not having a problem with that foundational requirement, so the advisory committee did not include it in the version published for public comment. The advisory committee recognized this omission and, at its Fall 2022 meeting, unanimously agreed to add the requirement of admissibility to the rule text. This addition was shown on page 965, line 5. That was the only change to the proposed amendment since the public-comment period.

Judge Bates asked whether, in line 4, the word "offered" should be added, so that the text reads, "The court may admit as evidence a summary, chart, or calculation *offered* to prove . . . ."

Turning to the fourth paragraph of the committee note, a judge member asked whether the verb "meet" in the phrase "meet the evidence" was sufficiently clear. After some discussion among the committee members and the advisory committee's representatives, the advisory committee's representatives agreed to replace the word "meet" with "evaluate."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 1006 with the following changes: in**

the rule text, adding the word "offered" after "calculation" as shown on page 965, line 4, of the agenda book; and in the fourth paragraph of the committee note, replacing the word "meet" with "evaluate."

Amendment to Rule 613(b) (Extrinsic Evidence of a Prior Inconsistent Statement). Judge Schiltz reported on this item. The advisory committee sought final approval of an amendment to Rule 613(b), which appeared on page 952 of the agenda book.

Rule 613(b) addresses the situation in which a witness takes the stand and testifies, and a party wants to impeach that witness by introducing extrinsic evidence—for example, the testimony of another witness, or a document— that the witness made an inconsistent statement in the past. Under the common law, before that party is allowed to bring in that extrinsic evidence to show that the witness made an inconsistent statement in the past, the witness had to be given a chance to explain or deny making the statement. This is called the requirement of prior presentation.

Rule 613(b) took the opposite approach: as long as sometime during the trial the witness had a chance to explain or deny the prior inconsistent statement, the extrinsic evidence could come in. But most judges ignore this rule—Judge Schiltz admitted ignoring it himself—and follow the common law. The common-law rule makes sense because the vast majority of the time, the witness will admit making the inconsistent statement, obviating the need to unnecessarily lengthen the trial by admitting the extrinsic evidence. Further, if the extrinsic evidence is admitted after the witness testifies, then someone has to bring the witness back for the chance to explain or deny it—and the witness may have flown across the country.

The proposed amendment therefore restores the common-law requirement of prior presentation. But it gives the court discretion to waive it—for example, if a party was not aware of the inconsistent statement until the witness finished testifying.

Professor Richter reported that the advisory committee received four public comments on Rule 613(b), all in support of restoring the prior-presentation requirement. The comments noted that it would make for orderly and efficient impeachment and impose no impediment to fairness. The proposal would also align the rule's text with the practice followed in most federal courts. There was no change to the rule text from the version that was published for public comment.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 613(b).**

Amendment to Rule 801(d)(2) (An Opposing Party's Statement). Judge Schiltz reported on this item. The advisory committee sought final approval of an amendment to Rule 801(d)(2), which appeared starting on page 956 of the agenda book.

Rule 801(d)(2) provides an exception to the hearsay rule for statements of a party-opponent. Courts are split about how to apply this rule when the party at trial is not the declarant but rather the declarant's successor in interest. For example, suppose the declarant is injured in an accident, makes an out-of-court statement about the incident that caused the declarant's injuries, then dies. If the declarant's estate sues, may the defendant use the deceased declarant's out-of-court statement against the estate? Some courts say yes because the estate just stands in the shoes of the declarant and should be treated the same. Some courts say no because it was technically the

human-being declarant who made the out-of-court statement, not the legal entity (the estate) that is the actual party.

The proposed amendment would adopt the former position: if the statement would be admissible against the declarant as a party, then it's also admissible against the party that stands in the shoes of the declarant. The advisory committee thought that the fairest outcome, and it also eliminates an incentive to use assignments or other devices to manipulate litigation.

Professor Capra reported that there was sparse public comment. Some comments suggested that the term "successor in interest" be used, but that was problematic because the term is used in another evidence rule, where it is applied expansively. Because it is not supposed to be applied expansively here, the committee did not adopt that change.

Judge Bates highlighted the statement in the committee note's last paragraph, that if the declarant makes the statement after the rights or obligations have been transferred, then the statement would not be admissible. He asked whether that was a substantive provision and whether there was an easy way to express it in the rule's text. Professor Capra responded that there was not an easy way to express it in the text, and this issue would arise very rarely. Furthermore, the rationale for attribution would not apply if the interest has already been transferred. The advisory committee decided in two separate votes not to include that issue in the rule text and instead to keep it in the committee note.

Turning back to the proposed rule text on line 29 of page 957 ("If a party's claim, defense, or potential liability is directly derived …"), Professor Hartnett asked whether "directly" was the appropriate term to use. For example, if a right passes through two assignments or successors in interest, would "directly derived" capture that scenario? Professor Capra responded that the term comes from the case law, and "derived" on its own seemed too diffuse.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 801(d)(2).**

Amendment to Rule 804(b)(3) (Statement Against Interest). Judge Schiltz reported on this item. The advisory committee sought final approval of a proposed amendment to Rule 804(b)(3), which appeared starting on page 960 of the agenda book.

Rule 804(b)(3) provides an exception to the hearsay rule for declarations against interest. The proposed amendment addresses a particular application of that rule.

In a criminal case in which the out-of-court statement is a declaration against penal interest—typically, a statement by somebody outside of court that the declarant was the one who actually committed the crime for which the defendant is now on trial—then the proponent of that statement must provide corroborating circumstances that clearly indicate the trustworthiness of the statement.

There's a dispute in the courts about how to decide if such corroborating circumstances exist. Some courts say that the judge may only look at the inherent guarantees of trustworthiness underlying the statement itself, not at any independent evidence (such as security-camera footage

or DNA evidence) that would support or refute the out-of-court confession. But most courts say the judge can look at independent evidence.

The proposed amendment resolves the split. It takes the side of the courts that say that the judges *can* look at independent evidence.

Professor Richter noted that the advisory committee received five public comments on this proposal, all of them in support. But several expressed confusion because, as originally drafted, the proposed rule used the term "corroborating" twice in the same sentence. The distinction was not clear between the finding of "corroborating circumstances" that a court had to make and the corroborating "evidence" that a court could use to make that finding.

The advisory committee modified the text slightly to avoid using the term "corroborating" twice and to clarify the distinction between the finding and the evidence. The revised rule text directs the court to consider "the totality of circumstances under which [the out-of-court statement] was made and any evidence that supports or contradicts it." Conforming changes were made to the committee note. The committee note also explains that a 2019 amendment to the residual hearsay exception (Rule 807) that does the same thing—expanding the evidence a court may use to find trustworthiness under that exception—should be interpreted similarly, even though amended Rules 804(b)(3) and 807 use slightly different wording.

A judge member observed that the criterion in the rule—that the statement tends to expose the declarant to criminal liability—was broader than Judge Schiltz's explanation that the statement exposes the declarant to criminal liability for the crime for which the defendant is being tried; the member asked which was the intended test. Judge Schiltz responded that his explanation was just the most common example, and the rule still reaches all statements exposing the declarant to criminal liability.

Judge Bates asked whether it is correct to say in the committee note that the language used in Rule 807, speaking only of "corroborating" evidence, is consistent with the "evidence that supports or contradicts" language in the proposed amendment to Rule 804. "Supporting or contradicting evidence" includes evidence that is not "corroborating." Professor Capra responded that, because Rule 807's committee note also discusses an absence of evidence, courts applying the post-2019 Rule 807 have considered evidence contradicting the account. Thus, the two rules, though not identical, are consistent. Judge Schiltz noted that the current proposal gets to the same point in a cleaner way. Professor Capra also remarked that the phrase "corroborating circumstances" was not changed because it has been in the rule for 50 years and there is a lot of law about it.

A judge member asked why the proposed rule uses a narrow term like "contradicts" instead of a broader term like "undermines," given that "supports" is a broad statement and the opposing term ought to have similarly broad scope. After some discussion, the advisory committee representatives agreed to replace "contradicts" with "undermines" (in line 27 on page 961 of the agenda book) and to make a corresponding change to the committee note.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the proposed amendment to Rule 804(b)(3) with the following changes:**

in the text of Rule 804(b)(3)(B), replacing "contradicts" with "undermines," and making the same change in the committee note.

Information Item

Juror Questions. Judge Schiltz reported on this item. The advisory committee proposed an amendment that would have established minimum procedural protections if a court decided to let jurors pose questions for witnesses. The proposed rule was clear that the advisory committee did not take any position on whether that practice should be allowed.

The advisory committee presented this proposal at a previous meeting of the Standing Committee. Some members of the Standing Committee expressed concern that putting safeguards in the rules would encourage the practice.

The matter was returned to the advisory committee for further study. It held a symposium on the topic at its Fall 2022 meeting. The advisory committee then discussed the issue at its Spring 2023 meeting and decided to table the proposal. There was significant opposition to it even within the advisory committee.

Professor Capra noted that the advisory committee has sent its work to the committee updating the Benchbook for U.S. District Court Judges. Judge Schiltz explained that the advisory committee suggested that the proposed procedural safeguards may be appropriate for inclusion in the revision of the Benchbook that is currently being worked on.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES (CONTINUED)

Information Items (Continued)

Rule 41(a)(1)(A) (Voluntary Dismissal by the Plaintiff Without a Court Order). Professor Bradt reported on this item.

The question under this rule is: what and when may a plaintiff voluntarily dismiss without a court order and without prejudice? The rule refers to the plaintiff's ability to voluntarily dismiss an "action." What does that word mean? Does it mean the entire case, all claims against all defendants? Or can it mean something less? The circuits are split on whether a plaintiff could dismiss all claims against one defendant in a multidefendant case. There's also a district-court split about whether a plaintiff may voluntarily dismiss even less without a court order, such as an individual claim.

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, is trying to figure out whether and to what extent this is a real-world problem rather than one that courts effectively muddle through. That is, can judges effectively narrow cases, despite the fact that Rule 41(a)(1)(A) speaks only of an "action"? Since the January 2023 Standing Committee meeting, the Rule 41 Subcommittee has conducted outreach with Lawyers for Civil Justice and the American Association for Justice, and it has an upcoming meeting with the National Employment Lawyers Association.

If this is a real problem, the next step would be to ask whether it can be solved by consensus. The subcommittee may need to consider the deeper question of how much flexibility a plaintiff ought to have. And if a plaintiff does have that flexibility, by when must it be exercised? The rule currently says that a plaintiff has until the answer or a motion for summary judgment is filed. But there might be a good reason to move that deadline up to the filing of a Rule 12 motion to dismiss. Further, an amendment to Rule 41 might have downstream effects on other rules designed to facilitate flexibility during litigation, such as Rule 15.

Judge Bates observed that the Eleventh Circuit in Rosell v. VMSB, LLC, 67 F.4th 1141, 1143 (11th Cir. 2023), recently held that an "action" means the whole case and therefore dismissed an appeal for lack of jurisdiction. It seems to be an issue that is live in the courts and could be causing problems for litigants.

Professor Bradt noted that the word "action" also appears in, and the interpretive questions thus extend to, Rule 41(a)(2) (concerning dismissals by court order).

Rule 7.1 (Disclosure Statement). Professor Bradt reported on this item.

The advisory committee has formed a subcommittee to examine Rule 7.1, which requires corporate litigants to disclose certain financial interests. The rule helps inform judges whether they must recuse themselves because of a financial interest in a party or the subject matter. It requires a party to disclose its ownership by a parent corporation. The problem is that the rule may not accurately reflect all of the different kinds of ownership interests that may exist in a party. One topic under discussion is when a "grandparent" corporation owns the parent corporation.

This issue has gotten a great deal of attention from the public and from Congress. At the last advisory-committee meeting, a subcommittee to investigate the issue was appointed, and it will be chaired by Justice Jane Bland of the Texas Supreme Court. The subcommittee will have its first meeting soon. It will initially research the relevant case law and local rules in the federal courts, and it will also look to state courts for insight into how best to resolve the issue.

Professor Beale wondered whether the Administrative Office or some other entity could create a database in which one could query a corporation and find all ownership interests in the corporation, in the corporation's owners, and so on, rather than depending on parties' disclosures. Professor Bradt responded that the subcommittee is going to look at this possibility, but a technological solution may be challenging because of the proliferation of many kinds of corporate structures.

Professor Bradt noted that it might make sense for the subcommittee to work with the Appellate Rules Committee on this issue because many of the questions addressed during the report about amicus disclosures parallel the questions the subcommittee will be addressing in this project.

A practitioner member commented that law firms have to investigate corporate ownership for conflict purposes. Services already exist with this information. The wheel does not necessarily need to be reinvented. Professor Bradt agreed, but also noted that the subcommittee wants to be mindful of whether those services would be sufficiently accessible to parties with fewer resources.

Additional Items. Professor Marcus briefly reported on several additional items.

Rule 23, dealing with class actions, is before the advisory committee again, this time with respect to two different issues. First, in a recent First Circuit opinion, Judge Kayatta addressed the question of incentive awards for class representatives. Because the Supreme Court has so far declined to grant certiorari on this issue, it remains before the advisory committee. Second, the Lawyers for Civil Justice suggested a change to Rule 23(b)(3) on the "superiority" prong to let a court conclude that some nonadjudicative alternative might be superior to a class action.

The advisory committee also continues to look at methods to sensibly handle applications for in forma pauperis ("IFP") status. Perhaps it should even be called something different so that people who are eligible will understand what IFP means.

Finally, three suggestions have been removed from the advisory committee's agenda. The first, suggested in 2016 by Judge Graber and then-Judge Gorsuch, would have amended Rule 38, dealing with jury-trial demands, in response to the declining frequency of civil jury trials. But studies suggest that Rule 38 is not the source of the problem, so an amendment to the rule did not seem the appropriate solution.

Second, Senators Tillis and Leahy wrote to the Chief Justice about a district judge who was extremely active in patent-infringement cases. This judge purportedly held several *Markman* hearings a week, using deputized masters or judicial assistants to assist him with that caseload. The senators did not believe that Rule 53 authorized that kind of use of special masters. But the senators did not suggest that Rule 53 should be changed. Also, the relevant court has revised its assignment of patent-infringement cases in a way that can reduce this problem. This item is therefore no longer on the advisory committee's agenda.

Third, an attorney proposed amending Rule 11 to forbid state bar authorities to impose any discipline on anyone who is accused of misconduct in federal court unless a federal court has already imposed Rule 11 sanctions. Because this proposal misconstrues the function of Rule 11, the advisory committee removed this proposal from its agenda.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge James Dever and Professors Sara Sun Beale and Nancy King presented the report of the Advisory Committee on Criminal Rules, which last met in Washington, D.C., on April 20, 2023. The advisory committee presented three information items and no action items. The advisory committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 875.

Information Items

Rule 17 and Pretrial Subpoena Authority. Judge Dever reported on this item. Judge Jacqueline Nguyen chairs the Rule 17 Subcommittee. Rule 17, which deals with subpoenas in criminal trials, has not been updated in about 60 years. The New York City Bar Association's White Collar Crime Committee submitted a proposal to amend it.

The advisory committee responded to the proposal by first asking whether there is a problem with how Rule 17 currently works. It began gathering information in its October 2022 meeting, and it has continued that information-gathering by asking how companies that deal with big data respond to subpoenas.

About a third of the states have criminal-subpoena rules that are structured differently than the federal rules. The Rule 17 Subcommittee reported on the topic at the advisory committee's April 2023 meeting.

The advisory committee is considering how to appropriately distinguish procedurally between protected information, such as medical records, personnel records, or privileged information, and other information, such as a video of events occurring outside a store.

Professor Beale added that the subpoena issue is an important question. Defense attorneys have very little means to get information from third parties because Rule 17 has been so narrowly interpreted.

Rule 23 and Jury-Trial Waiver Without Government Consent. Judge Dever reported on this item.

The American College of Trial Lawyers' Federal Criminal Procedure Committee submitted a proposal to amend Rule 23(a) to eliminate the requirement that the government consent to a defendant's request for a bench trial.

Currently, a defendant must waive a jury trial in writing, the government must consent, and the court must also approve the waiver. About a third of the states do not require the prosecution's consent to waive a jury trial. The federal rules have always required it.

The advisory committee has not yet appointed a subcommittee to review the proposal. It has asked the Federal Defenders and Criminal Justice Act lawyers on the advisory committee to gather more information. One premise of the proposal was that there is a backlog of trials because of COVID, but none of the district judges on the advisory committee had had that experience. So the advisory committee wanted to gather more information. That process is ongoing.

The advisory committee is also trying to gather information on what rationales, if any, the DOJ gives for not consenting to a jury trial. Part of what animates the discussion is that, although the Sixth Amendment talks about the accused's right to a jury trial, Article III, Section 2's directive that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" does not mention the defendant. So the United States actually has its own, independent interest in having a jury trial.

Professor Beale predicted that the Rule 23 proposal would generate interesting discussion about whether it is appropriate for parties to be adversarial about demands or waivers of juries or whether there is something different about the jury as an institution that makes it inappropriate for parties to try to demand it or waive it for strategic advantage. There are also apparently differences in the government's practices among the 94 judicial districts. She thought that the advisory committee's attention to the issue might spur the DOJ to change its process on its own.

Judge Bates asked to clarify whether the Rule 23 investigation would only focus on the government's consent to bench trials, not court approval. Professor Beale confirmed that the proposal focused only on government consent.

Professor Marcus remarked that the proposal seems to expand the court's power by letting it decide whether to grant the defendant's request for a bench trial even though the government does not consent.

Judge Dever reiterated that only a minority of the states' practices currently align with the proposal. The federal rule had always required the government's consent, and the Supreme Court has rejected a constitutional challenge to it.

Judge Bates concluded by noting that the DOJ, whose practices vary from district to district, had volunteered to provide information about what they do and have done with respect to requests for bench trials.

Rule 49.1 (Privacy Protections for Filings Made with the Court). As to this item, Judge Dever deferred to Professor Bartell's previous report on Senator Wyden's suggestion concerning privacy protections and court filings.

OTHER COMMITTEE BUSINESS

Information Item

Legislative Update. Judge Bates and Mr. Pryby stated that there was no significant legislative activity to report since the last meeting of the Standing Committee.

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates explained that the Standing Committee needed to provide input to the Judicial Conference's Executive Committee about the strategic plan for the federal judiciary. Judge Bates requested comment, either then or after the meeting, on the draft report that began on page 1005 of the agenda book.

Judge Bates then sought the Standing Committee's authorization to work with the Rules Committee Staff and Professor Struve to move forward with the report. Without objection: **The Standing Committee so authorized Judge Bates.**

New Business

No member raised new business.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the committee members for their contributions and patience. The Standing Committee will next convene on January 4, 2024.

TAB 2

Agenda E-19 (Summary)
Rules
September 2023

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-3

2. a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law

   b. Approve, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and

   c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 5-9

3. Approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, 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. 12-13

4. Approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 17-19

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 June 6, 2023. All members participated.

Representing the advisory committees were Judge Jay S. Bybee (9th Cir.), chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly (Bankr. W.D. Va.), chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg (S.D. Fla.), chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III (E.D.N.C.), chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz (D. Minn.), chair, Professor Daniel J. Capra, Reporter, and Professor Liesa Richter, consultant, 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; H. Thomas Byron III, the Standing Committee's Secretary; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Christopher Ian Pryby, Law Clerk to the Standing Committee;

John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process, and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider two suggestions affecting all four Advisory Committees—suggestions to allow expanded access to electronic filing by pro se litigants and to modify the presumptive deadlines for electronic filing. An additional update concerned the start of coordinated work among the Bankruptcy, Civil, and Criminal Rules Committees to evaluate a proposal to adopt a unified standard for admission to the bar of federal district and bankruptcy courts. Finally, the Standing Committee approved a brief report regarding judiciary strategic planning.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 32 (Form of Briefs, Appendices, and Other Papers), Rule 35 (En Banc Determination), Rule 40 (Petition for Panel Rehearing), and Appendix of Length Limits

The Advisory Committee completed a comprehensive review of the rules governing panel and en banc rehearing, resulting in proposed amendments transferring the content of Rule 35 to Rule 40, bringing together in one place the relevant provisions dealing with rehearing. The proposed amendments to Rule 40 would clarify the distinct criteria for rehearing en banc

and panel rehearing, and would eliminate redundancy. Rule 32 and the Appendix of Length Limits would be amended to reflect the transfer of the contents of Rule 35 to Rule 40. The proposed amendments were published in August 2022. The Advisory Committee reviewed the public comments and made no changes.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 32, 35, and 40, and the Appendix of Length Limits as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rule 6 (Appeal in a Bankruptcy Case) and Rule 39 (Costs on Appeal) with a recommendation that they be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Appellate Rule 6 would clarify the treatment of appeals in bankruptcy cases. A proposed amendment to Appellate Rule 6(a) would account for the fact that the time limits for certain post-judgment motions that reset the time to take an appeal from a district court to a court of appeals are different when the district court was exercising bankruptcy jurisdiction under 28 U.S.C. § 1334 than when it was exercising original jurisdiction under other statutory grants. The proposed committee note provides a table showing which Bankruptcy Rule governs each relevant type of post-judgment motion and the time allowed under the current version of the applicable Bankruptcy Rule. Proposed amendments to Appellate Rule 6(c) would address direct appeals in bankruptcy cases, which are governed by 28 U.S.C. § 158(d)(2). The Advisory Committee determined that Rule 6(c)'s current reliance on Rule 5 (Appeal by Permission) was misplaced and that there is considerable confusion in applying the Appellate

Rules to direct appeals. For that reason, the proposed amendments to Rule 6(c) would address direct appeals in a largely self-contained way. Finally, the proposed amendments also provide more detailed guidance for litigants about initial procedural steps once authorization is granted for a direct appeal to the court of appeals.

Rule 39 (Costs)

The proposed amendments to Rule 39 would clarify the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals or the district court (or the clerk of either) calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments would codify the holding in *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628 (2021)— that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court— and would provide a clearer procedure to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments would make Rule 39's structure more parallel by adding a list of the costs taxable in the court of appeals to the current rule, which lists only the costs taxable in the district court.

Information Items

The Advisory Committee met on March 29, 2023. In addition to the proposals noted above, the Advisory Committee discussed several other matters. The Advisory Committee has been considering potential amendments to Rule 29 (Brief of an Amicus Curiae) for several years and considered possible amendments requiring the disclosure by amici curiae of information about contributions by parties and nonparties. In addition, the Advisory Committee completed a draft of amended Form 4 to create a more streamlined and less intrusive form to use when seeking to proceed in forma pauperis. Because the Rules of the Supreme Court require litigants to use the same form, the draft has been provided to the Clerk of the Supreme Court for review.

Finally, the Advisory Committee discussed new suggestions, including a suggestion regarding the redaction of Social Security numbers in court filings, a suggestion for a possible new rule regarding intervention on appeal, a suggestion regarding third-party litigation funding, and a suggestion to follow the Supreme Court's lead in permitting the filing of amicus briefs without requiring the consent of the parties or the permission of the court.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: the proposed Restyled Bankruptcy Rules;[1] proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006; new Rule 8023.1;[2] the abrogation of Official Form 423; and a proposed amendment to Bankruptcy Official Form 410A. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Restyled Rules Parts I–IX (the 1000–9000 series of Bankruptcy Rules)

The Bankruptcy Rules are the fifth and final set of national procedural rules to be restyled. The Restyled Bankruptcy Rules were published for comment over several years in three sets: the 1000–2000 series of rules were published in August 2020, the 3000–6000 series in August 2021, and the final set, the 7000–9000 series, in August 2022. After each publication period, the Advisory Committee on Bankruptcy Rules carefully considered the comments received and made recommendations for final approval based on the same general drafting

[1]The Restyled Bankruptcy Rules are at Appendix B, pages 1-454. They are in side-by-side format with the existing unstyled version of each rule on the left and the proposed restyled version shown on the right. The unstyled left-side versions of the following rules reflect pending rule changes currently on track to take effect December 1, 2023, absent contrary action by Congress: Amended Rules 3011, 8003, 9006, and new Rule 9038.

[2]The proposed substantive changes to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1 are set out separately and begin at Appendix B, page 455. The changes, underlining and strikeout, are shown against the proposed restyled versions of those rules.

guidelines and principles used in restyling the Appellate, Criminal, Civil, and Evidence Rules, as outlined below. The Restyled Bankruptcy Rules as a whole, including the revisions based on public comments and a final, comprehensive review, are now being recommended for final approval.

General Guidelines. Guidance in drafting, usage, and style was provided by Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996), and Bryan A. Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). S*ee also* Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure*, Mich. Bar J., Sept. 2005, at 56 and Mich. Bar J., Oct. 2005, at 52; Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009).

Formatting Changes. Many of the changes in the restyled Bankruptcy Rules result from using consistent formatting to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules clearer and make the restyled rules easier to read and understand even when the words are not changed.

Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words. The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. The restyled rules also minimize the use of inherently ambiguous words, as well as redundant "intensifiers"—expressions that attempt to add emphasis but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the

restyled rules does not change their substantive meaning. The restyled rules also remove words and concepts that are outdated or redundant.

Rule Numbers. The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

No Substantive Change. The style changes to the rules are intended to make no changes in substantive meaning. The Advisory Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Advisory Committee also declined to modify "sacred phrases"—those that have become so familiar in practice that to alter them would be unduly disruptive to practice and expectations. One example is "meeting of creditors," a term that is widely used and well understood in bankruptcy practice.

Rules Enacted by Congress. Where Congress has enacted a rule by statute, in particular Rule 2002(n) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 357), Rule 3001(g) (Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 361), and Rule 7004(b) and (h) (Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4118), the Advisory Committee has not restyled the rule.

<u>Amendments to Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), related amendments to Rules 4004 (Grant or Denial of Discharge), 5009 (Closing Chapter 7, Chapter 12, Chapter 13, and Chapter 15 Cases; Order Declaring Lien Satisfied), and 9006 (Computing and Extending Time; Time for Motion Papers), and abrogation of Official Form 423 (Certification About a Financial Management Course)</u>

The amendments to Rule 1007(b)(7) delete the directive to file a statement on Official Form 423 (Certification About a Financial Management Course) and make filing the course certificate itself the exclusive means showing that the debtor has taken a postpetition course in

personal financial management. References in other parts of Rule 1007 and in Rules 4004, 5009, and 9006 to the "statement" required by Rule 1007(b)(7) are changed to refer to a "certificate." Because Official Form 423 is no longer necessary, the Advisory Committee recommends that it be abrogated.

Rule 7001 (Scope of Rules of Part VII)

The amendment to Rule 7001(a) creates an exception for certain turnover proceedings under § 542(a) of the Code. An individual debtor may need an order requiring the prompt return by a third party of tangible personal property—such as an automobile or tools of the trade—in order to produce income to fund a plan or to regain the use of exempt property. As noted by Justice Sonia Sotomayor in her concurrence in *City of Chicago v. Fulton*, 141 S. Ct. 585, 592–95 (2021), the procedures applicable to adversary proceedings can be unnecessarily time-consuming in such a situation. Instead, the proposed amendment allows the debtor to seek turnover of such property by motion under § 542(a), and the procedures of Rule 9014 would apply. [3]

Rule 8023.1 (Substitution of Parties)

New Rule 8023.1 is modeled on Appellate Rule 43. Neither Appellate Rule 43 nor Civil Rule 25 applies to parties in bankruptcy appeals to the district court or bankruptcy appellate panel. This new rule is intended to fill that gap by providing consistent rules (in connection with such appeals) for the substitution of parties upon death or for any other reason.

Official Form 410A (Proof of Claim, Attachment A)

Part 3 of Form 410A is amended to provide for separate itemization of principal due and interest due. Because under Bankruptcy Code § 1322(e) the amount necessary to cure a default

[3]As noted by Justice Sotomayor, "Because adversary proceedings require more process, they take more time. Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days [citation omitted]. One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments." *Fulton*, 141 S. Ct. at 594.

is "determined in accordance with the underlying agreement and applicable nonbankruptcy law," it may be necessary for a debtor who is curing arrearages under § 1325(a)(5) to know which portion of the total arrearages is principal and which is interest.

Recommendation: That the Judicial Conference:

a. Approve the proposed Restyled Bankruptcy Rules and proposed amendments to Bankruptcy Rules 1007, 4004, 5009, 7001, and 9006, and new Rule 8023.1, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

b. Approve, contingent on the approval of the above-noted amendments to Bankruptcy Rule 1007, the abrogation of Bankruptcy Official Form 423, effective in all bankruptcy proceedings commenced after December 1, 2024, and, insofar as just and practicable, all proceedings pending on December 1, 2024; and

c. Approve, effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 410A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3002.1 and 8006 and proposed six new Official Forms related to the Rule 3002.1 amendments, Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R, with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation with one change, discussed below, to Rule 3002.1.

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)

In response to suggestions submitted by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy, the Advisory Committee proposed amendments to Rule 3002.1 that were published for comment

in 2021. The proposed amendments—intended to encourage a greater degree of compliance with the rule's provisions—included a new midcase assessment of the mortgage claim's status in order to give the debtor time to cure any postpetition defaults that may have occurred, new provisions concerning the effective date of late payment-change notices, and requirements concerning notice of payment changes for a home equity line of credit ("HELOC"). Additionally, the proposed amendments would have changed the assessment of the status of the mortgage at the end of a chapter 13 case from a notice to a motion procedure that would result in a binding order.

There were 27 comments submitted in response to the proposed amendments. Many of them identified concerns about the midcase review and end-of-case procedures. The comments led the Advisory Committee to recommend several changes to the rule as published. Among those changes, the provision for giving only annual notices of HELOC changes is made optional. The proposed midcase review procedure is also made optional, can be sought at any time during the case, is done by motion rather than by notice, and can be initiated either by the debtor or the trustee, not just the trustee as initially proposed. Changes are also made to the end-of-case procedures in response to the comments, including initiating the process by notice rather than by motion from the case trustee.

In addition to the changes discussed above, the Advisory Committee also recommended changes to current Rule 3002.1(i) (which would become Rule 3002.1(h)) to clarify the scope of relief that a court may grant if a claimholder fails to provide any information required under the rule. Following concerns raised during the Standing Committee meeting, the Advisory Committee chair withdrew one aspect of those proposed changes to allow for further consideration and possible resubmission at a later time.

Because the changes to the originally published amendments are substantial, and further public input would be beneficial, the Advisory Committee sought republication of the new proposed amendments to Rule 3002.1. After the Advisory Committee chair withdrew the portion of the proposed amendments noted in the preceding paragraph concerning current Rule 3002.1(i), the Standing Committee unanimously approved for publication the remainder of the proposed amendments to Rule 3002.1.

Rule 8006 (Certifying a Direct Appeal to the Court of Appeals)

The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.

Official Forms Related to Proposed Amendments to Rule 3002.1

- Official Form 410C13-M1 (Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim),
- Official Form 410C13-M1R (Response to [Trustee's/Debtor's] Motion Under Rule 3002.1(f)(1) to Determine the Status of the Mortgage Claim),
- Official Form 410C13-N (Trustee's Notice of Payments Made),
- Official Form 410C13-NR (Response to Trustee's Notice of Payments Made),
- Official Form 410C13-M2 (Motion Under Rule 3002.1(g)(4) to Determine Final Cure and Payment of Mortgage Claim),
- Official Form 410C13-M2R (Response to [Trustee's/Debtor's] Motion to Determine Final Cure and Payment of the Mortgage Claim)

The proposed amendments to Rule 3002.1 that were published for comment in 2021 called for five Official Forms to implement the proposed procedures. As a result of its recommendation to republish proposed Rule 3002.1, and the substantial changes to the proposed

procedures, the Advisory Committee now seeks publication of six proposed implementing Official Forms.

Information Items

The Advisory Committee met on March 30, 2023. In addition to the recommendations discussed above, the Advisory Committee gave preliminary consideration to a suggestion to require redaction of the entire Social Security number from filings in bankruptcy, a new suggestion to adopt national rules addressing electronic debtor signatures, changes to the timing of clerk notices of a debtor's failure to file the certificate showing completion of a personal financial management course, and a rule amendment that would require the debtor to disclose certain assets obtained after the petition date.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rule 12(a). The Standing Committee unanimously approved the Advisory Committee's recommendation.

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

Rule 12(a) prescribes the time to serve responsive pleadings. Paragraph (1) provides the general response time, but recognizes that a federal statute setting a different time governs. In contrast, neither paragraph (2) (which sets a 60-day response time for the United States, its agencies, and its officers or employees sued in an official capacity) nor paragraph (3) (which sets a 60-day response time for United States officers or employees sued in an individual capacity for acts or omissions in connection with federal duties) recognizes the possibility of conflicting statutory response times.

The current language could be read to suggest unintended preemption of statutory time directives. While it is not clear whether any statutes inconsistent with paragraph (3) exist, there are statutes setting shorter times than the 60 days provided by paragraph (2); one example is the Freedom of Information Act. The current rule fails to reflect the Advisory Committee's intent to defer to different response times set by statute. Thus, the current language could be mistakenly interpreted as a deliberate choice by the Advisory Committee that the response times set in paragraphs (2) and (3) are intended to supersede inconsistent statutory provisions, especially because paragraph (1) includes specific language deferring to different periods established by statute.

The Advisory Committee determined that an amendment to Rule 12(a) is necessary to explicitly extend to paragraphs (2) and (3) the recognition now set forth in paragraph (1)---namely, that a different response time set by statute supersedes the response times set by those rules. After public comment, the Advisory Committee recommended final approval of the rule as published.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 12(a), as set forth in Appendix C, 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 Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) and proposed new Rule 16.1 (Multidistrict Litigation) with a recommendation that they be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b)(3) would provide that the court may address the timing and method of such compliance in its scheduling order. During the January 2023 Standing Committee meeting, members expressed differing views concerning the length of, and level of detail in, the committee notes that would accompany the proposed amendments. The Advisory Committee subsequently reexamined the notes in light of that discussion, and at the June 2023 Standing Committee meeting, the Advisory Committee presented shortened notes to accompany the proposed amendments.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings, which the Civil Rules do not expressly address. After several years of work by its MDL Subcommittee, extensive discussions with interested bar groups, and consideration of multiple drafts, the Advisory Committee unanimously recommended that new Rule 16.1 be published for public comment.

Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after transfer. An initial MDL management conference allows for early attention to matters identified in Rule 16.1(c), which may be of great value to the transferee judge and the parties. Because not all MDL proceedings present the same type of management challenges, there may be some MDL proceedings in which no initial management conference is

needed, so proposed new Rule 16.1(a) says that the transferee court "should" (not "must") schedule such a conference.

Rule 16.1(b) recognizes that the transferee judge may designate coordinating counsel---before the appointment of leadership counsel—for the initial MDL conference. The court may appoint coordinating counsel to ensure effective and coordinated discussion and to provide an informative report.

Rule 16.1(c) encourages the court to order the parties to submit a report prior to the initial MDL conference. The court may order that the report address, inter alia, any matter under Rules 16.1(c)(1)–(12) or Rule 16. The rule provides a series of prompts for the court to consider, identifying matters that are often important to the management of MDL proceedings, including (1) whether to appoint leadership counsel; (2) previously entered scheduling or other orders; (3) principal factual and legal issues; (4) exchange of information about factual bases for claims and defenses; (5) consolidated pleadings; (6) a discovery plan; (7) pretrial motions; (8) additional management conferences; (9) settlement; (10) new actions in the MDL proceeding; (11) related actions in other courts; and (12) referral of matters to a magistrate judge or master.

Rule 16.1(d) provides for an initial MDL management order, which the court should enter after the initial MDL management conference. The order should address matters the court designates under Rule 16.1(c) and may address other matters in the court's discretion. This order controls the MDL proceedings until modified.

Information Items

The Advisory Committee met on March 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed various information items, including potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible grounds for recusal, Rule 23 (Class Actions) regarding awards to class representatives in class actions and

the superiority requirement for class certification, Rule 28 (Persons Before Whom Depositions May Be Taken) regarding cross-border discovery, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, and Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena. The Advisory Committee also discussed issues related to sealed filings, the standards for in forma pauperis status, and the mandatory initial discovery pilot project.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on April 20, 2023. The Advisory Committee considered several information items.

The Advisory Committee continues to consider a New York City Bar Association suggestion concerning Rule 17 (Subpoena). On issues related to third-party subpoenas, the Advisory Committee has heard from a number of experienced attorneys, including defense lawyers in private practice, federal defenders, and representatives of the Department of Justice. Through its Rule 17 Subcommittee, the Advisory Committee has collected information from experts regarding the Stored Communications Act and other issues relating to materials held online, as well as issues affecting banks and other financial service entities.

A new proposal from the American College of Trial Lawyers would allow the defendant to waive trial by jury without the government's consent. The Advisory Committee discussed this proposal and its previous consideration of this issue in connection with deliberations over new Criminal Rule 62 (part of the set of proposed rules—currently on track to take effect December 1, 2023, absent contrary action by Congress—that resulted from the CARES Act directive that rules be considered to address future emergencies).

Finally, the Advisory Committee voted to remove two items from its study agenda: a suggestion to clarify Rule 11(a)(2), which governs conditional pleas, and a suggestion to amend Rule 11(a)(1) to provide for a plea of not guilty by reason of insanity.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Evidence Rule 107. The Standing Committee unanimously approved the Advisory Committee's recommendations with minor changes to the text of Rules 107, 804, and 1006, and minor changes to the committee notes accompanying Rules 107, 801, 804, and 1006.

New Rule 107 (Illustrative Aids)

The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the trier of fact in understanding evidence) is sometimes a difficult one to draw, and the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards. The proposed amendment, originally published for public comment as a new subsection of Rule 611, would provide standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. Following publication in August 2022, the Advisory Committee determined that the contents of the rule were better contained in a new Rule 107 rather than a new subsection of Rule 611, reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony. In addition, the Advisory Committee determined to remove the notice requirement from the published version of the proposed amendment and to extend the rule to cover opening

and closing statements. Finally, the Advisory Committee changed the proposed amendments to provide that illustrative aids can be used unless the negative factors "substantially" outweigh the educative value of the aid, to make clear that illustrative aids are not evidence, and to refer to Rule 1006 for summaries of voluminous evidence.

Rule 613 (Witness's Prior Statement)

The proposed amendment would provide that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. To allow flexibility, the amended rule would give the court the discretion to dispense with the requirement. The proposed amendment would bring the courts into uniformity, and would adopt the approach that treats the witness fairly and promotes efficiency.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The proposed amendment to Rule 801(d)(2) would resolve the dispute in the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant's successor-in-interest. The Advisory Committee reasoned that admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness)

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate the trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendments to Rule 804(b)(3) would require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also

any evidence supporting or undermining it. This proposed amendment would help maintain consistency with the 2019 amendment to Rule 807, which requires courts to look at corroborating evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under the residual exception.

Rule 1006 (Summaries to Prove Content)

The proposed amendments to Rule 1006 would fit together with the proposed new Rule 107 on illustrative aids. The proposed rule amendment and new rule would serve to distinguish a summary of voluminous evidence (which summary is itself evidence and is governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would also clarify that a Rule 1006 summary is admissible whether or not the underlying evidence has been admitted.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

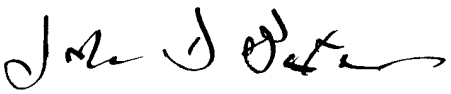
The Advisory Committee on Evidence Rules met on April 28, 2023. In addition to the matters discussed above, the Advisory Committee discussed possible amendments to add a new subdivision to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) to address permitting jurors to submit questions for witnesses. Proposed amendments setting forth the minimum safeguards that should be applied if a trial court decided to allow jurors to submit questions for witnesses were under consideration for some time, but doubts about the practice of allowing jurors to submit questions for witnesses led the Advisory Committee to table any possible proposed amendments. The Advisory Committee referred the issue to the committee

updating the Benchbook for U.S. District Court Judges, and it is being considered for inclusion in the Benchbook.

JUDICIARY STRATEGIC PLANNING

The Standing Committee approved a brief report on the strategic initiatives that the Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler (N.D. Ala.), judiciary planning coordinator.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
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William J. Kayatta, Jr.	D. Brooks Smith
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Troy A. McKenzie	Jennifer G. Zipps
Patricia Ann Millett	

* * * * *

TAB 3

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Congress (Apr 2023)

REA History:

- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which 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.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which 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.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
BK Form 410A	Published in August 2022. Approved by the Standing Committee in June 2023. The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." The amendments would put the burden on the claim holder to identify the elements of its claim.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Congress (Apr 2023)

REA History:

- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	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. A literal reading of "A party may amend its pleading once as a matter of course 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 (beginning on the 22nd day after service of the pleading and extending 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."	
CV 72	The proposed amendment 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).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which 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.	AP 2, BK 9038, and CR 62
CR 16	The technical proposed amendment corrects a typographical error in the cross reference under (b)(1)(C)(v).	
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which 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.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Congress (Apr 2023)

REA History:

- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Approved by Standing Committee (June 2023 unless otherwise noted)

REA History:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Approved by Standing Committee (June 2023 unless otherwise noted)

REA History:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2001. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. If approved, the amended form would go into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, designation of coordinating counsel, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

TAB 4

Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
National Defense Authorization Act for Fiscal Year 2024	**H.R. 2670** *Sponsor:* Rogers (R-AL) *Cosponsor:* Smith (D-WA) **S. 2226** *Sponsor:* Reed (D-RI)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2670/BILLS-118hr2670eas.pdf https://www.congress.gov/118/bills/s2226/BILLS-118s2226es.pdf **Summary:** Section 9011(a)(2)(B) of H.R. 2670, as amended and passed by the Senate but disagreed to by the House, and of S. 2226, as passed by the Senate, would deem that a "request for disclosure of unidentified anomalous phenomena, technologies of unknown origin, and non-human intelligence materials . . . constitute[s] a showing of particularized need under rule 6 of the Federal Rules of Criminal Procedure."	• 09/20/2023: House appointed conferees and requested a conference to resolve differences • 09/19/2023: House disagreed to the Senate amendment to H.R. 2670 • 07/27/2023: Senate passed S. 2226 with an amendment (86–11); Senate amended H.R. 2670 by striking all after the Enacting Clause and substituting the language of S. 2226, as amended; Senate passed H.R. 2670, as amended, by unanimous consent • 07/26/2023: H.R. 2670 received in Senate • 07/14/2023: H.R. 2670 passed House (219–210) • 07/11/2023: S. 2226 introduced in Senate • 06/21/2023: H.R. 2670 ordered to be reported as amended (58–1). • 04/18/2023: H.R. 2670 introduced in House; referred to Armed Services Committee
Protecting Our Courts from Foreign Manipulation Act of 2023	**H.R. 5488** *Sponsor:* Johnson (R-LA) **S. 2805** *Sponsor:* Kennedy (R-LA) *Cosponsor:* Manchin (D-WV)	CV 26(a)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5488/BILLS-118hr5488ih.pdf https://www.congress.gov/118/bills/s2805/BILLS-118s2805is.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party "foreign person, foreign state, or sovereign wealth fund . . . that has a right to receive any	• 09/14/2023: H.R. 5488 introduced in House; referred to Judiciary Committee • S. 2805 introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			payment that is contingent in any respect on the outcome of the civil action by settlement, judgment, or otherwise. . . ." Would further require disclosure of the source of funding and, by default, a copy of any agreement creating the contingent right. Would prohibit third-party ligation funding by foreign states and sovereign wealth funds	
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 90 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 34 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf **Summary:** Would require rulemaking (through Rules Enabling Act process) of gifts, income, or reimbursements to justices from parties, amici, and their affiliates, counsel, officers, directors, and employees, as well as lobbying contracts and expenditures of substantial funds by these entities in support of justices' nomination, confirmation, or appointment. Would require expedited rulemaking (through Rules Enabling Act process) to allow court to prohibit or strike amicus brief resulting in disqualification of justice, judge, or magistrate judge	• 09/05/2023: Placed on Senate Legislative Calendar under General Orders. Calendar No. 199. • 07/20/2023: S. 359 ordered to be reported favorably, with an amendment • 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee
Government Surveillance Transparency Act of 2023	**H.R. 5331** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf **Summary:** Would require promulgation of Rules to put any criminal surveillance order, including search warrants, on the public docket and/or create a case number and caption. There would be exceptions to address personal information and where the surveillance applicant asks the court to seal the order Would amend Criminal Rule 41(f)(1)(B) by adding that an inventory shall disclose information about any electronic information	• 09/01/2023: H.R. 5331 introduced in House; Referred to Judiciary Committee
Protect Reporters from Exploitative	**H.R. 4250** *Sponsor:* Kiley (R-CA)	CV 26–37, 45; BK 7026–37, 9016;	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr4250/BILLS-118hr4250ih.pdf	• 07/19/2023: H.R. 4250 ordered reported (23–0) • 06/21/2023: H.R. 4250 introduced in House;

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
State Spying (PRESS) Act	*Cosponsors:* 19 bipartisan cosponsors **S. 2074** *Sponsor:* Wyden (D-OR) *Cosponsors:* Lee (R-UT) Durbin (D-IL) Graham (R-SC)	CR 16, 17	https://www.congress.gov/118/bills/s2074/BILLS-118s2074is.pdf **Summary:** Would require federal entities to obtain court authorization to compel testimony or certain documents from covered journalists or covered providers; court must find by preponderance of evidence that "there is a reasonable threat of imminent violence unless the testimony or document is provided"	referred to Judiciary Committee • S. 2074 introduced in Senate; referred to Judiciary Committee
Bring Our Heroes Home Act	**H.R. 3110** *Sponsor:* Pappas (D-NH) *Cosponsors:* Fulcher (R-ID) Houlahan (D-PA) Simpson (R-ID) **S. 2315** *Sponsor:* Crapo (D-ID) *Cosponsors:* 9 bipartisan cosponsors	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3110/BILLS-118hr3110ih.pdf https://www.congress.gov/118/bills/s2315/BILLS-118s2315is.pdf **Summary:** Would deem that a "request for disclosure of [H.R. 3110: Missing Armed Forces Personnel; S. 2315: missing Armed Forces and civilian personnel] materials . . . constitute[s] a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure"	• 07/13/2023: S. 2315 introduced in Senate; referred to Homeland Security & Governmental Affairs Committee • 05/05/2023: H.R. 3110 introduced in House; referred to Oversight & Accountability Committee
LGBTQ+ Panic Defense Prohibition Act of 2023	**H.R. 4432** *Sponsor:* Pappas (D-NH) *Cosponsor:* Davids (D-KS) **S. 2279** *Sponsor:* Markey (D-MA) *Cosponsors:* 17 Democratic or Democratic-caucusing cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr4432/BILLS-118hr4432ih.pdf https://www.congress.gov/118/bills/s2279/BILLS-118s2279is.pdf **Summary:** Would preclude the use of evidence of a "nonviolent sexual advance or perception of belief, even if inaccurate, of the gender, gender identity, or sexual orientation of an individual . . . to excuse or justify the conduct of an individual or mitigate the severity of an offense," except that a court may admit evidence "of prior trauma to the defendant for the purpose of excusing or justifying the conduct of the defendant or mitigating the severity of an offense"	• 07/12/2023: S. 2279 introduced in Senate; referred to Judiciary Committee • 06/30/2023: H.R. 4432 introduced in House; referred to Judiciary Committee
Judicial Ethics and Anti-Corruption Act of 2023	**H.R. 3973** *Sponsor:* Jayapal (D-WA)	CV 26(c)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3973/BILLS-118hr3973ih.pdf	• 06/09/2023: H.R. 3973 introduced in House; referred to Judiciary, Oversight &

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Cosponsors: 40 Democratic cosponsors **S. 1908** *Sponsor:* Warren (D-MA) *Cosponsors:* 8 Democratic or Democratic-caucusing cosponsors		https://www.congress.gov/118/bills/s1908/BILLS-118s1908is.pdf **Summary:** Would prohibit a court from entering an order otherwise authorized under Civil Rule 26(c) to restrict disclosure of information obtained through discovery unless the court makes certain findings regarding the protection of public health and safety and the tailoring of the order; would also prevent order from continuing in effect after entry of final judgment unless court makes similar findings	Accountability, Rules, Financial Services, Agriculture, and House Administration Committees • 06/08/2023: S. 1908 introduced in Senate; referred to Judiciary Committee
National Guard and Reservists Debt Relief Extension Act of 2023	**H.R. 3315** *Sponsor:* Cohen (D-TN) *Cosponsors:* Cline (R-VA) Dean (D-PA) Burchett (R-TN)	Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp.	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3315/BILLS-118hr3315ih.pdf **Summary:** Would extend the applicability of Interim Rule 1007-I and existing temporary amendments to Official Form 122A1 and Official Form 122A1-Supp. for four years after December 19, 2023	• 05/15/2023: Introduced in House; referred to Judiciary Committee
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 14 Democratic & 1 Republican cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would establish Diwali (a/k/a Deepavali) as a federal holiday	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee
Strengthening Transparency and Obligations to Protect Children Suffering from Abuse and Mistreatment (STOP CSAM) Act of 2023	**S. 1199** *Sponsor:* Durbin (D-IL) *Cosponsors:* Hawley (R-MO) Cruz (R-TX) Grassley (R-IA) Klobuchar (D-MN)	CR 32(c)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s1199/BILLS-118s1199rs.pdf **Summary:** Would require probation officer, in preparing PSR, to request information from multidisciplinary child-abuse team or other appropriate sources "to determine the impact of the offense on a child victim and any other children who may have been affected by the offense"	• 05/15/2023: Reported favorably with an amendment; placed on Senate Legislative Calendar under General Orders • 04/19/2023: Introduced in Senate; referred to Judiciary Committee
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 18 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf	• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee • 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	H.R. 3079 *Sponsor:* Bacon (R-NE) *Cosponsors:* 19 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 41 Republican cosponsors		**Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases to bar application of Civil Rule 60(b)(6) in proceedings under 28 U.S.C. § 2254(j)	• 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee
September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 5 Democratic cosponsors **S. 1472** *Sponsor:* Blackburn (R-TN) *Cosponsor:* Wicker (R-MS)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf **Summary:** Would make September 11 Day of Remembrance a federal holiday	• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee • 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee
Federal Extreme Risk Protection Order Act of 2023	**H.R. 3018** *Sponsor:* McBath (D-GA) *Cosponsor:* 95 Democratic cosponsors	CV? CR?	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3018/BILLS-118hr3018ih.pdf **Summary:** Would authorize a new kind of ex parte and permanent injunctive relief, albeit one sounding in criminal law, not civil law. The injunctive relief could also result in property forfeiture. May need new rulemaking to account for this kind of hybrid procedure	• 04/28/2023: Introduced in House; referred to Judiciary Committee
Workers' Memorial Day	**H.R. 3022** *Sponsor:* Norcross (D-NJ) *Cosponsors:* 11 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf **Summary:** Would make Workers' Memorial Day a federal holiday	• 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee
Women in Criminal Justice Reform Act	**H.R. 2954** *Sponsor:* Kamlager-Dove (D-CA)	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2954/BILLS-118hr2954ih.pdf **Summary:**	• 04/27/2023: Introduced in House; referred to Judiciary, Ways & Means, and Energy & Commerce Committees

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
	Cosponsors: 8 Democratic & 1 Republican cosponsors		Would create a pretrial diversion program for federal criminal cases; may need new rulemaking for criminal procedure (e.g., to allow for withdrawal of guilty plea under diversion program)	
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 22 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would create new Fed. Rule of Evidence to exclude "evidence of a defendant's creative or artistic expression, whether original or derivative" as evidence against that defendant (not restricted to criminal cases); would permit it on certain showings by the government by clear and convincing evidence (but not clear what would happen in a civil case if the government is not a party)	• 04/27/2023: Introduced in House; referred to Judiciary Committee
Competitive Prices Act	**H.R. 2782** *Sponsor:* Porter (D-CA) *Cosponsor:* Nadler (D-NY) Cicilline (D-RI) Jayapal (D-WA)	CV 8, 12	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2782/BILLS-118hr2782ih.pdf **Summary:** Would abrogate *Twombly*'s pleading standard, at least in antitrust cases	• 04/20/2023: Introduced in House; referred to Judiciary Committee
First Step Implementation Act of 2023	**S. 1251** *Sponsor:* Durbin (D-IL) *Cosponsors:* 10 bipartisan cosponsors	AP 4(a)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s1251/BILLS-118s1251is.pdf **Summary:** Would provide that Appellate Rule 4(a) governs the time limit for an appeal of a final order on a motion to modify a term of imprisonment imposed for crimes committed before age 18	• 04/20/2023: Introduced in Senate; referred to Judiciary Committee
Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act of 2023	**H.R. 1059** *Sponsor:* Kelly (R-ND) *Cosponsors:* 30 bipartisan cosponsors **S. 1212** *Sponsor:* Cramer (R-ND) *Cosponsor:* 9 bipartisan cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1059/BILLS-118hr1059rfs.pdf https://www.congress.gov/118/bills/s1212/BILLS-118s1212is.pdf **Summary:** Would establish national standards for remote electronic notarization; would make signature and title of notary prima facie or conclusive evidence in determining genuineness or authority to perform notarization	• 04/19/2023: S. 1212 introduced in Senate; referred to Judiciary Committee • 02/28/2023: H.R. 1059 received in Senate; referred to Judiciary Committee • 02/27/2023: H.R. 1059 passed House by voice vote • 02/17/2023: H.R. 1059 introduced in House;

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
				referred to Judiciary Committee
Online Privacy Act of 2023	**H.R. 2701** *Sponsor:* Eshoo (D-CA) *Cosponsor:* Lofgren (D-CA)	CV 4, CV 23	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2701/BILLS-118hr2701ih.pdf **Summary:** Would permit service of "petition for enforcement" for civil investigative demand under § 401 to be served by mail, and proof of service would be permitted by "verified return" including, if applicable, any "return post office receipt of delivery" Would require a class action to be prosecuted by a nonprofit organization, not an individual, and mandates equal division of total damages among entire class	• 04/19/2023: Introduced in House; referred to Energy & Commerce, House Administration, Judiciary, and Science, Space & Technology Committees
Relating to a National Emergency Declared by the President on March 13, 2020	**H. J. Res. 7** *Sponsor:* Gosar (R-AZ) *Cosponsors:* 68 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hjres7/BILLS-118hjres7rfs.pdf **Summary:** Would terminate the national emergency declared March 13, 2020, by President Trump. Ends authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference	• 04/10/2023: Signed into law • 03/29/2023: Passed Senate (68–23) • 02/02/2023: Received in Senate; referred to Finance Committee • 02/01/2023: Passed House (229–197) • 01/09/2023: Introduced in House
St. Patrick's Day Act	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Lawler (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
Sunshine in the Courtroom Act of 2023	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf **Summary:** Would permit, after JCUS promulgates guidelines, district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law (e.g., CR 53)	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee
Everyone can Notice-and-Takedown Distribution of Child Sexual	**S. 823** *Sponsor:* Hawley (R-MO)	CV 4(i)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s823/BILLS-118s823is.pdf **Summary:**	• 03/15/2023: Introduced in Senate; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Abuse Material (END CSAM) Act			Would allow a private person to bring a qui tam civil action against a social-media company that does not disable access to or remove an offending visual depiction within 10 days of notice; complaint must be served on the government under Civil Rule 4(i)	
Justice for Kennedy (JFK) Act of 2023	**H.R. 637** *Sponsor:* Schweikert (R-AZ)	CR 6(e)	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr637/BILLS-118hr637ih.pdf **Summary:** Would deem that a "request for disclosure of assassination records . . . constitute[s] a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure"	• 03/07/2023: Introduced in House; referred to Judiciary, Oversight & Accountability, Ways & Means, Foreign Affairs, Armed Services, and Intelligence Committees
Facial Recognition and Biometric Technology Moratorium Act of 2023	**H.R. 1404** *Sponsor:* Jayapal (D-WA) *Cosponsors:* 10 Democratic cosponsors **S. 681** *Sponsor:* Markey (D-MA) *Cosponsors:* Merkley (D-OR) Warrant (D-MA) Sanders (I-VT) Wyden (D-OR)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1404/BILLS-118hr1404ih.pdf https://www.congress.gov/118/bills/s681/BILLS-118s681is.pdf **Summary:** Would bar admission by federal government of information obtained in violation of bill in criminal, civil, administrative, or other investigations or proceedings (except in those alleging a violation of the bill itself)	• 03/07/2023: H.R. 1404 introduced in House; referred to Judiciary and Oversight & Accountability Committees • 03/07/2023: S. 681 introduced in Senate; referred to Judiciary Committee
Asylum and Border Protection Act of 2023	**H.R. 1183** *Sponsor:* Johnson (R-LA)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1183/BILLS-118hr1183ih.pdf **Summary:** Would require "an audio or audio visual recording of interviews of aliens subject to expedited removal" and would require the recording's consideration "as evidence in any further proceedings involving the alien"	• 02/24/2023: Introduced in House; referred to Judiciary Committee
Bankruptcy Venue Reform Act	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsor:* Buck (R-CO)	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf **Summary:** Would require rulemaking under 28 U.S.C. § 2075 "to allow any attorney representing a governmental unit to be permitted to appear on behalf of the governmental unit and intervene without charge, and without meeting any requirement under any local	• 02/14/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel"	
Write the Laws Act	S. 329 *Sponsor:* Paul (R-KY)	All	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s329/BILLS-118s329is.pdf **Summary:** Would prohibit "delegation of legislative powers" to any entity other than Congress. Definition of "delegation of legislative powers" could be construed to extend to the Rules Enabling Act. Would not nullify previously enacted rules, but anyone aggrieved by a new rule could bring action seeking relief from its application.	• 02/09/2023: Introduced in Senate; referred to Homeland Security & Government Affairs Committee
Fourth Amendment Restoration Act	H.R. 237 *Sponsor:* Biggs (R-AZ)	CR 41; EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr237/BILLS-118hr237ih.pdf **Summary:** Would require warrant under Crim. Rule 41 to electronically surveil U.S. citizen, search premises or property exclusively owned or controlled by a U.S. citizen, use of pen register or trap-and-trace device against U.S. citizen, production of tangible things about U.S. citizen to obtain foreign intelligence information, or to target U.S. citizen for acquiring foreign intelligence information. Would require amendment of 41(c) to add these actions as actions for which warrant may issue Would bar use of information about U.S. citizen collected under E.O. 12333 in any criminal, civil, or administrative hearing or investigation, as well as information acquired about a U.S. citizen during surveillance of non-U.S. citizen	• 02/07/2023: Referred to subcommittee • 01/10/2023: Introduced in House; referred to Judiciary and Intelligence Committees
Federal Police Camera and Accountability Act	H.R. 843 *Sponsor:* Norton (D-DC) *Cosponsors:* Beyer (D-VA) Torres (D-NY)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr843/BILLS-118hr843ih.pdf **Summary:** Among other things, would bar use of certain body-cam footage as evidence after 6 months if retained solely for training purposes; would create evidentiary presumption in favor of criminal defendants and civil plaintiffs against the government if	• 02/06/2023: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			recording or retention requirements not followed; and would bar use of federal body-cam footage from use as evidence if taken in violation of act or other law	
Save Americans from the Fentanyl Emergency (SAFE) Act	**H.R. 568** *Sponsor:* Pappas (D-NH) *Cosponsors:* 18 bipartisan cosponsors	CR 43	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr568/BILLS-118hr568ih.pdf **Summary:** Would permit reduction or vacatur of sentence for certain crimes involving controlled substances that are "removed from designation as a fentanyl-related substance"; would not require defendant to be present at any hearing on whether to vacate or reduce a sentence	• 02/03/2023: Referred to Health Subcommittee • 01/26/2023: Introduced in House; referred to Energy & Commerce and Judiciary Committees
Limiting Emergency Powers Act of 2023	**H.R. 121** *Sponsor:* Biggs (R-AZ)	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr121/BILLS-118hr121ih.pdf **Summary:** Would limit emergency declarations to 30 days unless affirmed by act of Congress. Current COVID-19 emergency would end no later than 2 years after enactment date; would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference	• 02/01/2023: Referred to subcommittee • 01/09/2023: Introduced in House; referred to Transportation & Infrastructure, Foreign Affairs, and Rules Committees
Restoring Judicial Separation of Powers Act	**H.R. 642** *Sponsor:* Casten (D-IL) *Cosponsor:* Blumenauer (D-OR)	AP	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr642/BILLS-118hr642ih.pdf **Summary:** Would give the D.C. Circuit certiorari jurisdiction over cases in the court of appeals and direct appellate jurisdiction over three-district-judge cases. A D.C. Circuit case "in which the United States or a Federal agency is a party" and cases "concerning constitutional interpretation, statutory interpretation of Federal law, or the function or actions of an Executive order" would be assigned to a multicircuit panel of 13 circuit judges, of which a 70% supermajority would need to affirm a decision invalidating an act of Congress. Would likely require new rulemaking for the panel and its interaction with the D.C. Circuit and new appeals structure	• 01/31/2023: Introduced in House; referred to Judiciary Committee
No Vaccine Passports Act	**S. 181** *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s181/BILLS-118s181is.pdf	• 01/31/2023: Introduced in Senate; referred to Health, Education, Labor & Pensions Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
			Summary: Would prohibit disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure	
No Vaccine Mandates Act of 2023	**S. 167** *Sponsor:* Cruz (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s167/BILLS-118s167is.pdf **Summary:** Would prohibit disclosure by certain individuals of others' COVID vaccination status absent express written consent; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings; imposes civil and criminal penalties on disclosure	• 01/31/2023: Introduced in Senate; referred to Judiciary Committee
See Something, Say Something Online Act of 2023	**S. 147** *Sponsor:* Manchin (D-WV) *Cosponsor:* Cornyn (R-TX)	BK, CR 17, CV, EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s147/BILLS-118s147is.pdf **Summary:** Would prohibit disclosure by providers of interactive computer services of certain orders related to reporting of suspicious transmission activity; no exception made for subpoenas, court orders, discovery, or evidence in court proceedings	• 01/30/2023: Introduced in Senate; referred to Commerce, Science & Transportation Committee
Protecting Individuals with Down Syndrome Act	**H.R. 461** *Sponsor:* Estes (R-KS) *Cosponsors:* 19 Republican cosponsors **S. 18** *Sponsor:* Daines (R-MT) *Cosponsors:* 24 Republican cosponsors	CV 5.2; BK 9037; CR 49.1	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr461/BILLS-118hr461ih.pdf https://www.congress.gov/118/bills/s18/BILLS-118s18is.pdf **Summary:** Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed	• 01/24/2023: H.R. 461 introduced in House; referred to Judiciary Committee • 01/23/2023: S. 18 introduced in Senate; referred to Judiciary Committee
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 57 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 31 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee
ADA Compliance for Customer Entry to Stores and Services (ACCESS) Act	**H.R. 241** *Sponsor:* Calvert (R-CA) *Cosponsors:* Waltz (R-FL) Grothman (R-WI)	CV 16	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr241/BILLS-118hr241ih.pdf **Summary:** Would require JCUS to "under rule 16 of the Federal Rules of Civil Procedure or any other applicable law, in consultation with property owners and representatives of the disability rights community, develop a model program to promote the use of alternative dispute resolution mechanisms, including a stay of discovery during mediation, to resolve claims of architectural barriers to access for public accommodations."	• 01/10/2023: Introduced in House; referred to Judiciary Committee
Kalief's Law	**H.R. 44** *Sponsor:* Jackson Lee (D-TX)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr44/BILLS-118hr44ih.pdf **Summary:** Would impose strict requirements on the admission of statements by youth during custodial interrogations into evidence in criminal or juvenile-delinquency proceedings against the youth	• 01/09/2023: Introduced in House; referred to Judiciary Committee

TAB 5

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
March 28, 2023

The Civil Rules Advisory Committee met on March 28, 2023, in West Palm Beach, Florida. Participants included Judge Robin Rosenberg (Advisory Committee Chair) and Judge John Bates (Standing Committee Chair), Advisory Committee members Justice Jane Bland; Judge Cathy Bissoon; Judge Jennifer Boal; Brian Boynton; David Burman; Chief Judge David Godbey (remotely); Judge Kent Jordan; Judge M. Hannah Lauck; Judge R. David Proctor; Joseph Sellers; Judge Manish Shah; Dean Benjamin Spencer; Ariana Tadler; and Helen Witt. Professor Richard Marcus participated (remotely) as Reporter, Professor Andrew Bradt as Associate Reporter, and Professor Cooper as Consultant. Also representing the Standing Committee were Judge D. Brooks Smith, Liaison to this committee (remotely) Professor Catherine Struve, Reporter to the Standing Committee (remotely); and Professor Daniel Coquillette, Consultant to the Standing Committee (remotely). Representing the Bankruptcy Rules Committee was Judge Catherine McEwen, liaison to this committee. Carmelita Shinn, clerk liaison, also participated. The Department of Justice was also represented by Joshua Gardner. The Administrative Office was represented by H. Thomas Byron III; Allison Bruff; Christopher Pryby; and Scott Myers (remotely). The Federal Judicial Center was represented by Dr. Emery Lee; Jason Cantone (remotely); and Timothy Reagan (remotely); Darcie Thompson, law clerk to Judge Rosenberg, and Supreme Court Fellow Brad Baranowski also attended.

Susan Steinman of the American Association for Justice, Alex Dahl of Lawyers for Civil Justice, and Robert Levy of Exxon Corp. and Kyle Cutts and Gil Keteltas of Baker Hostetler attended in person. Members of the public also joined the meeting remotely. They are identified in the attached attendance list.

Judge Rosenberg opened the meeting by noting that this was her first meeting as Chair. She noted that she aspired to continue the great tradition set most recently by Judges Bates and Dow, the immediate past chairs of this Committee.

New Committee Members and Associate Reporter

Judge Rosenberg introduced two newly-appointed members of the Committee. First, Justice Jane Bland of the Texas Supreme Court has joined the Committee. She has been a Justice of that court since 2019 and was previously on the Texas Court of Appeals, and before that served as a district court judge in the Texas state courts. She has abundant rulemaking experience, having served for 21 years on the Texas Rules Committee.

Judge Manish Shah of the Northern District of Illinois graduated from Stanford and then the University of Chicago Law School. He then worked for a San Francisco law firm before serving as law clerk to Judge James Zagel of the Northern District of Illinois. After his law clerk service, he was an Assistant U.S. Attorney in the N.D. Ill. for 12 years, the last two years as Chief of the Criminal Division.

Judge Rosenberg then introduced Professor Andrew Bradt, the new Associate Reporter of the Committee. He is a Professor of Law at the University of California, Berkeley, where he has won law school and campus-wide teaching awards. He is also co-author of casebooks on Civil Procedure and Complex Litigation. And he is Faculty Director of the Berkeley Law Civil Justice Institute. Before entering full-time teaching, he served as law clerk to Judge Patti Saris (D.Mass.), practiced at Ropes & Gray and at Jones Day, and served as a Climenko Teaching Fellow at Harvard Law School.

Standing Committee January meeting

Judge Rosenberg then reported on the Standing Committee meeting in January 2023. Much of the meeting focused on work done by other advisory committees. For this Committee, there were

three areas of interest:

(1) The Rule 42 Consolidation Subcommittee, a joint subcommittee of the Civil and Appellate Rules Advisory Committees (sometimes call the Hall v. Hall Committee) was disbanded. This committee was formed after the Supreme Court's decision in Hall v. Hall, 138 S.Ct. 1118 (2018), holding that even after separate cases have been consolidated a final judgment in one of them is immediately appealable even though the other case or cases remain pending in the district court. The Court recognized in its decision that a rule change could alter the result it reached, which resolved a circuit conflict. A very substantial research effort by FJC Research, after overcoming considerable obstacles, showed that there had not been significant problems under the rule announced by the Court, and that there was no significant indication that a rule change was needed. Consequently, the subcommittee was disbanded.

(2) The proposed privilege log amendments to Rules 16(b)(3) and 26(f)(3) were presented to the Standing Committee. That committee did not have a problem with the small changes in the rules themselves, but had misgivings about the length of the draft Committee Notes in relation the minor changes in the rules. One concern was that these Notes were verging on being a practice manual rather than explaining how the amendments were to function. The decision was to return the privilege log package to the Advisory Committee to consider shortening the Note, and the Discovery Subcommittee had since January agreed on a shorter Note that is before the full Committee today.

(3) The third topic presented to the Standing Committee in January was the MDL package. That generated substantial discussion at the Standing Committee meeting, and is an important part of today's agenda. So detailed discussion can be deferred until that point in the agenda.

Judicial Conference Meeting, March 2023

Judge Rosenberg also noted that the agenda book contains a report submitted to the Judicial Conference for its March 2023 meeting. It is included for information purposes only. It notes the matters now under study by this Committee.

Minutes for October 2022 Meeting

The agenda book also contains the draft minutes for the Advisory Committee's October 2022 meeting. The draft was approved without dissent, subject to correction of typographical or similar errors.

Rule 12(a) -- Recommending adoption

A small amendment to Rule 12(a) was published for public comment in August 2022. It was introduced as correcting a seeming oversight in the rule that suggested the rule altered statutes that call for the government to respond in fewer than 60 days (the time specified for the government to file its answer under Rules 12(a)(2) and (3)). The prime example is the Freedom of Information Act, and the Committee was informed that the existing rule had caused problems in some FOIA cases. The amendment sought to cure this problem by amending the provision formerly limited to Rule 12(a)(1) so it applies to the entirety of Rule 12(a), including the times that apply to the government, and the Note made clear that this would invoke a statute that provided another time -- whether shorter or longer -- in place of the time provisions of the rule itself.

Only three comments were submitted. One (submitted by Anonymous) supported the amendment, and another objected that the rule had been "disregarded" in favor of the State of Indiana in a prior litigation. The Federal Magistrate Judges Association supported the amendment

but noted that there might be other rules that might specify a different time. The FMJA did not identify any such rules, but a comment during the meeting noted that Rule 15(a)(3) calls for responding to an amended pleading within 14 days, which might be affected. Rule 15(a) was not exempted by the current rule, however, and no problems under that rule had been identified (as with the FOIA cases). Moreover, this possible change could be said to go beyond the published draft amendment.

On motion, the amendment was approved for recommendation that the Standing Committee forward it to the Judicial Conference for adoption, with one dissent.

Privilege Logs
Rules 16(b)(3) and 26(f)(3)

As already noted, the Standing Committee returned the proposed amendments to the Advisory Committee with a request to consider shortening the Note. No questions were raised about the rule amendments themselves.

Chief Judge David Godbey, Chair of the Discovery Subcommittee, reported that the Subcommittee had met by email on a number of occasions to craft a punchier Note. After considerable wordsmithing, the Subcommittee agreed to a revised and shortened Note, which is included in the agenda book. It urges that the draft rule amendments, along with the shortened Notes, but published for public comment.

In addition, after the Standing Committee meeting, Judge Facciola and Mr. Redgrave submitted a proposal for an amendment to Rule 26(b)(5)(A), where the requirement to specify what has been withheld on grounds of privilege appears. The Subcommittee does not recommend making this additional rule change.

A Subcommittee member commented in support of the amendment, but expressed worries that the parties might often find it difficult to devise a specific method of complying with Rule 26(b)(5)(A) as early in the case as when the Rule 26(f) conference occurs. The idea is that this should be "the beginning of the process" in many instances.

A reaction was that one can "almost always" make later revisions to any early arrangements of this sort in light of developments. And it was repeatedly emphasized as the Subcommittee studied the problem that early attention was critical. Deferring serious consideration of the method of satisfying Rule 26(b)(5)(A) until the end of the discovery period could produce major problems.

A question was raised about the suggestion from Judge Facciola and Mr. Redgrave. Why not make that change? An answer was that the rule amendment calls for discussion during the Rule 26(f) meet-and-confer session, so the best place to put that is in Rule 26(f). Presumably that is where people would look to find out what they should do during the meet-and-confer session. Telling them the same thing in Rule 26(b)(5)(A) seems redundant.

The Committee voted unanimously to recommend that the revised amendment package be published for public comment.

MDL Subcommittee -- Rule 16.1

Judge Rosenberg introduced this matter by noting that this subcommittee may have set a record for longevity for Advisory Committee subcommittees. The task has lasted more than four years and has ranged through a multitude of issues. Much time was spent on whether to move

forward with special rules for interlocutory appellate review in MDL proceedings. Considerable additional time was devoted to study of third party litigation funding. Aggressive "vetting" proposals were also made, sometimes calling for plaintiffs to submit "evidentiary" materials at the outset of litigation to validate their claims.

For some time (up until when the Advisory Committee's agenda book for the March 2022 meeting was prepared), the focus was on Rules 26(f) and 16(b), the same rules addressed in the Discovery Subcommittee privilege log proposals. But eventually it became clear (a) that Rule 26(f) was not entirely suitable as a vehicle because it is addressed to individual actions, and (b) that a special feature -- appointment of "coordinating counsel" -- might be important to assist in the organization of the meet-and-confer session that could produce a report for the court to assist in the management of MDL proceedings.

After the Advisory Committee's March 2022 meeting, an initial sketch of a possible Rule 16.1 was prepared, using two alternatives. The first included a list of specifics very much like the one being presented to this committee. The second alternative was more general. This sketch was included in the Standing Committee agenda book for its June 2022 meeting as a purely informational item. It was later the focus of very useful meetings with members of the Lawyers for Civil Justice and the American Association for Justice attended by members of the Subcommittee.

In addition, as reported during the October 2022 meeting of this Committee, representatives of the Subcommittee would be attending the transferee judges conference hosted by the Judicial Panel on Multidistrict Litigation at the end of October 2022. The Panel was very helpful to the Subcommittee during that event. There was a session of the entire conference devoted to the Rule 16.1 ideas, and at the end of the conference also a special breakout session for in-depth discussion of the 16.1 ideas. During that session in particular, the transferee judges expressed a distinct preference for the Alternative 1 approach -- including more specifics. Such a rule could provide valuable guidance, particularly to judges new to the MDL process, and to lawyers without substantial prior experience. In addition, it could tee up a variety of topics that can beneficially be considered at the outset of MDL proceedings.

Judge Proctor continued the introduction of the Rule 16.1 proposal. He noted that he had been Chair of the Subcommittee only since last November -- the third Chair for this Subcommittee (perhaps also a record). He recalled an early presentation during the Judicial Panel's 2018 transferee judges conference about the possibility of amending the Civil Rules to address MDL proceedings. At that time he was a member of the Panel, and was personally skeptical about the rule amendment ideas, particularly given the topics then under discussion, including expanded interlocutory appeals and "vetting" requirements. Many other transferee judges were similarly resistant to these amendment ideas during the 2018 conference.

He also attended the sessions at the Panel's 2022 transferee judges conference and found the sessions very helpful in crystallizing what emerged as strong support among the judges for the Alternative 1 approach. Support even came from a number of judges who had been opposed to rule amendments during the 2018 conference. Indeed, one very experienced transferee judge remarked that he had become a "convert" to favoring this new approach to addressing MDL proceedings in the Civil Rules.

With this background, the Subcommittee set to work. The Subcommittee members were indefatigable. There may have been as many as ten meetings, and unless they were ill or out of the country all members showed up for and participated in these meetings. There was a collective effort to take account of the comments received from the sources mentioned above, and from other sources that the very experienced members of the Subcommittee have consulted.

The basic concept is to give the transferee judge a set of prompts that can provide a valuable starting point for successful management of an MDL proceeding. In a sense, the rule offers the judge a "cafeteria plan" to direct counsel to provide needed input up front without constricting the judge's flexibility in tailoring the management order to the needs of the specific proceeding.

As recognized in the rule and Note, there may be some MDL proceedings that do not need as much detail or management as the larger ones. But a consistent message through the long consideration of these issues is that almost all transferee judges convene an initial management conference to develop a plan.

Turning to the structure of the 16.1 draft, Judge Proctor noted that this is about the initial management conference, though it foresees that ordinarily there will be further conferences to monitor the proceedings and adapt to developments. Rule 16.1(b) authorizes appointment of "coordinating counsel" to assist in the preparation and organization of a meet-and-confer session under Rule 16.1(c) and in the preparation of the report to the court before the Rule 16.1(a) initial management conference. Such a designation might be likened to having to "herd cats," but it is something that may provide important value to the court.

A concern repeatedly raised during meetings with bar groups and in submissions to the Committee might be called a "chicken/egg" problem -- how can all the topics on which the meet-and-confer session is to focus be addressed meaningfully before leadership is appointed (assuming there is to be an appointment of leadership counsel -- one of the proposed topics of the meet-and-confer session). But the scheme is not to insist that all these matters be immediately set in concrete. Indeed, Rule 16.1(d) says the initial case management order governs only "until" it is modified. A key objective is to maintain flexibility while also providing guidance and identifying issues that might cause great difficulty later unless brought to the surface near the outset.

Rule 16.1(c) provides the "cafeteria" menu, and leaves it entirely to the judge to pick the topics that the parties must discuss and address in their report. The rule does not require that they agree on how to handle these matters, but the reporting function at least equips the judge to appreciate the various positions (sometimes, perhaps, involving disagreements among plaintiff counsel or defense counsel and not only between the two "sides").

Turning to some of the specifics, (c)(4) introduces the question of what was originally called "vetting." Some say the § 1407 process is not primarily designed to weed out groundless claims, but that is not so. The statute is indeed designed to deal with the "forest" more than individual trees, and in some instances there may be a cross-cutting issues that should be considered first. General causation, preemption, and *Daubert* issues might be examples of that sort of issue. It may often be that individual specifics are best deferred until remand to the transferor district. But in some MDL proceedings, early requirements for disclosure of information about specific claims can be important. Indeed, the frequent use of plaintiff fact sheets or the census methods introduced recently demonstrate that such methods are often important, particularly in MDL proceedings with hundreds or thousands of actions.

Another topic that has received much attention is settlement, and particularly the judicial role in connection with possible settlement of some of these individual cases. Settlement issues are different in MDL proceedings from class actions. Rule 23 authorizes the judge to appoint class counsel, and also authorizes the judge to approve a settlement presented by class counsel even over class member objections. In MDL proceedings, most plaintiffs have their own attorneys, and settlement is an individual decision made by individual parties. The Note makes that clear, and that is an important point.

Nevertheless, the court has a role to play in regard to settlement. For one thing (as recognized by proposed 16.1(c)(1)(C)), it is common for leadership (if appointed) to have prominent role in regard to settlement, at least when settlement involves resolution of multiple cases. Since the court appoints leadership (and may restrict the activities of nonleadership counsel -- see proposed 16.1(c)(1)(E)) there is a potential oversight role for the court.

Beyond that, whether or not leadership counsel are appointed, proposed 16.1(c)(9) draws attention to measures the court can take to facilitate settlement. Rule 16(a)(5) already recognizes that "facilitating settlement" is one purpose for pretrial conferences in general, and proposed 16.1 builds on that foundation.

Some have called attention to the Manual for Complex Litigation as a valuable source for guidance for transferee judges. And it certainly is a wonderful source of guidance, though by now nearly 20 years old. But it is also about 900 pages long and may not be easily digested by a judge (or lawyer) newly introduced into MDL proceedings. The Panel has been consciously reaching out to involve more judges in this process. And not all judges have an extensive background in complex civil litigation; for example, some may come to the bench with more experience in criminal cases. Transferee judges are also making efforts to involve attorneys in leadership who have not previously had extensive MDL experience. The draft Committee Note recognizes the importance of care in designation of leadership counsel, including a variety of experiences for potential appointees. For those new to the MDL process, the Manual may be daunting to contemplate up front. And the draft Note calls attention to the Manual as a source of guidance.

So 16.1 is not designed to supplant the Manual, but instead to provide a valuable starting point for the court and the attorneys. 16.1 is not even for every MDL, though it is probably quite rare for an MDL proceeding to be so simple that an initial management conference is unnecessary. The draft Note recognizes that, and that matters identified in 16.1(c) may be important also in actions concentrated before a single district judge without an MDL assignment, as by a related case provision in local rules.

In conclusion, many of the particulars included in proposed 16.1(c) are features of particular importance in MDL proceedings, and particularly in the larger ones that have assumed such prominence in recent years. The "cafeteria" process is designed to equip the judge to be able to manage the action successfully, something that often depends on getting a good start.

A Subcommittee member began the discussion by emphasizing that the proposal was the product of great effort and care -- ten meetings and many, many emails. The Subcommittee spent lots if time on many issues and was very careful about wording. Regarding the Manual for Complex Litigation, it might be that completion of a new edition and final adoption of a new Rule 16.1 could be seen as something of a race. The Enabling Act process takes several years, and the completion of a new edition of the Manual would also likely take several years.

Turning to the draft rule, this member noted that the goal was to be as flexible as possible. And the messages in the Committee Note are meant to be used to interpret and implement the rule's provisions. As with the 2015 amendments to the discovery rules, the rule and Note work hand in hand.

A judge raised several questions:

(1) The title is "Multidistrict Litigation Management," but the rule seems almost entirely addressed to the "initial" management conference. In the same vein, in line 291, the term "MDL" should be moved before "management" for consistency. It was agreed that this

change in line 291 is needed.

(2) It may be that draft 16.1(c)(4) is too strong, as it assumes that this information exchange should occur in every MDL even though the Note says that some MDLs don't call for this process. That seems to be in tension.

(3) In the Note to 16.1(b), in line 364, it seems that the reference should be to the 16.1(a) conference, for that is the conference on which the rule focuses, not the 16.1(c) meet-and-confer. The resolution might best be to make it clear in line 364 that the meet-and-confer session is what's meant.

(4) In regard to 16.1(c)(12), the Note seems to insist that any appointment of a master be done in strict compliance with Rule 53. Yet it seems that creative judges sometimes use masters in other ways in some MDL proceedings. Was it meant to disapprove that activity?

(5) The discussion of settlement in 16.1(c)(1)(C) and 16.1(c)(9) seems not entirely consistent. Moreover, the Note at lines 415-26 seems to authorize the court to pass on the "fairness" of any settlement. Is that suitable to MDL proceedings? In lines 501-05, the Note appears to direct the court to ensure that any proposed settlement process "has integrity." If that is a direction to the court, should it be in the rule? And does the court have that authority in MDL proceedings, where judicial approval of settlements is not required?

(6) In the Note to 16.1(c)(6), about a discovery plan, there is a reference to 16.1(c)(11), which is about related actions in other courts. What does that mean?

An immediate reaction was that these are very important questions. As to the last question, the point was that duplicative or overlapping discovery resulting from the pendency of overlapping proceedings was to be avoided, if possible. That could be a goal of the "coordination" that 16.1(c)(11) addresses.

An additional reaction was that the rule really looks beyond the initial management conference. For one thing, 16.1(c)(8) says that there probably should be a schedule for further such management conferences. And the Note (lines 490-91) says that "courts generally conduct management conferences throughout the duration of MDL proceedings." In addition, 16.1(c)(1)(A) directs attention to whether, if leadership counsel are appointed, "the appointment should be reviewed periodically during the MDL proceedings," again foreseeing recurrent oversight by the court. Though the basic point is to provide the court with the information needed during the initial management conference, that initial conference (and the resulting initial management order under 16.1(d)) would ordinarily be a foundation for further judicial management.

A Subcommittee member addressed the master question. There has been, and to some extent still is, substantial disagreement about the necessity of following the entire Rule 53 procedure every time there is a need for such an appointment. Some might even say such appointments lead to a "quasi master." The Subcommittee did not seek to resolve these divergent attitudes. The reality is that "you won't get far without party buy-in in MDLs" in situations in which special assignments are needed for a master. But the rule provision is directed more to enabling the parties to inform the court of their views before the 16.1(a) initial management conference. The goal was to leave some play in the joints.

Regarding settlement, this member emphasized that "we beat settlement half to death." The lawyer members of the Subcommittee were critical to the process. A starting point is in 16.1(c)(1)(C). If the court appoints leadership counsel it is highly likely that those lawyers will play

a prominent role in any considerable settlement process. It is appropriate to consider judicial directions regarding this recurrent possibility. Indeed, some say it makes sense on occasion to appoint liaison settlement counsel. That is what Judge Breyer did in the VW Diesel case. Proposed 16.1(c)(9) thus refers to existing Rule 16(c)(2)(I). The Note makes a critical point twice -- in MDL proceedings the decision whether to settle is an individual decision by a claimant and defendant. The variety of settlement arrangements is wide. There may be some "global" settlements. One or more defendants may approach some plaintiffs with settlement proposals for them. When bellwether trials are scheduled, that may also prompt attention to settlement of some cases.

The judge who raised the questions noted above responded that it is not clear whether the purpose is to make the judge responsible to ensure that the settlement is "fair," or that the settlement process has "integrity." In either event, if that is the purpose it is likely it should be in the rule, not just the Note.

Another Subcommittee member addressed the settlement topic, stressing that there is a broader perspective here than under Rule 23. On the one hand, if the court appoints leadership counsel, the rule is intended to give the court an opportunity to consider the appropriate role of those attorneys in the settlement context. Separately, whether or not the court appoints leadership counsel, the court in MDL proceedings, as in all cases, has some authority to address resolution. Regarding the Note at lines 425-26, the point is only to attend to procedural fairness, not to assess the fairness of the underlying settlement itself.

A judge commented that it may not be sufficient that the rule refers to the possibility of further management conferences; perhaps the title should be limited to the initial conference. On the question of "should" v. "must," that deserves discussion. It was clear from the introduction of the rule that the Subcommittee carefully considered which verb to use, but "should" seems to be nothing more than advice. Saying "may" makes it clear that the court has authority to do the things mentioned. It is not clear that there is a doubt about the court having authority under the current rules to do the things this rule proposal calls for the court to explore. Saying "must" is surely a rule, and this rule does use that verb for what the parties have to do if the judge tells them to discuss and report on a given topic. But "should" could be seen as existing in a sort of netherworld doing neither of these two things.

A Subcommittee member responded that this was a key discussion topic at the transferee judges' conference. Initially the judges favored "may," in part to ensure that the rule was clear about the breadth of the court's authority to address the matters listed in the rule. Another member recognized that one might regard "should" as precatory. But the rule is clear that judges have the authority to address the matters listed, and beyond that it provides guidance on how that authority ordinarily can be used.

A judge on the full Committee warned of "mission creep." This is not really a rule; there is only one "must" in it. This proposal seems almost entirely to be a best practices guidance document. And beyond that, it seems that the idea is that the Note is equally as important as the rule. That seems backward; the Note ought only provide commentary, and is not of equal dignity. Courts have to follow rules; they do not have to follow Notes.

Another Committee member agreed. This is really a "best practice" guide. It is not giving new authority or commanding judges to do anything. It is also not clear how this rule operates with current Rule 16. Rule 16(b) commands the judge to adopt a scheduling order limiting the time to do certain things in the case.

A Subcommittee member responded that this is not just a best practices guide. Instead, it

might best be regarded (as Professor Bradt has written in an article) as providing the judge with the tools to engage in what can be called "information forcing." And the first sort of information it forces out is guidance for the judge on how to organize and manage the MDL proceedings. This rule does not supplant Rule 16; it operates alongside it. The use of "should" in the rule proposal is intentional and meaningful.

A consultant noted that the proper role of the Note raises jurisprudential issues. For one thing, one must be careful about giving advice in a Note, in part because there is a risk of a negative pregnant. In this proposal, we have only one "must," and even it is contingent. It comes into play under 16.1(c) only if the judge directs the counsel to address certain topics in their report to the court.

A judge responded that Rule 16 itself has lots of "may" provisions. And the use of "should" reflects the "overwhelming" feedback the Subcommittee received about the need for flexibility. The starting point has been and should be whether this rule is useful.

On that point, the judge stressed that it is exceptionally rare for an MDL not to need at least an initial management conference. But that rare possibility is a reason not to command a useless conference; hence the "should" in 16.1(a) and 16.1(c). The "may" in 16.1(b) recognizes that there might be a question about appointing a "coordinating counsel" to organize for the initial management conference, and this rule puts that to rest. The basic bottom line the Subcommittee has heard, particularly from transferee judges, is that "this is needed." At least one judge at the recent transferee judges conference said: "This rule would give me authority that I need." Another example is presented by Judge Chhabria's 2021 opinion about his common benefit fund order, which may have been done too quickly.

Another judge on the Subcommittee emphasized that Judge Chhabria's experience was an important stimulus to favor adoption of this rule. For a period of time, this judge was adamant that no rule was needed. But Judge Chhabria's experience played a role in this judge's conversion. Absent a rule, there is a risk that judges new to the process (and perhaps some with MDL experience) will feel they should promptly sign early orders without an adequate appreciation of the implications of those early decisions. This rule is designed in part to protect the judge, and also to provide a method for non-leadership counsel to be heard on important issues.

Another judge emphasized that a high percentage of pending actions are subject to MDL transfer orders. This is not a situation that existed 20 years ago, and the Civil Rules presently say nothing about these very important proceedings. Moreover, the Panel is trying to expand the number of judges given MDL responsibilities, and many transferee judges are seeking to expand the circle of attorneys involved in leadership positions. Guidance is presently important, and likely to become more important.

A Committee member questioned these points. For example, the use of "should" in lines 287 and 295 regarding convening an initial management conference and directing the parties to meet and confer to address specified topics are not really rules. "It's not up to us to say this."

A Subcommittee member responded: "We think it is right to say 'should.'" It's more than "may." There almost always is an initial management conference.

A judge suggested that an alternative formulation might be "must, unless exceptional circumstances exist," which at least is in form a rule.

This suggestion drew a caution that inviting litigation about whether an exception applies could invite distractions. To contrast, Rule 16(b) says the court "must" enter a scheduling order

because, when it was adopted in 1983, judicial management was very new in most federal courts and a command seemed necessary. The use of an "exceptional circumstances" exception can breed litigation. An example is provided by the "exceptional circumstances" exception in Rule 26(b)(4)(D)(ii) for discovery of facts or opinions developed by a retained expert not testifying at trial. Inviting disputes about whether such an exception applies could distract the early organization of MDL proceedings.

Another Subcommittee member emphasized that "may" is not strong enough. But saying "must" with an exceptional circumstances exception would prove problematical. Using "may" has no teeth. There will be a lot of comments during the public comment period, and this question may deserve further discussion after that is completed.

The question whether "should" is used in other rules came up. Although a comprehensive review could not be done on the spot, at least some examples came immediately to the surface:

Rule 15(a)(2); "The court should freely give leave [to amend] when justice so requires."

Rule 16(d): "After any conference under this rule, the court should issue an order reciting the action taken."

Rule 25(a)(2): In the event of a party's death, "[t]he death should be noted in the record."

Rule 56(a): If it grants summary judgment, "t]he court should state on the record the reasons for granting or denying the motion."

A more comprehensive investigation of other rules might well turn up additional examples.

A judge observed that this proposed rule could be put out for comment, but continued to believe that was really just a best practices item. Perhaps "must, if appropriate" could be considered. The invitation to comment might include an invitation to comment on the choice of verbs and whether use of "should" will be useful. Perhaps the published proposal could include bracketed alternative versions.

The question was raised whether such bracketed alternatives have ever been offered in the past with regard to possible rule changes. Caution was expressed: such an invitation might provide a muddled result during and after the public comment period. The report to the Standing Committee would call attention to this topic, and ordinarily be included in the published invitation for public comment. So those offering comments could see that this topic deserved attention and comment accordingly. There was one time over recent decades when a footnote called attention to an alternative provision, but offering seemingly co-equal alternatives in a published preliminary draft might produce more confusion than light.

A judge on the Subcommittee recalled the series of questions Judge Dow used to ask about possible rule changes: (1) Is there actually a problem?; (2) If so, is there a rule solution to that problem?; and (3) Does the rule-based solution create a risk of harm? This is a unique set of circumstances in MDL proceedings, which are not otherwise addressed in the Civil Rules. So on question (1) there seems to be an actual need. On question (2), the Subcommittee has concluded that there is a rule-based solution -- proposed 16.1. And on question (3), it seems that using "must" or "may" would create problems, and that using "should" is the right choice.

A Committee member drew attention to proposed 16.1(c)(4), which seems to assume there should be an exchange of information, perhaps before formal discovery. Shouldn't that instead say

something like "Whether the parties must exchange information . . . ."?

A Subcommittee member responded that this is not about formal discovery. FJC research on the "vetting" issue extensively considered earlier in the Subcommittee's work showed that some such exchange occurs extremely often in large MDL proceedings. Another judge suggested that this is more like existing Rule 26(a)(1)(A) initial disclosure. Attention was drawn to lines 458-62 of the draft Note, which provide an explanation of the focus of 16.1(c)(4).

[During the lunch break, the Subcommittee met and considered whether or how to modify the proposed preliminary draft to respond to concerns voiced by Committee members.]

After the lunch break, the MDL Subcommittee presented revisions to its proposed preliminary draft that responded to certain concerns raised during the morning's discussion. By way of introduction, it was noted that some ideas for changing the proposed rule were not adopted. The title was not changed. 16.1(c)(4) was not changed. 16.1(c)(9) was not changed. Finally, the word "should" was retained.

But the Subcommittee proposed making the following revisions, which were displayed to the whole Committee for its review:

Rule 16.1(b) would be revised as follows:

> **(b)** DESIGNATION OF COORDINATING COUNSEL FOR INITIAL MDL MANAGEMENT CONFERENCE. The transferee court may designate coordinating counsel to assist the court with the initial MDL management ~~MDL~~ conference under Rule 16.1(a) and to work with plaintiffs or defendants to prepare for any conference and to prepare any report ordered pursuant to Rule 16.1(c).

Rule 16.1(c) would be revised as follows:

> **(c)** PREPARATION OF REPORT FOR INITIAL MDL MANAGEMENT CONFERENCE. The transferee court should order the parties to meet and confer to prepare and submit a report to the court prior to the initial MDL management conference. The report must address any matter designated by the court, which may include any matter listed below ~~addressed in Rule 16.1(c)(1)-(12)~~ or in Rule 16. The report may also address any other matter the parties desire to bring to the court's attention.

The Committee Note at lines 362-65 would be revised as follows:

> **Rule 16.1(b).** Rule 16.1(b) recognizes the court may designate coordinating counsel -- perhaps more often on the plaintiff than the defendant side -- to ensure effective and coordinated discussion during the Rule 16.1(c) meet and confer ~~conference~~ and to provide an informative report for the court to use during the initial MDL management conference under Rule 16.1(a).

The Committee Note at lines 418-26 would be revised as follows:

> Subparagraph (C) recognizes that, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible settlement. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that -- a decision to be made by those particular parties. Nevertheless,

leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions about resolution. It is often important that the court be regularly apprised of developments regarding potential settlement of some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate ~~fair~~.

The Committee Note at lines 458-62 would be revised as follows:

Rule 16.1(c)(4). Experience has shown that in ~~certain~~ MDL proceedings early exchange of information about the factual bases for claims and defenses can facilitate ~~the~~ efficient management ~~of the MDL proceedings~~. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings.

The Committee Note at lines 482-84 would be revised as follows:

Rule 16.1(c)(6). A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication~~, addressed in Rule 16.1(c)(11)~~.

The Committee Note at lines 494-505 would be revised as follows:

Rule 16.1(c)(9). Even if the court has not appointed leadership counsel, it may be that judicial assistance could facilitate the settlement of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that -- a decision to be made by the parties. But as recognized in Rule 16(a)(5) and 16(c)(2)(I), the court may assist the parties in settlement efforts. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate settlement. ~~Should the court be called upon to approve a settlement, as in any class actions filed within the MDL, or when the court is asked to appoint a settlement administrator, the court should ensure that all parties have reasonable notice of the process that will be used to determine the division of the proceeds, that the process of allocation has integrity, and that monies be held safely and distributed appropriately.~~

After these changes were presented and explained to the Advisory Committee, it voted without dissent to recommend publication of the revised Rule 16.1 proposal for public comment.

Rule 41 Subcommittee

Judge Bissoon introduced the report of the Rule 41 Subcommittee. It had held three online meetings, but had not reached consensus or closure. Accordingly, one could say that it is still at a preliminary point. To take Judge Dow's approach to rule-change ideas, the first question -- whether there is a problem -- may depend on where you are or what kind of case you are talking about. On the "where you are" consideration, the divergence of the circuits on the rule means that judges in some circuits have less latitude than judges in other circuits. On the "kind of cases" consideration, one might focus on civil rights and pro se cases and conclude that there is indeed a problem.

Professor Bradt continued the introduction, noting that the core question is that we have a

rule that seems straightforward and has remained essentially the same since originally adopted in 1938. One could, therefore, say that it only applies when the entire action is dismissed. But that is the minority view, suggesting the courts chafe at such a limited handling of the problem. Often the rule is found satisfied when a plaintiff dismisses as to one of two defendants. District courts may be more flexible yet. In the background lie possibly "unintended consequences," particularly relating to possible preclusion effects -- dismissal without prejudice may not affect preclusion if the remainder of the case is fully adjudicated on the merits.

A comment observed that the cases are presently inconsistent, but also that it is not clear what the result of a rule change would be. Instead, the outcome is not simple. To some extent, that is illustrated by a recent 11th Circuit case in which all the parties and the district court thought that when the plaintiff used Rue 41(a) to dismiss the remainder of its claims after the district court had dismissed some but not all of the claims, that would produce a final judgment subject to immediate review on appeal. But the court of appeals concluded that some claims in the very long complaint had not been effectively dismissed, with the result that it could not address the appeal on the merits.

Another comment noted that there might be said to be a slippery slope problem to begin sorting out all the inter-related rule provisions that could be affected. It might be likened to pulling one loose thread on a sweater, only to find that the unraveling goes much further than initially appreciated. And it is worth noting that it always seems open to the plaintiff to seek dismissal via court order under Rule 41(a)(2), which has a default setting of without prejudice. So the Rule 41(a)(1) problem only exists when the defendant (or a defendant) will not stipulate to dismissal without prejudice. That resistance to stipulating might result from uneasiness that the dismissed claim will come back in another forum, but it may well be that such a "boomerang" claim is quite rare. Nonetheless, a party unwilling to stipulate -- even before an answer is filed -- could make 41(a)(1) dismissal of less than the entire action unavailable.

A Committee member pointed out the preclusion complications that could result if the court dismissed without prejudice but the remaining claims reached judgment on the merits. Assuming the dismissed claim would be viewed as arising from the same transaction, that might well preclude the assertion of the dismissed claim in another action.

Another Committee member noted that this can be a pretty important set of issues, particularly for some unsophisticated litigants. "This is something that affects some people in important ways."

A Subcommittee member reiterated the view that Rule 41(a) is not designed to "shape and prune" multi-party or multi-claim actions. Other rules, most notably Rule 15 on amendments without leave of court, address these issues. At the same time, the 11th Circuit decision was wrong.

Another comment noted that there may be considerable reason for caution due to the Supreme Court's view in the Semtek case that preclusion is not within the Enabling Act authority. In addition, with regard to self-represented litigants, it might be useful to canvas pro se law clerks to see what their experience has been. A further suggestion was that the Administrative Office has a pro se working group that could be a resource.

Against that background, the Subcommittee's work will continue.

Discovery Subcommittee

In addition to its action item on privilege log issues, the Discovery Subcommittee reported on three other items on which it is currently focusing. Chief Judge David Godbey, Chair of the

Subcommittee, made the report.

"Delivery" of a subpoena; Rule 45(b)(1) says a subpoena should be served by "delivering a copy to the named person." There are divergent judicial decisions, even in the same district, on whether that requires delivery by hand or can be accomplished by other means. More than a decade ago, a Rule 45 Subcommittee comprehensively surveyed issues involving the rule and made fairly comprehensive changes to many features of the rule. One of the issues raised then was the question of clarifying what "delivering" means in the rule. But that was put aside, in part because it seemed important -- at least for some nonparty witnesses called upon to respond on short notice -- that in hand service occur.

A Committee member expressed concern about the possibility that some substituted method of service might be sanctioned under the rule, particularly when the subpoena called for very prompt action by the witness, often a nonparty. In hand service can be important in such situations.

A liaison member of the Committee suggested that overnight courier or email should suffice in most instances.

One suggestion going forward would be for research to be done, perhaps by the Rules Law Clerk, on whether state court systems have more flexible provisions for serving subpoenas. A first look at the California provisions suggested that they are nearly the same as in Rule 45.

Filing under seal: Several years ago, Prof. Volokh and the Reporters' Committee for Freedom of the Press urged a fairly elaborate new Rule 5.3. One feature of this proposal was that it recognize what the submission said was already recognized in the case law -- that the showing needed to support filing under seal is much more exacting than the standard to support a protective order under Rule 26(c). The Subcommittee developed a sketch of changes to Rule 26(c) and existing Rule 5 to make that clear in the rules.

But the submission went well beyond the standard to be used for filing under seal and proposed a variety of special procedures to attend motions to seal, seemingly including posting outside the case file for the given case and forbidding any decision sooner than seven days after such posting. Meanwhile, an inquiry to the Federal Magistrate Judges Association gave an indication the magistrate judges (who often handle such motions) did not think there was a problem with the standard for filing under seal, but did think that the diversity of procedures used for deciding motions to seal might be regularized.

Around this time, however, the Subcommittee also learned that the Administrative Office had formed a working group to study problems of filing under seal more generally, and the advice to the Subcommittee was to defer acting on the pending proposal until that A.O. project produced results. So, as reported to the full Committee, the Subcommittee put the project on the back burner.

Early this year, however, the Subcommittee was informed that it seemed unlikely the A.O. project would address standards for filing under seal. But the A.O. group seems focused on what might be called "inside the clerk's office" features of handling materials filed under seal, and it remains uncertain how that work will bear on the multiple other proposals made in the original submission or the FMJA idea that regularizing procedures would be desirable. So work will continue on these topics.

Rule 28 proposal: In March, Judge Baylson (E.D. Pa.), a former member of the Advisory Committee, proposed an amendment to Rule 28 to address discovery activity in relation to U.S. litigation occurring outside this country. Because this submission was received so recently, the

Subcommittee has not had time to examine it in any detail. It may be that Professor Gensler (another former member of the Advisory Committee mentioned in Judge Baylson's submission) can offer the Subcommittee background on the issues. Work will begin on this proposal in the future.

Rule 7.1

Professor Bradt introduced the issues presented. Two submissions have addressed conflict disclosure. Judge Erickson called attention to what might be called the "grandparent" problem, with the illustration being Berkshire Hathaway, which owns 100% of the stock of a number of corporations that in turn own 100% of the stock of other corporations. So if a judge owns Berkshire Hathaway stock and one of those "grandchild" corporations is a party to a case pending before the judge, the judge may not know of the problem even though under 28 U.S.C. § 455(b)(4) the judge should recuse. And Berkshire Hathaway is not the only corporation that might have such holdings; another example identified by Judge Erickson is CitiGroup.

Possibly pertinent to this kind of situation going forward might be the Anti-Corruption and Public Integrity Act of 2022 (S. 5315), introduced by Senator Warren. That bill would require judges to "maintain and submit to the Judicial Conference a list of each association or interest that would require the justice, judge, or magistrate to recuse under subsection (b)(4)." How exactly judges would identify all such interests in the case of very large conglomerates like Berkshire Hathaway is uncertain.

Meanwhile, the Courthouse Ethics and Transparency Act (Pub. L. 117-125, May 13, 2022), now requires the creation of a searchable internet database to enable public access to any report required to be filed with regard to securities or similar holdings. That database came online on Nov. 9, 2022.

Judge Erickson submits that an amendment to Rule 7.1 could facilitate determinations whether a judge has to recuse. Presently, Rule 7.1(a)(1) directs that a nongovernmental corporate party must disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock."

Magistrate Judge Barksdale proposes that Rule 7.1 be amended to require every party to certify that they have checked the assigned judge's database disclosures. Then, if there is a possible conflict, the party must file a motion to recuse or a notice of possible conflict within 14 days.

It seems clear that this is a difficult and delicate situation for judges. Congress may take further action that is pertinent, as mentioned above, but it is not presently possible to determine whether that will happen. Expanding the disclosure requirement beyond "parent corporations" could make definition of what additional corporations must be disclosed quite difficult. And it may be that other entities present similar difficulties. Recently, for example, Rule 7.1 was amended to call for disclosure of information about all members of LLCs, including all members of any LLC that is a member of an LLC that is a party before the court. That change was designed to reveal whether compete diversity exists, not to address recusal problems. But the stimulus was the proliferation of LLCs, and the intricacy of their organization. It seems that there is a very wide range of entities that engage in business nowadays.

Other rules committees have similar issues before them. But for the present it seems sensible that the Civil Rules Advisory Committee take the lead in addressing these challenges.

A judge mentioned getting a disclosure statement raising such a difficulty. Without that disclosure, the judge could not have found out about the problem.

One suggestion was to look at local rules to see if they add such disclosure requirements. The D.C. Circuit, for example, has its local rule 26.1, which could be a model. Another possibility might be to investigate how the states approach these issues with regard to judges on their state courts. It seems reasonable to suppose that somewhat similar issues bear on recusal of state court judges, even though they obviously are not bound by the federal statute.

A Wall Street Journal article identified a significant number of instances in which federal judges decided cases involving parties in which they held interests. It seems that all, or almost all, of these examples were cases in which the judge did not know of the disqualification problem. A Committee member noted that these are important issues, and that passing them by is not the best way to go.

But another Committee member noted the thorny problem of identifying such conflicts. Ownership of business entities is changing "by the minute." The range of forms used to do business seems to grow by leaps and bounds. Finding a solution will be a major challenge.

Another point was brought up: There is a bill in Congress seeking to require the Federal Judicial Center to use its research capacity to unearth this sort of information. This sort of research effort might absorb a very large portion of the FJC's capacity, and could also create tensions between the Center and the judiciary. That would be very unfortunate.

Returning to the local rules possibility, it was noted that all or almost all of the clerks in district courts require some disclosures. There are local rules that have forms for disclosure; those could be investigated.

But a serious problem was noted: What are the updating requirements? Judges' holdings may change over time. And it seems clear that corporate and other business arrangements change over time. Not only do companies "go public," some that were public "go private."

A judge emphasized that it's essential that we operate within the bounds of what can be done. Could one have a rule that required disclosure of "all affiliated entities"? That would seem to raise questions about what "entity" is and what "affiliated" means.

Returning to local rules, it was noted that it is likely some go well beyond the corporate form -- LLCs, partnerships, limited partnerships, joint ventures, etc. And getting into the amount of stockholding could be complicated. Suppose a corporation that owns 50% of the stock of a corporation that owns 10% of a publicly held entity. Is that counted as a 5% holding for these purposes?

Another Committee member cautioned that it may not be so difficult. It is likely unwise to try to include "affiliates" in this effort. And moving beyond "parents" -- perhaps to "siblings" and "cousins," etc. -- would likely cause unnecessary problems.

A judge questioned whether the problem is really so great. At some point, it may seem that the rules cannot be a cure-all. One might say the central issue is the application of the recusal statute, which itself may be the subject of further change. Given the possibly exceptional difficulty of the task, one might conclude that at some point such directives must be honored but in the breach.

Another judge reacted that if the Berkshire Hathaway example is the correct guideline, judges need to know. This judge also mentioned the recurrent issue raised with third party litigation funding that judges might unknowingly hold interests in funders supporting one of the parties in a case before the judge. In the past, it has seemed unlikely that judges would be holding interests in hedge funds

allegedly involved in litigation funding, but some reports indicate that funding is going mainstream.

A more specific reaction was offered: The proposal that the rule require certification by parties that they checked the judge's holdings on the new database does not look promising. For one thing, it is not clear that the database is designed for that purpose. More significantly, it seems unreasonable to expect pro se litigants (the subject of another agenda item) to be able to make a reliable check. And if the proposed requirement that parties file a motion to recuse or a notice of potential conflict within a specified time is meant to foreclose later recusal, that seems to go against the statute, which simply requires recusal.

In conclusion, the Committee would continue to gather information and study this set of issues. It is likely that a subcommittee would be formed to develop information and consider solutions. It is not clear whether such a subcommittee should include members of other advisory committees. The work will continue.

Rule 38

In 2016, a question was raised before the Standing Committee about whether to consider an amendment to Rule 81(c)(3) to protect against waiver of jury trial in removed cases. [That submission -- 15-CV-A -- remains on the Advisory Committee's agenda.]

After that Standing Committee discussion of that question, two members of the Standing Committee -- then-Judge Gorsuch and Judge Graber -- proposed that Rule 38 be amended to "flip the default," as is true of the Criminal Rules, which direct that trial will be to a jury unless the government, the defendant and the judge all agree that it will be to the court.

Interestingly, it seems that the Criminal Rules Committee is considering whether to change the Criminal Rule on jury trial to provide that if the defendant requests a court trial and the judge thinks the request is meritorious the government not be permitted to veto that election. Whether that Criminal Rules amendment idea is pursued remains uncertain. In a sense, however, such a change would make jury less protected (with the judge's oversight) than under current Rule 38, which permits either party to make a binding request for a jury trial. In addition, under Rule 39(b), the court may order a jury trial even though a Rule 38 jury demand was not made.

During the Committee's October 2022 meeting the agenda book included an FJC study of jury demands that found little indication that failure to adhere to Rule 38's requirements had prevented parties who wanted jury trials from getting jury trials. So one possibility at that time would be to remove this matter from the agenda on the ground that it did not satisfy Judge Dow's first inquiry -- there seems not to be a problem. That decision was deferred, however, because the FJC was working on a massive project ordered by Congress about differences among districts in the frequency or number of jury trials. That project was not yet finished, and might shed light on the Rule 38 proposal.

The report to Congress has been completed and was included in the agenda book. It does not focus on jury demands in particular, but rather was addressed to the declining frequency of civil jury trials. Discussion as the work was being done frequently prompted judges to say that if a party failed to satisfy Rule 38 "we forgive." But some judges said the rule requires a waiver and we follow the rule.

In terms of what seems to have been the reason why Congress directed that the study be prepared, it does not shed much light on why different districts have different numbers of jury trials. From one perspective it does -- the largest district (C.D.Cal.) has the largest number of jury trials.

But if one focuses on frequency of jury trials as a percentage of civil cases, the smallest district -- Wyoming -- has the highest percentage. That percentage is only 2.7%, however, so inter-district comparisons don't tell us much because the figure is very low all around. Sixty years ago, nationwide, it was about ten times as high.

It was suggested, however, that the Gorsuch/Graber proposal might be taken to raise a normative issue more than a question to be answered by empirical work. If the right to jury trial is important, it should not be difficult to enforce. How one assesses Judge Dow's first question -- is there a need -- in normative terms is not entirely certain.

In conclusion, it was decided that this proposal could be removed from the Committee's agenda. The pending Rule 81(c) issue will remain, however.

Pro se E-Filing

Professor Struve (Reporter of the Standing Committee) gave an update on the work of the inter-committee working group on whether to facilitate electronic filing by pro se litigants. The Committee has received several submissions urging the easing of the current rules, which leave the choice whether to permit pro se E-Filing largely up to individual district courts. The pandemic fortified momentum behind this initiative.

With great help from the Federal Judicial Center (particularly Tim Reagan), interviews have been done with 15 court personnel from 8 districts. A particular focus has been on the districts that exempt non-electronic filers from having also to mail hard copies of each filing to each other party even though the clerk's office will upload the documents and the parties will then get the document via CM/ECF. In all the districts that have made such accommodations, the report is that it works fine.

Special issues arise when a document is filed under seal. One solution then is to restrict online access to parties. But that is not an issue at the core of the basic concern.

The biggest pending question is to figure out how pro se litigants know which parties will receive service via CM/ECF and that paper service by mail is therefore not necessary.

Special problems can exist if pro se litigants are in prison.

A sketch of a possible amendment to Rule 5 appears on pp. 256-57 of the agenda book.

One concern that was raised seems not problematical -- the risk that pro se litigants who got credentials to use CM/ECF would then share those credentials with others. There is one instance in which a son used his mother's credentials to make filings on her behalf in a case to which she was a party, but this does not seem like a serious problem.

Another possibility is an alternative to CM/ECF -- some districts allow electronic noticing without formal credentials.

The conclusion was that the work will continue, and that more information is needed.

Rule 23

Purely as information items, this topic is on the agenda to alert Committee members to ongoing matters. No current action is before the Committee.

First, during the October 2022 meeting the 11th Circuit decision by a divided panel that two 19th century Supreme Court decisions preclude "incentive awards" to class representatives in class actions was raised as a concern. The 11th Circuit declined to grant a rehearing en banc, and a cert. petition is now pending before the Supreme Court. Meanwhile, at least some courts are explicitly not following the 11th Circuit's ruling; the agenda book contained a reference to a recent 1st Circuit case declining to follow that view. But it appears that a panel of the Second Circuit has taken a different view; this ruling may be the subject of a petition for rehearing en banc.

A Committee member observed that it is unrealistic to expect class representatives to invest substantial time and energy (and perhaps even money) into doing a good job in that role but deny them any compensation for that effort. Even class member objectors can receive awards if their objections result in improvements to the deal. In class action settlement situations, we want the class reps to take an active interest; why shouldn't they get equal treatment? As for the Second Circuit case, that may be an example of over-compensation; the class reps were awarded something like $900,000. Perhaps a rule could be devised to guide district courts in making such awards, but a total ban based on a 19th century precedent does not make sense.

Another member agreed. The 9th Circuit has articulated some factors for determining what amount to award, and there is guidance of that sort in other circuits though not all of them. If this issue goes forward, that would be a place to look; it is possible that case law suffices on this point. The first question, however, is whether the Supreme Court addresses the question on the merits; on that, it is necessary to watch and wait.

The other issue is a proposal by Lawyers for Civil Justice to amend Rule 23(b)(3) so that it does not limit the superiority prong to adjudicative alternatives. An example is a 7th Circuit case in which a product recall prompted more than 50% of purchasers of the product in question to obtain the refund offered but a lawyer nevertheless filed a class action seeking more on behalf of the other purchasers. The district court denied certification on the ground the recall program gave the class adequate relief, but the 7th Circuit held that this was not a consideration permitted under the current rule.

The agenda book report raises some concerns that might arise if this proposal moves forward -- whether companies would be less likely to make such recall offers if class actions could be defeated by after-the-fact offers, whether courts could, early in the litigation, make the sort of comparison that would need to be made if presented with a settlement embodying similar measures for the non-participating customers. LCJ recently submitted a further paper on the topic of this proposal (23-CV-J), which came in too late to be included in the agenda book.

A judge noted that Rule 23 is a perennial. For example, the question of ascertainability has remained uncertain for many years. For the present, on both these issues, it is better to let things percolate.

The matters will be carried on the Committee's agenda.

In forma pauperis applications

Professors Hammond and Clopton submitted a proposal that the Committee consider rulemaking regarding the handling of ifp status under 28 U.S.C. § 1915. Professor Hammond's Yale Law Journal article in 2019 showed that there were significant differences in the way such applications were handled -- both in terms of the criteria for receiving a fee waiver and the procedures for requesting a fee waiver -- in districts across the country. Indeed, it seems there are difference between judges in a given court. One concern is reported inconsistency in selecting the

A.O. form that should be used.

The topic was introduced as principally involving a statute. The Civil Rules do not include specific provisions about ifp applications, and -- at least as to the standards that should be used to decide such applications -- a national rule seems a dubious instrument. For example, it is likely that one could conclude that somebody in San Francisco (where the cost of living is very high) would be a pauper with income or assets that would be more than sufficient in some other parts of the country. And such things change much more rapidly than the Enabling Act process would permit changes to be made.

In addition, it may be that various districts diverge considerably in their personnel for making such determinations. Large metropolitan districts may have a considerable platoon of pro se law clerks who can do an initial review, while other districts may not have a similar setup.

But this is an important issue, and the A.O. has a pro se working group. It seems that an effort to make contact with that group should be made. It may well be that this topic is not suited to rulemaking, but the topic should remain on the agenda. For the present, the topic will be retained on the agenda pending Judge Rosenberg's discussion with the A.O. Pro Se Working Group.

Rule 53

In July 2022 Senators Tillis and Leahy wrote the Chief Justice relaying press reports that a single federal judge was overusing "technical advisors" to assist in addressing patent infringement cases. According to the article cited by the senators, using that assistance the judge is able to preside over as many as six or seven *Markman* hearings in a week. According to the story, at the time the story was written this judge had "about 25% of the nation's patent cases."

The senators observe that this judge's practices "appear to clearly exceed the boundaries of Rule 53," and that "[t]he rules governing the use of special masters seem clear to us." They asked for an investigation into whether the practices described in this article are authorized under Rule 53, and if so whether the rule should be amended.

The senators sent a copy of their letter to the Chief Judge of this district court, who may have taken action to change circumstances there by introducing district-wide assignment of patent cases on a random basis.

On the rulemaking front, as the senators note, the Rule seems appropriately designed and focused. It was comprehensively rewritten about 15 years ago to take account of recent developments. Further change to rule seems unnecessary. In terms of rule amendment, then, the appropriate measure seems to be to remove the topic from the Committee's agenda.

But it is also important to make certain the senators know of the response their inquiry produced -- that the rule seems correct, as they note, and therefore that this situation does not call for a rule amendment. The Rules Committee Staff will ensure that the Administrative Office has responded to the senators' letter.

Rule 11

Andrew Straw urges that Rule 11 be amended. The stimulus seems to be a longstanding conflict between him and his former employer -- the Indiana Supreme Court. This conflict has included suits he filed in federal court against various entities. In some of those suits, Rule 11 sanctions were not imposed, but state bar authorities suspended him from practice partly as a result.

Mr. Straw proposes that the rule be amended to forbid state bar authorities from taking such action unless a federal court has first imposed formal Rule 11 sanctions.

The interaction of Rule 11 sanctions and state bar discipline is occasionally an important matter. A number of state bars direct attorneys to notify the bar if they are subjected to sanctions by a court, including a federal court acting under Rule 11. The state bars may treat that circumstance as a basis for imposing bar discipline on the attorney. It seems this is what happened to Mr. Straw. (He also submitted a comment regarding the amendment to Rule 12(a) that the Committee approved for formal adoption, raising objections to the handling of some of his litigation with the Supreme Court of Indiana.)

The federal courts do not control state bar discipline. Yet Mr. Straw proposes adding a new Rule 11(e) entitled "Containment of Discipline and Prevention of State Court Abuse." Although the district courts can, and sometimes do, impose discipline including something akin to disbarment for conduct in federal court, they do not have authority under that rule to constrain state bar authorities. Attempting by rule to prevent state bar authorities from acting pursuant to their governing statutes would likely raise serious questions about rulemaking power.

The matter will be dropped from the agenda.

Mandatory Initial Discovery Project

Initial disclosure was a highly controversial addition to Rule 26 in 1993. Owing the controversy surrounding this addition to Rule 26, it was initially made optional; districts could opt out. There ensued a patchwork of regimes in different districts. The initial disclosure was extended nationwide in 2000, again prompting considerable controversy even though it removed the "heartburn" of having to disclose harmful evidence.

Nonetheless, stronger disclosure rules might make litigation less costly and produce faster resolutions. To evaluate such a possibility, a pilot project was approved by the Standing Committee and many judges in the District of Arizona and the Northern District of Illinois agreed to implement the pilot project. In brief, it restored the "heartburn" requirement.

A very intensive study of the results of this pilot in approximately 5,000 cases in Arizona (where the state courts have long had a similar disclosure requirement) and 12,000 cases in the N.D. Ill. revealed that cases handled were resolved more rapidly. That difference between these cases and cases not handled under the pilot was statistically significant. This was not a huge difference, but it was good news. In Dr. Lee's words, this was a "modest but real effect on duration." But it may be that some resolved quickly because otherwise the parties would have had to comply with the pilot's requirements.

The study also involved attorney surveys on closed cases, and the report (100 pages long) provides much detail about attorney responses. The responses did not show great enthusiasm among attorneys for the pilot. Interestingly, though the expectation was that younger attorneys would be more receptive, in actuality more experienced attorneys were satisfied more often.

One way of looking at the study's results is whether they support a "clarion call" for amending Rule 26(a) along these lines. It is difficult to find such a call in the data, despite the heartening finding about duration. It may be that the attitudes that contributed to the controversy in 1991-93 about adding initial disclosure to the rules, and again in 1998-2000 about removing the "opt out" for districts and imposing it nationwide persist today.

The Committee discussed the ways in which the study could nevertheless be employed to identify promising solutions to existing problems. It was agreed that the Discovery Subcommittee should carefully review the study and see whether it identified specific techniques that could be added to the rules even without the mandatory arrangement employed in the pilot.

Several points were made during the discussion of this study. One was that the project was initiated by the past and present chairs of the Standing Committee, rather than by the Advisory Committee. It was also noted that the E.D. Va. has a local process known as the "rocket docket," adopted by local rule, so that perhaps local rules might be a method of introducing practices found successful in the project. In addition, since courts are always looking for techniques to increase efficiency, it is worth considering whether there are lessons to be drawn from this study.

The Discovery Subcommittee will review the study with care and consider whether it shows that specific changes should be pursued.

Respectfully submitted,

Richard Marcus
Reporter

TAB 6

6. Discovery Subcommittee

Discovery Subcommittee Report

On Aug. 29, 2023, the Discovery Subcommittee held a meeting via Teams. Notes of this meeting are in this agenda book. The Subcommittee discussed four topics, presented below. On two of them, it concluded that work should proceed. On the third, it concluded that no suitable amendment project presently appears warranted in light of the FJC report on the Mandatory Initial Discovery Project. On the fourth topic – rules to deal with discovery outside the U.S. – it concluded that the topic is important but also that the Advisory Committee (and the Subcommittee) would need to do substantial work to achieve needed familiarity with the issues involved, and that presently there does not appear it has the capacity to commence this work in light of other ongoing obligations. So the topic should remain on the agenda, and members of the full Committee are invited to express views on the issues presented.

(1) Rule 45(b)(1) – Manner of Service of Subpoena

This topic was brought to the Advisory Committee's attention by Judge Catherine McEwen, liaison to the Bankruptcy Rules Advisory Committee. Similar concerns have been presented several times over the last 20 years, but the issue was not taken up in the Rule 45 project about a decade ago.

Rule 45(b)(1) now specifies that "[s]erving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law." As the submissions we have received on this topic illustrate, there seem to be notable differences in whether this direction is satisfied even though in-hand service is not accomplished. Background issues include whether service requirements might be different for nonparty witnesses than for party witnesses, and whether subpoenas to appear and testify in court should be treated as different from subpoenas to produce documents or to appear and testify at a deposition. Trying to break up Rule 45 to provide separately for these somewhat different situations could produce considerable complications, however.

At the Subcommittee's request, Rules Law Clerk Chris Pryby prepared a comprehensive memo dated June 1, 2023, on the requirements of the state courts, which might provide insights. That memo is in this agenda book. It is very thorough. But it does not show that there is any consistent thread of service requirements in state courts that could provide useful guidance for Rule 45. Indeed, quite a few of these state courts have subpoena rules modeled on our rule, but it seems that there is nevertheless some divergence in practice among those state courts.

The Subcommittee's Aug. 29 discussion led to the conclusion that the rule's ambiguity about service of subpoenas has produced sufficient wasteful litigation activity to warrant an effort to clarify the rule. At the same time, the consensus was also that requiring in-hand service in every instance (as some courts have concluded is required under the current rule) would not be a good idea.

Instead, after discussion the Subcommittee gravitated toward recognizing several means of service of initial process authorized under Rule 4 and also recognizing that the court (or perhaps,

a local rule) could authorize additional means of service. For purposes of discussion with the full Committee, it therefore offers the following sketch of a possible amendment to Rule 45(b)(1):

> **(1)** ***By Whom and How; Tendering Fees.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person, including using any means of service authorized under Rule 4(d), 4(e), 4(f), 4(h), or 4(i), or authorized by court order [in the action] [or by local rule] {if reasonably calculated to give notice} and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.

This sketch includes choices among means authorized under Rule 4. Some of those selected might be dropped, or others might be added. At least one – waiver of service under Rule 4(d) – likely has timing aspects that would make it inappropriate for service of some subpoenas. It is worth noting, however, that the Committee has received a submission urging that the waiver of service provision in Rule 4(d)(1)(G) be amended explicitly to authorize service of the waiver request by email. See 21-CV-Y, from Joshua Goldblum. (Presently the rule requires service "by first-class mail or other reliable means.")

Another point worth noting is that Rule 4(e)(1) permits reliance on state law provisions for service of summons, which might begin to incorporate the various state-law provisions presented in the Rules Law Clerk memo in this agenda book. The local rule possibility might take account of the wide variety of methods permitted under state law in various states. It could be that a district court would wish to adopt some of those local methods by local rule on the theory that they are familiar to lawyers in the state.

The court order authorization may be unnecessary. But Rule 4(f)(3) does explicitly authorize a court order for service by other means when the person is to be served in a foreign country. There is no clear parallel service provision for a court authorizing alternative means of service under Rule 4 on a person to be served in this country, so perhaps explicit authority in Rule 45 for such a court order would be desirable.

A subpoena may be directed to a nonparty and may require very immediate action. For example, it might command a nonparty to testify at a trial or hearing in court on very short notice. Certainly default is a serious consequence that can follow service of initial process if no responsive pleading is filed. But the time to respond may be considerably longer than with some subpoenas. Under Rule 55, moreover, courts are generally fairly liberal in setting aside defaults, particularly if there is some question about the effectiveness of service and the request to set aside the default is made promptly after the defendant becomes aware of the entry of default.

The invocation of the due process standard "reasonably calculated to give notice" might be unnecessary, for district courts would presumably have that in mind when asked to authorize additional means of service in a given case, and district courts adopting local rules would similarly be expected to have that in mind. If it were adopted, however, the Committee Note should specify that actual notice is not required, but only the use of substitute means reasonably calculated to give notice.

Another thing that might be considered would be building in some sort of minimum time requirement. Regarding depositions, Rule 30(b)(1) says the noticing party "must give reasonable written notice to every other party," but this does not address notice to the nonparty witness. Rule 45(a)(4), meanwhile, says that when the subpoena is a documents subpoena the serving party must give notice to the other parties before serving the subpoena. This requirement was designed in part to protect the confidentiality interests of other parties that might be compromised if the nonparty target (e.g., a hospital) produced before the party even learned about the subpoena.

If one wanted to build in a notice period, it might be that one would make an exception for testimony at a trial or hearing. Once a trial begins, for example, requiring a significant notice period could present problems, particularly if a jury trial were ongoing.

Another notice period feature is that Rule 30(b)(2) says that a subpoena duces tecum is handled under Rule 34, and Rule 45(d)(2)(A) says that if the only thing called for is production of documents or ESI, the person need not appear.

But it must be remembered that there is no time limit in Rule 45 at present so long as the subpoena does not require production of documents, making the timing requirements of Rule 45 applicable.

Another point deserves mention. From time to time, there has been discussion of whether separate rules might address subpoenas designed to achieve different objectives. A basic distinction is between a deposition subpoena and a subpoena to testify in court. Scheduling flexibility is much more likely with the deposition subpoena. And if it is only a document subpoena, Rule 45(d)(2)(A) says no appearance is required.

Trying to devise separate and special rules for the varying contexts in which subpoenas are used is probably not worth the effort and complication, however. So any transcendental notice period is likely not suitable either.

For the October 2023 meeting, the Subcommittee is inviting reactions to its current approach to the service of subpoena issues.

(2) Filing Under Seal

The Committee has received a number of submissions urging that the rules explicitly recognize that issuance of a protective order under Rule 26(c) invokes a "good cause" standard quite distinct from the more demanding standards that the common law and First Amendment require for sealing court files. There seems to be little dispute about the reality that the standards are different, though different circuits have articulated and implemented the standards for filing under seal in somewhat distinct ways. The Subcommittee's current orientation is not to try to displace any of these circuit standards.

Instead, when the issues were first raised, it focused on making explicit in the rules the differences between issuance of a protective order regarding materials exchanged through discovery and filing under seal. Two years ago, therefore, it presented the full Committee with sketches of rule provisions to accomplish this goal:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

* * * * *

(4) ***Filing Under Seal.*** Filings may be made under seal only under Rule 5(d)(5).

The Committee Note could recognize that protective orders – whether entered on stipulation or after full litigation on a motion for a protective order – ought not also authorize filing of "confidential" materials under seal. Instead, the decision whether to authorize such filing under seal should be handled by a motion under new Rule 5(d)(5).

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is directed by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified and consistent with the common law and First Amendment rights of public access to court filings.

This provision could be accompanied by a Committee Note explaining that the rule does not take a position on what exact locution must be used to justify filing under seal, or whether it applies to all pretrial motions. For example, some courts regard "non-merits" or "discovery" motions as not implicating rights of public access comparable to those involved with "merits" motions. Trying to draw such a line in a rule would likely prove difficult, and might alter the rules in some circuits.

One starting point is that since 2000, Rule 5(d)(1)(A) has directed that discovery materials not be filed until "used in the proceeding or the court orders filing." Exchanges through discovery subject to a protective order therefore do not directly implicate filing under seal.

Another starting point here is that there are federal statutes and rules that call for sealing. The False Claims Act is a prominent example of such a statute. Within the rules, there are also provisions that call for submission of materials to the court without guaranteeing public access. Rule 26(b)(5)(B) obligates a party that has received materials through discovery and then been notified that the producing party inadvertently produced privileged materials to return or sequester the materials, but also says the receiving party may "promptly present the information to court under seal for a determination of the [privilege] claim."

There is a lingering issue about what constitutes "filing." Rule 5(d)(1)(A) says that "[a]ny paper after the complaint that is required to be served must be filed no later than a reasonable time after service." One would think that an application to the court for a ruling on privilege under Rule 26(b)(5)(B) should be served on the party (or nonparty) that asserted the privilege claim. Having given the notice required by the rule, it is surely aware of the contents of the allegedly privileged materials, so service of the motion (including the sealed information) would not be inconsistent with the privilege. And it is conceivable that should the court conclude the materials are indeed privileged its decision could be reviewed on appeal, presumably meaning that the sealed materials themselves should somehow be included in the record. Perhaps they would be regarded as "lodged" rather than filed.

Rule 5.2(d) also has provisions on filing under seal to implement privacy protections. In somewhat the same vein, Rule 5.2(c) limits access to electronic files in Social Security appeals and immigration cases.

Rule 79 also may bear on these issues. Rule 79(d) directs the clerk to keep "records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference."

Finally, it is worth noting that it appears there are different degrees of sealing. Beyond ordinary sealing, there may be more aggressive sealing for information that is "highly confidential," or some similar designation. And national security concerns may in exceptional circumstances call for even stricter confidentiality protections. It is not clear that a Civil Rule adopting these distinctions is necessary or appropriate.

Uniform Procedures for Filing Under Seal and Unsealing

Many of the submissions to the Committee have gone well beyond urging that the rules recognize the diverging standards for protective orders and filing under seal. Indeed, since most recognize that the courts are already aware of this difference in standards, one might say that the main objective of the current proposals is to promote nationally uniform procedures for deciding whether to authorize filing under seal. At least some judges seem receptive to efforts to standardize the handling of decisions whether to permit filing under seal.

These proposals contain a variety of procedures for handling sealed filings. One submission (22-CV-A, from the Sedona Conference) contains a model rule that is about seven pages long. Another (21-CV-T, from the Knight First Amendment Institute at Columbia University) attaches a compilation of local rules regarding sealing from all or almost all district courts that is about 100 pages long. Some of the local rules are quite elaborate, and other districts give little or no attention to sealed court filings in their local rules.

There does presently seem to be considerable variety in local rules on filing under seal. Adopting a set of nationally uniform procedures could introduce more consistency in the treatment of such issues, but also would likely conflict with the local rules of at least some courts.

One more moving part should be noted. Two years ago, the Subcommittee paused its work on the sealing issues because the Administrative Office had inaugurated a project on sealing of court records. The pause was to avoid possibly conflicting with or complicating this project's

efforts. Early this year, we were advised that this ongoing project should not cause us to stay our hands. Though the precise contours of the project are not entirely clear, it seems now to be addressing only the manner in which the clerk's office manages materials filed under seal, not the decision whether or not to authorize filing under seal. Whether the dividing line between the decision to seal in the first place and later unsealing is crystal clear might be debated.

The Subcommittee is uncertain how far to venture into prescribing uniform procedures. Although the various proposals received so far have urged the adoption of a new Rule 5.3 on filing under seal, the Subcommittee's inclination is instead to treat these procedural issues within the framework of existing Rule 5(d). Though there are rules addressed to only one kind of motion (e.g., Rule 37 on motions to compel; Rule 50 on motions for judgment as a matter of law; Rule 56 on motions for summary judgment; and Rule 59 on motions for a new trial), motions to seal do not seem of similar moment, so that a whole rule devoted to them does not seem warranted.

At the same time, the Rule 5(d) approach sketched above could be adapted to include various features suggested by submissions received by the Committee. The following offers a variety of alternative provisions on which the Subcommittee hopes to receive reactions from the full Committee, building on the sketch presented above.

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is directed by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified and consistent with the common law and First Amendment rights of public access to court filings. The following procedures apply to a motion to seal:

(**i**) [Unless the court orders otherwise,] The motion must not be filed under seal;

Many urge that motions to seal themselves be included in the public docket and open to public inspection. But there may be circumstances in which even that openness could produce unfortunate results. The bracketed phrase would take account of those situations. The rule could specify something more about what the motion should include, but that seems unnecessary given the rule's invocation of common law and First Amendment limitations in filing in court under seal. A number of submissions provide that sealing orders be "narrowly tailored." But that seems implicit in the invocation of the existing limitations on filing under seal.

In the same vein, the proposal by some that there be "findings" to support an order to seal seems an unnecessary addition. Except for court trials governed by Rule 52, there are few findings requirements in the rules. (Rule 23(b)(3) does seem to have such a requirement because the court may certify a class only if it finds that the predominance and superiority prongs of the rule are satisfied.) Again, once the common law and First Amendment standards are specified as criteria

for deciding a motion to seal, adding a findings requirement seems unnecessary. Perhaps it would be useful were frequent appellate review anticipated, but appellate review of discovery-related rulings is rare, and there are no similar findings requirements for such rulings.

A potential problem here is that the party that wants to file the materials may not itself be in a position to make the showing required to justify sealing. For example, if the party that wants to file the materials obtained them through discovery from somebody else, the entity capable of making the required showing is not the one that wants to file these items. (This may often be true.)

One possibility might be to direct that the parties confer about the motion to seal before presenting it to the court, as is presently required for a motion to compel under Rule 37(a)(1). But the motion to seal situation may be quite different from the motion to compel situation. Party agreement is not sufficient to support sealing if the common law or First Amendment requirements are not met, while party agreement is almost always sufficient to resolve discovery disputes. Indeed, party agreement was a motivating factor behind the certification requirements of Rule 37(a)(1).

In a sense, there may often be two antagonistic parties wanting different things. Often the party that wants to make the filing is indifferent to whether it is under seal, perhaps even favoring public filing. It's another party (or perhaps a nonparty that responded to a subpoena) that wants the court to seal the confidential materials. Conferring might simplify the court's task in such circumstances, but it does not promise to relieve the court of the ultimate duty to make a decision on the motion to seal.

(ii) Upon filing a motion to seal, the moving party may file the materials under [temporary] {provisional} seal[, providing that it also files a redacted version of the materials];

Some of the proposals forbid a court ruling on a motion to seal for a set period (say 7 days) after the motion is filed and docketed. But it appears that the reality is that many such filings are in relation to motions or other proceedings that make such a "waiting period" impractical. The filing of a redacted version of the materials sought to be sealed seems to provide some measure of public access.

(iii) The moving party must give notice to any person who may claim a confidentiality interest in the materials to be filed;

This provision is designed to permit nonparties to be heard on whether the confidential materials should be sealed. Perhaps it should be a requirement of (i) above, and it might also include some sort of meet-and-confer requirement.

Alternative 1

(iv) If the motion to seal is not granted, the moving party may withdraw the materials, but may rely on only the redacted version of the materials;

Alternative 2

(**iv**) If the motion to seal is not granted, the [temporarily] {provisionally} sealed materials must be unsealed;

The question what should be done if the motion to seal is denied is tricky. One answer (Alternative 2) is that the temporary seal comes off and the materials are opened to the public. Unless that happens, it would seem that the court could not rely on the sealed portions in deciding the motion or other matter before the court. On the other hand, it seems implicit that if the motion is granted the court can consider the sealed portions in making its rulings. Whether that might somehow change the public access calculus might be debated.

Things get trickier if the motion is denied and the party claiming confidentiality is not the one that wanted to file the materials. To permit that party (or nonparty) claiming confidentiality to snatch back the materials would deprive the party that filed them of the opportunity to pursue the result it sought in filing the materials in the first place.

(**v**) The motion to seal must indicate a date when the sealed material may be unsealed. Unless the court orders otherwise, the materials must be unsealed on that date.

This is a recurrent proposal. It cannot reasonably be adopted along with the alternative (below) that the materials must be returned to party that filed them, or to the one claiming confidentiality, at the termination of the litigation.

(**vi**) Any [party] {interested person} [member of the public] may move to unseal materials filed under seal.

Various proposals have been submitted along these lines. One caution at the outset is that such a provision seems to overlap with Rule 24's intervention criteria. Rule 24 has been employed to permit intervention by nonparties to seek to unseal sealed materials in the court's files. See 8A Fed. Prac. & Pro. § 2044.1.

Such intervention attempts may sometimes raise standing issues. A recent example is *U.S. ex rel. Hernandez v. Team Finance, L.L.C.*, ___ F.4th ___, 2023 WL 5618996 (5th Cir., Aug. 31, 2023), a False Claims Act case in which the district court denied a motion to intervene by a "health care economist." The intervenor sought to unseal information about health care pricing in an action alleging that defendant routinely billed governments for doctor examinations and care services that did not actually occur. The court of appeals concluded that "violations of the public right to access judicial records and proceedings and to gather news are cognizable injuries-in-fact sufficient to establish standing." But the court also remanded for a determination whether the application to intervene was untimely under Rule 24(b).

Because there is an existing body of precedent on intervention for these purposes, providing some parallel right by rule looks dubious. On the one hand, the notion that every "member of the public" can intervene may be too broad. Rule 24(b)(1), which is ordinarily relied upon for such intervention to unseal, also has other requirements that might not be included in a new rule.

The role of nonparty confidentiality claimants (mentioned above) seems distinguishable. Particularly if their confidential information was obtained under the auspices of the court (e.g., by subpoena), it would seem to follow that they should have some avenue to protect those interests when a party sought to file those materials in court. (It might be mentioned that most of the submissions seem to take no notice of the possibility that nonparties might favor filing under seal.)

(vii) Upon final termination of the action, any party that filed sealed materials may retrieve them from the clerk.

This provision would not seem to fit with a requirement (mentioned above) that there be a prescribed date for unsealing the material. Indeed, unless there is some sort of timeliness requirement for requests by nonparties to unseal these materials (see Rule 24), permitting them to be withdrawn would complicate matters. Must an application to unseal be made during the pendency of the action? Must clerk's offices retain sealed materials forever?

An alternative proposal made in at least one submission is that all sealed materials be unsealed within 60 days after "final termination" of the action. If that "final termination" is on appeal, it may be difficult for the district court clerk's office to know when to unseal. Imposing such a duty on the clerk's office, rather than empowering the party that filed the material to request its return based on a showing that final termination of the action has occurred seems more reasonable.

Alternatively, as reflected in at least one local rule, the clerk could be directed to destroy the sealed materials after final termination of the action. That would also present the monitoring problem mentioned just above.

* * * * *

It is worth noting that these proposals have also prompted at least one submission opposing adoption of any such provisions. See 21-CV-G from the Lawyers for Civil Justice, arguing that such amendments would unduly limit judges' discretion regarding confidential information, conflict with statutory privacy standards, and stoke unprecedented satellite litigation.

For the present, the Subcommittee is seeking guidance from the full Committee on whether these procedural provisions hold promise, and whether others should be considered.

(3) Mandatory Initial Discovery Pilot Findings

The agenda book for the March 2023 Advisory Committee meeting contained the very thorough report done by FJC Research on the Mandatory Initial Discovery Project in the N.D. Ill. and D. Ariz.

The report (even without appendices) occupied about 100 pages of the March agenda book. In March, the Subcommittee undertook to review the report to determine whether it identified specific possible amendments to the initial disclosure regime of Rule 26(a)(1)(A) that warranted further study.

A bit of background on initial disclosure issues seems helpful. In 1991, this Committee proposed adoption of a new Rule 26(a)(1) initial disclosure requirement. That proposal prompted considerable resistance. Ultimately Rule 26(a)(1)(A) was adopted, but with an opt-out feature permitting districts to elect whether to follow the "national" rule. The rule was not limited to disclosure of favorable information, but instead required disclosure of information relevant to matters alleged with particularity, even if unfavorable to the disclosing party. Three Supreme Court Justices dissented from adoption of the disclosure rule, largely on the ground that it was out of step with the American adversarial litigation system. See Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 402, 507-09 (1993) (dissenting opinion of Justice Scalia, joined by Justices Thomas and Souter). The disclosure rule went into effect in 1993.

Considerable diversity among districts emerged, prompting preparation of a thorough study of divergent practices in various districts. *See* D. Stienstra, Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (FJC 1998). During the same general period of time, districts were obliged to develop cost and delay plans pursuant to the Civil Justice Reform Act, and the RAND Corporation intensely studied the results of those projects. Finally, in 1997, at the request of the Advisory Committee, the FJC did a very thorough study of a variety of discovery issues, including several affected by rule amendments that went into effect in 1993. *See* T. Willging, J. Shapard, D. Stienstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change (FJC 1997).

In 1998, the Advisory Committee proposed amendments to Rule 26(a)(1) that would remove the opt-out provision for district courts and restore national uniformity, but also limit initial disclosure to information the disclosing party "may use to support" its claims or defenses. There was considerable resistance to the national uniformity features of this amendment proposal, including some from district court judges, but it was adopted and went into effect in 2000. The rule has remained essentially unchanged since then. From time to time, there have been expressions of satisfaction and dissatisfaction with the present rule.

The MIDP was a careful effort to investigate the potential effect of more demanding initial requirements. It was implemented on a voluntary basis by judges in the District of Arizona and the Northern District of Illinois. Some judges of these courts elected not to participate. Among other things, the pilot did not limit required initial discovery to information on which the party providing discovery would rely, and it also required the filing of responsive pleadings even from parties intending to file Rule 12(b) motions (something not explicitly required in the 1991 proposed rule or the 1993 rule as adopted).

The FJC study focused on cases filed between Jan. 1, 2014, and March 12, 2020 (the day before the pandemic emergency declaration). "Comparison" districts were selected for purposes of comparison – the S.D.N.Y. for the N.D. Ill. and the E.D. Cal. for the D. Ariz. The FJC report has very detailed information about the study, and deserves close study. This agenda book includes a link to the full FJC report. But some overall reactions may provide a useful introduction.

One important take away is that the project had a statistically significant effect on case duration – "the pilot shortened disposition times for cases subject to the MIDP." But it is not

possible to say that the study of these two volunteer districts provides a firm foundation to support national rulemaking at this time.

The members of the Subcommittee carefully reviewed the report and explored its implications during their Aug. 29 meeting. Ultimately, the conclusion was that though the pilot projects were admirable undertakings and the FJC analysis was excellent, there is not a solid foundation for further initial disclosure provisions. It remains true that there is considerable resistance in the bar, and perhaps to some extent within courts. So though it was important to do this experiment it does not seem to justify any rules effort now.

The Subcommittee therefore recommends that the topic be dropped from the Committee's agenda.

(4) Discovery in Cross-Border Situations

In March, Judge Michael Baylson (E.D. Pa.), a former member of the Advisory Committee, submitted 23-CV-G, which was included in the agenda book but did not receive substantial attention during that meeting. Since submitting that proposal, he and Professor Gensler (another former member of this Committee) have prepared an article that will soon appear in *Judicature* entitled "Should the Federal Rules Be Amended to Address Cross-Border Discovery?" A draft of that article is included in this agenda book. It proposes that the Committee "initiate a project to examine how the Civil Rules might be amended to better guide judges and attorneys through the cross-border discovery maze."

The Sedona Conference has submitted a letter in support of this project (23-CV-H), citing three of its publications: The Sedona Conference International Principles of Discovery, Disclosure & Data Protection (December 2011); The Sedona Conference International Litigation Principles on Discovery, Disclosure & Data Protecting in Civil Litigation (Transitional Edition) (January 2017); and The Sedona Conference Commentary and Principles on Jurisdictional Conflicts Over Transfers of Personal Data Across Borders (April 2020).

Some background may be helpful for Committee members:

The Hague Convention, 28 U.S.C. § 1781: One starting point is the Hague Convention on Taking Evidence Abroad. It was drafted in the 1960s, and the U.S. became a party in 1972. The goal was to facilitate and regularize the taking of evidence in one country for use before the courts of another country. But it also had built-in constraints. Of particular importance, it authorized countries that joined the Convention also to adopt "blocking statutes" to prevent certain types of discovery on their soil, in part because U.S. discovery is so much broader than parallel evidence-gathering in the rest of the world. Elaboration on this point is easy, but the basic point is that U.S. discovery is unique in the world. Some might view U.S. discovery as an "imperialistic" endeavor.

For some time after 1972, many American federal courts were presented with arguments that they would have to use the Convention instead of the Federal Rules, and counter-arguments that the Convention's procedures were cumbersome and slow, so that ordinary American discovery was preferable. In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987), the Supreme Court essentially rejected the requirement of first resort to the Convention procedures and directed that federal courts evaluate a number of factors in deciding whether to use

the Convention or ordinary American discovery. Justice Blackmun partially dissented, arguing that comity principles should counsel greater deference to the Convention practices. But over the years many American lawyers have argued that the Convention is costly and slow.

Insisting on discovery American style could present serious problems. On that, consider a pre-Convention case, *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), in which a Swiss company suing in the U.S. faced dismissal as a sanction for failure to produce documents it said Swiss law forbade it to produce. The Supreme Court regarded this outcome as raising Due Process issues, because it seemed that the company could not comply with the American production order without violating Swiss criminal law.

Blocking statutes could produce the same sort of problem if they blocked evidence collection needed for American litigation. Some experience suggests that a collaborative approach could be more efficient and effective. An example is *Salt River Project Agricultural Improve. & Power Dist.*, 303 F.Supp.3d 1004 (D. Ariz. 2018), a decision by Judge David Campbell, a former Discovery Subcommittee Chair, Advisory Committee Chair, and Standing Committee Chair.

In that case, there were two defendants, one from France, which has adopted a blocking statute, and a related corporate entity from Canada. Plaintiff sought production of a variety of materials from both defendants. The French defendant took the initiative to have its production handled under the Convention, urging the appointment of a private attorney in France as "commissioner" to oversee the production in France. It pointed out "it would violate the French blocking statute if it produced these documents and ESI outside the Hague Convention procedures." That could subject the company to up to six months imprisonment and a fine of up to 90,000 Euros. The French company also made a showing that the actual commissioner process could move efficiently and quickly, and that the Canadian company would produce most (but not all) of the documents it would produce without the need to use Convention procedures, making production by the French defendant less important.

Plaintiff opposed the motion, but Judge Campbell granted it, invoking the *Aerospatiale* factors. This seems an eminently sensible result, and much to be preferred to some sort of face-off between the American courts and the French sovereignty concerns. Judge Baylson had a similar experience in a litigation over which he presided.

So it may be that some provision in the Civil Rules stimulating such a balanced approach would pay dividends. On the other hand, some might say that such a provision would not be a real "rule." For a rule to say a court must always make first use of the Convention seems to run against the main holding of *Aerospatiale*, and (as with Judge Campbell's decision) the choice whether to turn first to the Convention would seem to depend on the factors outlined by the Supreme Court in that case.

In 1988, an amendment proposal to provide direction for the federal courts' handling of discovery for use in American cases was published for public comment. After the public comment period was completed, the proposal was revised, approved by the Standing Committee and the Judicial Conference and sent to the Supreme Court for its review. While the proposal was before the Court, the Department of State transmitted a set of objections from the United Kingdom to the

Court. The Court then returned the proposed amendments to the rulemakers for further review, and no further action occurred at that time.

This is relatively ancient history. Since 1990, very great changes have occurred in cross-border litigation, and the advent of the Digital Age and E-Discovery mean that the importance and implications of Hague Convention procedures may be viewed differently.

28 U.S.C. § 1782: U.S. discovery for use in proceedings abroad: A companion statute, 28 U.S.C. § 1782, authorizes U.S. discovery to provide evidence for use in "a proceeding in a foreign or international tribunal" if the person from whom discovery is sought "resides or is found" in the district in which discovery is sought. According to Yanbai Andrea Wang, Exporting American Discovery, 87 U. Chi. L. Rev. 2089 (2020), there has been a very considerable uptick in the use of this statute during the 21st century.

It seems that this statute was intended to some extent to prompt other countries to relax their limitations on obtaining evidence. Some developments suggest that other countries are relaxing their previous antagonism toward discovery. An example might be found in the ELI/UNIDROIT Model European Rules of Civil Procedure (2020), which recognize a right for parties to obtain evidence.

As with § 1781, the lower courts entertained a variety of limiting interpretations of this statute. In *Intel Corp. v. Advanced Micro Devices, Inc*, 542 U.S. 241 (2004), the Supreme Court gave a relatively broad reading to the statute and, as with § 1781, emphasized that district courts have to use sound discretion in deciding whether to grant applications for discovery under this statute. It held that the petitioner in the case was an "interested person" able to utilize the discovery provisions even though it was not a formal party to the foreign proceeding. It took a broad view of what is a foreign "tribunal" to include the European Commission (though a private arbitration did not qualify as a "proceeding in a foreign or international tribunal").

One significant limitation under § 1782 is that the party subject to American discovery must be "found" in the district in which the discovery order is sought. Since 2011, the Supreme Court has taken a cautious attitude toward "general jurisdiction" with regard to corporate parties. But the Second Circuit has held that being "found" in the district under § 1782 is broader than the "general jurisdiction" concept applied for purposes of due process limits on personal jurisdiction. *See In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019); *see also In re Eli Lilly & Co.*, 37 F.4th 160 (4th Cir. 2022).

* * *

It should be apparent that much learning and study would be necessary as part of a project on cross-border discovery, whether limited the Hague Convention aspects or also considering the use of American discovery to provide evidence for litigation outside this country.

During its Aug. 29 meeting, the Subcommittee had an introductory discussion of these issues. This report is partly to invite reactions from other members of the full Committee on experiences and concerns about these topics. In particular, it might be important to ascertain whether there are international community concerns of which we should be aware, perhaps like

the UK concerns relayed by the Department of State a third of a century ago. Taking on such a project presently seems too time-intensive, but surveying its contours could be a good beginning.

Notes of Aug. 29 Subcommittee Meeting

Discovery Subcommittee
Advisory Committee on Civil Rules
Teams Meeting
Aug. 29, 2023

On Aug. 29, 2023, the Discovery Subcommittee of the Advisory Committee on Civil Rules held met via Teams. Participants included Chief Judge David Godbey (Chair, Discovery Subcommittee), Judge Robin Rosenberg (Chair, Advisory Committee), Judge Jennifer Boal, David Burman, Joseph Sellers, Ariana Tadler, Helen Witt, Carmelita Shinn, Prof. Richard Marcus (Reporter, Advisory Committee), Prof. Andrew Bradt (Associate Reporter, Advisory Committee), Prof. Edward Cooper (Consultant, Advisory Committee), and Allison Bruff (A.O. Rules Staff).

Chief Judge Godbey welcomed and thanked the participants for making time in their busy schedules to participate in this meeting and review the rather voluminous materials circulated before the meeting.

Rule 45(b)(1)
Manner of Service

The issue was introduced as involving actual uncertainty about what is required to satisfy the rule's directive that service depends on "delivering a copy to the named person." Some courts have interpreted this provision to require in-hand delivery of the subpoena to the witness. Others have found that alternative means suffice. The need for specifics may be greater with nonparty witnesses than party witnesses. Indeed, lawyers for represented parties might strongly prefer that the other side not serve subpoenas on their officers and employees but instead work out some modus vivendi, particularly in regard to depositions. On the other hand, with subpoenas directing nonparty witnesses to testify on short notice at a hearing or trial in court it may be urgently important to ensure actual notice to the witness. There are many gradations in between.

One could debate whether this is a real problem requiring a rules solution. Given the likelihood of a negotiated method for deposition discovery, it is likely that with party-affiliated witnesses agreements on timing and location and the like usually are dispositive and formal service is not needed. Yet in litigation in which the parties are playing "hardball" an impasse may arise. It does seem that some creative methods of service have been adopted. For example, a recent news story described a situation in which a witness located in Singapore was subpoenaed by a bankruptcy court in New York via a tweet. The court later quashed the subpoena on the ground that the witness had renounced his U.S. citizenship and therefore was beyond the jurisdiction of the court, not on the ground that no in-hand service had occurred. But the manner of service issue has repeatedly been advanced as a topic for rulemaking, starting nearly 20 years ago.

A very thorough research memo from Rules Law Clerk Chris Pryby demonstrated that the methods of service employed in state courts around the nation fall into no set pattern, even though many of the states have subpoena rules modeled on Rule 45. For discussion purposes, various possible amendment approaches were offered: (1) requiring in-hand service in all instances; (2) adding service by U.S. mail with return receipt or by commercial carrier; (3) authorizing service

by several of the means authorized in Rule 4 for service of initial process; or (4) authorizing a court order or local rule to provide for additional means of service.

An initial reaction from a Subcommittee member was that this problem comes up frequently enough to justify resolving the ambiguity under the current rule. An example in this member's experience involved service by overnight mail on a nonparty witness who did not show up, leading to a court hearing in which the witness contended that the service by overnight mail was ineffective under the rule. That experience prompted the member's law firm to organize a presentation to the firm about how to solve this problem. "A lot of money is spent researching this issue that ought not be spent with a clear rule."

Another member agreed. Clarity would be helpful. But there might be some concern about whether the Rules Enabling Act limits the rulemaking possibilities. A response to this concern was that, given the geographic limitations of current Rule 45(c) there should not be any Enabling Act constraints.

Another point made was that the pandemic lock-down has had a pervasive effect on the behavior of litigants and lawyers and witnesses that matters in this context. In the day of "virtual depositions" rather than in-person depositions, it seems odd to insist on face-to-face service of subpoenas.

Another member agreed with the first two. This member has on occasion faced the same problem. Increasingly there are entities that don't actually have a brick-and-mortar existence. Similar issues arose in the Advisory Committee's CARES Act discussions about when Rule 4 service requirements for initial process should be relaxed in emergency circumstances. The key should be what the Constitution requires – was the means of service used reasonably calculated to give notice to the person served? In the instance this member confronted, initial service was achieved via a tweet, and the fact of receipt could be demonstrated by actions the party took thereafter, showing actual notice.

A judge observed that judges see a "steady diet" of disputes about whether subpoenas were served in the proper manner. These situations can arise when the target of the subpoena is actively resisting, and also when there is no response at all and the court is asked to take action against the nonresponding person. Clarity would be welcome. Incorporating provisions from Rule 4 would be welcome.

Another judge suggested that combining two approaches might be better yet – invoke suitable provisions from Rule 4 and add explicit authority for the court to authorize service by a different means. At the same time, it might be risky to insist that the rule say the means selected be "reasonably calculated to give actual notice." That invites disputes.

Another member spoke up in favor of retaining the "reasonably calculated" language. One alternative would be to indicate in the rule that the court should choose an alternative means "reasonably calculated."

The possibility of using the "reasonably calculated" language from the Supreme Court's old *Mullane* decision drew a caution. The rule certainly should not require actual notice; the Court did not say that was required to satisfy due process. Proof of actual notice could be valuable to a

court asked to sanction failure to respond, but insisting on "actual notice" could introduce serious problems.

The discussion of this topic was summed up as showing that the Subcommittee's report to the full Committee should recognize that clarification of the rule (or expansion, if one views things that way) is a desirable way to remove grounds for disputes. That need not mean that an amendment should be prepared for publication in mid 2024 (though that might make sense). The preliminary drafts now out for public comment are likely to prompt a good deal of comment, and the Advisory Committee's Spring meeting may be mainly occupied with determining how or whether to proceed with those.

Filing Under Seal

This topic was introduced as having returned to the active Subcommittee docket this year after being put on hold two years ago due to the creation of an A.O. task force on sealed filings. On June 5 (the day before the Standing Committee's June meeting), the reporters and Allison Bruff (and the Criminal Rules Committee reporters) met with three representatives of the A.O. task force. Though the exact contours of that project remain somewhat unclear, it is mainly concerned with how materials filed under seal are handled rather than with the process of deciding whether to authorize filing under seal.

Before putting this project on hold, the Subcommittee had developed possible amendments to Rules 26(c) and 5(d) recognizing that the grounds for a protective order regarding materials exchanged in discovery are significantly different from the demanding criteria for filing under seal. There seems little debate about this difference, and the courts recognize it, though it seems to be phrased differently in different circuits. The amendment ideas developed in the past were designed not to change any circuit's formulation.

The abiding question is whether to go beyond this sort of general (and widely accepted) differentiation and prescribe uniform procedures. The Advisory Committee has received quite a number of proposals for specifics in the rules, and some in the judiciary think that more uniform procedures would be desirable. Such specifics could add considerable length to any rule. As an illustration, a draft rule submitted by the Sedona Conference (22-CV-A), prepared in late 2021, fills about seven pages. That could make the motion-to-seal rule one of the longest in the rule book.

Part of the background is that there is a great deal of variety in local rules about motions to seal, and that any national rule would therefore be likely to conflict with some at least some local rules. It may be that various local practices result from local differences that a national rule should not override, at least unless there is a good reason for doing so.

Particular issues include the practicalities of giving lawyers enough time to decide what to file, determining whether filings sought to be sealed can be "provisionally" sealed before the court rules on whether sealing is authorized and, if so, whether the filing party can "take back" the item if filing under seal is not approved. Another question is whether a redacted version of the document must also be filed and open to public inspection. Other concerns include whether the duration of the seal must be determined at the time of sealing, and how to protect nonparty interests in confidentiality of materials a party seeks to file.

A member began by saying that the Rule 5(d) approach is appealing, but that we should do more. In terms of criteria for sealing, there is no reason for a rule to intrude. Indeed, since some circuits regard "non-merits" or "discovery" motions as not invoking a public right of access but others may not, it is probably best not to try to get into that area.

At the same time, insisting on a ruling in advance of filing is impractical in the high-pressure world of litigation. That does support the "provisional" filing under seal idea, but does not necessarily indicate whether the confidential document may be withdrawn if leave to seal is denied. Perhaps having a redacted version in the file would provide a middle ground – the party that filed the document found not to justify sealing could rely on the portions of the redacted document that are in the court's file but not the confidential parts.

Another member agreed that some sort of standardization is a laudable goal. But some sort of invitation for public comment on motions to seal (beyond having motions to seal in the court's docket like other motions) seems unwise. "The press is capable of following the cases the readers want to hear about." Motions to seal should not be treated differently from other motions. There is no practical reason why the decision on the motion to seal must be made in advance. Redaction after the fact suffices in more than 99% of the cases.

A judge cautioned that getting into the details might lead to a slippery slope towards something like the seven-page model rule submitted to the Advisory Committee. If we start to get into that sort of detail it is difficult to determine where to stop.

Another judge echoed what the practitioners said – this tends to come up when the filing deadline rolls around, and can't be addressed productively much before then. So a waiting period on deciding the motion to seal does not sound workable.

Another reality should be kept in mind – often the party seeking to file the document is not the one best situated to explain why it is confidential and should be filed under seal. In commercial or patent litigation, that is often true of items obtained by one side through discovery that it wants to file in relation to a motion, but the other side (or even a nonparty) has confidentiality concerns that should be considered in regard to the sealing motion.

Another concern was the impact on the clerk's office of some sort of public notice. The reality is that public notice can open a can of worms, or one might say of court "gadflies." A caution was also offered about proceeding far with specifics about rulings on motions to seal. It was noted that one proposal seemed to seek a separate posting of motions to seal – not just in the court file – but it seems that the consensus of the Subcommittee is that such a requirement would not only burden the clerk's office but also invite other difficulties.

A question was asked: Can a search of CM/ECF locate all motions to seal. It seems that at this moment that is not possible, but it may soon be possible. That might bear on whether there would be any need for separate notice to the public.

The discussion seemed to assume that the motion to seal itself should be public, and indeed several of the proposals received by the Advisory Committee say so. But a judge reported that there have been ex parte applications for leave to file under seal that were themselves under seal. One should be cautious of these details, which might handcuff judges.

An attorney member reacted this discussion by saying that the points made suggest a cautious approach.

The discussion was summed up as supporting a report to the Advisory Committee that the basic question of sealing court files is important, but also that caution is indicated. For the Fall meeting, perhaps a mock up of a rule with some of these specifics included would provide a basis for discussion by the full Advisory committee. Getting reactions from the entire Committee would be valuable to the Subcommittee in moving forward on this issue.

Mandatory Initial Discovery Pilot and Possible Changes to Rule 26(a)(1)

This topic was introduced as involving an excellent and detailed FJC study of the Mandatory Initial Discovery Pilot conducted in the N.D. Ill. and the D. Az. This pilot project was initially spearheaded by the Chairs of the Standing Committee (first David Campbell and then John Bates). It was hoped there would be four or five districts that would participate, but eventually only the N.D. Ill. (home court of Judge Dow, Chair of the Advisory Committee) and the D. Az. (home court of Judge Campbell) participated, and only some judges in each district participated. (It might be noted also that the state courts in Arizona have a fairly aggressive form of initial disclosure introduced in the 1990s.)

One part of the introduction was that the initial roll-out of the Rule 26(a)(1) disclosure requirement was fairly bumpy. After public comment, the proposal was first retracted, and then adopted by the Advisory Committee with an opt-out feature permitting individual districts to choose not to follow the national rule. That diversity of treatment prompted a re-examination of the initial disclosure requirement leading to a 1998 preliminary draft adopting a more constrained but nationally uniform disclosure requirement (only applying to information that the disclosing party intended to use in support of its claims or defenses) that was adopted over some opposition from some judges, effective 2000. Since then, the national rule has not been significantly changed.

The pilot project, in a sense, followed up on the Duke Conference in May 2010, which was a foundation for the 2015 discovery amendments and also gave rise to consideration of whether a more ambitious disclosure regime would provide benefits in terms of litigation duration and cost.

The data on the pilot project show that there was some notable (though limited) effect on litigation duration. They also show that some lawyers (notably more among the experienced than the younger lawyers) had a favorable reaction to the pilot project approach. At the same time, the effects were somewhat modest, and there seemed to be little or no clarion call for strengthening the initial disclosure rule. The question, then, is whether some specific rule changes might be indicated from this somewhat subdued report.

One member read the FJC report carefully when it was first before the full Committee. Though it might be that there are some nuggets in the report that justify serious consideration of rule changes, on reflection it does not seem that there are any in this instance. And it seems that the pilot project prompted a fairly negative reaction in the bar in the places where it was implemented, a difficult foundation for a rule change.

Another member concurred. "Were we to propose something specific, the obvious question would be what in the study provides support for making such a change." The report is frankly inconclusive. That's in no way a criticism of the report, it's simply a frank recognition of what was found out.

The consensus was that the pilot project was a good idea and the FJC study was exactly the sort of solid evaluation that is needed to consider a rule change. But the purpose of a pilot is to evaluate the promise of a rule change, and it's too difficult to find anything in this effort that provides a ground for a specific rule change. Accordingly, the report to the full Advisory Committee should be that though the effort was worthy, and executed by high caliber work, at the end of the day it does not show that there is a need (or justification) for any specific rule changes. As time passes, and discovery issues evolve, the need to return to Rule 26(a)(1) may return, but for the present this item can be dropped from the agenda.

Discovery Outside the U.S.

Judge Baylson and Professor Gensler (both former members of the Advisory Committee) have submitted a proposal for rulemaking regarding how district judges approach efforts to do discovery outside this country or efforts to compel parties to cases in this country to provide information from records or people located outside the country for use in American courts. This topic (including the possibility of adopting a new rule addressing these issues) will be examined in some detail in an article by Judge Baylson and Prof. Gensler that is slated to appear in Judicature later this year. The Subcommittee received a draft of that article, which urges the Advisory Committee to develop a project studying the issues.

The Sedona Conference has also submitted a brief letter supporting such an effort, noting that it has published several books on these issues and offering to provide assistance.

The topic was introduced with some background. Here, as with initial disclosure, there is a history to be noted. The Hague Convention (supported by the United States) established procedures for obtaining evidence from signatory states. But the reality has been for decades that U.S. discovery methods (particularly Rule 34 requests) are very different from the practices of the rest of the world, which require a court order to support document production and have very strict requirements for those seeking such an order.

Partly as a consequence of the divergence between U.S. practice and the practice in the rest of the world, the Hague Convention includes authority for signatory nations to refuse to provide some sorts of discovery for use in U.S. litigation (sometimes called "blocking statutes"), or to insist that local procedures be used to obtain evidence in those countries.

For a time, there was a difference of opinion in American cases on whether, given the existence of Hague Convention procedures, litigants in American courts should be required to attempt a "first resort" to Convention procedures. In 1987, the Supreme Court, in the *Aerospatiale* case, rejected the "first resort" requirement, though it also recognized that multiple factors should be considered, with considerable weight placed on comity. Justice Blackmun, in a separate opinion, was more sympathetic to the "first resort" idea.

Soon after the *Aerospatiale* decision, a preliminary draft of rule amendments addressing these issues was published for public comment. From one perspective, these proposed rule amendments seemed to pursue the route taken by Justice Blackmun. But after public comment, the draft was changed, and the Judicial Conference approved and sent to the Supreme Court a revised draft.

Meanwhile, the original draft had attracted international attention and prompted some opposition. Specifically, the United Kingdom submitted an opposition to the proposed rule change (focusing on the original proposal, not the one submitted to the Court by the Judicial Conference). This opposition was submitted to the Supreme Court, and it sent the amendments back to the rules committees for further consideration. Eventually no further action occurred on this front.

Though that history is informative, it is not a ground for declining to move forward on the current submissions. A great deal has changed in the last third of a century since the earlier rule change was shelved. In particular, the frequency of cross-border litigation has risen. More importantly, the enormous consequences of the Digital Revolution have transformed American discovery and introduced new concerns about privacy and confidentiality, as well as data preservation.

And there may be something of a tension between a face off with the rest of the world and productive cooperation. Thus, Judge Baylson handled a litigation in which following the Hague procedures worked effectively. And Judge Campbell similarly did so with a French litigant. It may be that flexibility on the American side could pay large dividends.

An initial reaction was that it seems that much of this topic turns on treaties or statutes. There may be little room for a rule to operate. And any such "rule" might really amount to little more than a best practices document.

The consensus was that one thing is clear at present – the Advisory Committee is not able to initiate the sort of effort that would be required to address these concerns. The Sedona Conference has several books on the general subject. But that does not mean the members of the Committee are conversant enough with the issues to pursue them now, particularly given the prospect of a heavy workload from the privilege log and Rule 16.1 proposals now out for public comment and the existing subcommittee work also in progress.

So the wisest course at present seems to be to introduce the issues to the full Committee during the October meeting. Judge Baylson's submission came in as the agenda book for the March meeting was being finished, and it was in a sort of appendix to the agenda book for that meeting. But there was no significant discussion of these issues at the March meeting. It may be that few of the other members of the Committee have experience or views, but it would be important to find out about that. In particular, given the prior experience with the United Kingdom, it might be that the Government (through the Department of Justice?) could shed light on current attitudes on this front. This is clearly important, but it's not clear that there is a valuable role for rules in dealing with this set of problems. Making that determination will require considerable effort.

Memorandum

To: Hon. Robin L. Rosenberg, Chair, Civil Rules Advisory Committee
Hon. David Godbey, Chair, Discovery Subcommittee, Civil Rules Advisory Committee
Prof. Richard L. Marcus, Reporter, Civil Rules Advisory Committee
Prof. Andrew Bradt, Associate Reporter, Civil Rules Advisory Committee

From: Christopher Ian Pryby, Rules Law Clerk

Re: Survey of State Rules for Serving Subpoenas in Civil Cases

Date: June 1, 2023

Introduction

Federal Rule of Civil Procedure 45(b)(1) specifies the manner of serving a subpoena to a deponent or witness in a civil case.[1] The Discovery Subcommittee (the "Subcommittee") of the Advisory Committee on Civil Rules (the "Committee") is investigating the ambiguity in the rule's requirement that a copy of a subpoena be "deliver[ed]" to the person named in it.[2] There is a conflict among federal courts over

[1] (b) **Service.**

(1) **By Whom and How; Tendering Fees.** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

FED. R. CIV. P. 45(b)(1).

[2] Memorandum from Hon. Robin L. Rosenberg, Chair & Advisory Comm. on Civ. Rules to Hon. John D. Bates, Chair & Comm. on Rules of Prac. & Proc., Report of the Advisory Committee on Civil Rules, *in* U.S. CTS., *Committee on Practice and Procedure: June 6, 2023*, at 784, 803 (2023), https://www.uscourts.gov/sites/default/files/2023-06_standing_committee_agenda_book_final_0.pdf.

whether the provision requires personal, in-hand service of the subpoena.[3] The Subcommittee is also investigating a suggestion by Hon. Catherine P. McEwen to allow delivery of a subpoena by overnight courier.[4]

On behalf of the Committee, Judge Rosenberg requested that I research the methods the states permit for service of a subpoena in a civil case. In particular, there is interest in how many states' rules more-or-less imitate the federal rule and to what extent states have identified alternative methods of service.[5] To that end, I have surveyed the statutes, court rules, and case law of the 50 states and the District of Columbia governing how to serve subpoenas in civil cases.

This memorandum summarizes my findings. Part I documents which states use language similar to that in Rule 45(b)(1) and how those states interpret that language. Part II documents which states permit methods of service beyond personal delivery (whether based on language similar to Rule 45(b)(1) or not). I also attach an appendix consisting of pertinent statutes and rules from my survey.

[3] *See id.* (citing Ava Benny-Morrison, *Leslie Wexner Can Be Mailed Subpoena in Epstein Suit*, BLOOMBERG L. NEWS (Feb. 21, 2023, 12:56 PM), https://news.bloomberglaw.com/white-collar-and-criminal-law/leslie-wexner-can-be-mailed-subpoena-in-epstein-suit-judge-says; *In re* Three Arrows Cap., Ltd., 647 B.R. 440, 453 (Bankr. S.D.N.Y. 2022)).

[4] *Id.* at 803–04.

[5] *Id.* at 804.

Part I

A. 24 States Use "Delivering" Without Qualification to Refer Exclusively to Personal Service

This and the next two categories contain states that incorporate language similar to that in Federal Rule 45(b)(1)—"delivering a copy to the named person"—into their subpoena-service rules, either expressly or by reference to service-of-process rules. This first category consists of those states that interpret that language to mean personal service only. (The states may permit other methods of service through other language, though.)

1. Alabama[6]
2. Alaska[7]
3. Arizona[8]
4. Arkansas[9]

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[6] ALA. R. CIV. P. 45(b)(1) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."). A court has held that service must be made personally under this provision. Bus. Realty Inv. Co. v. City of Birmingham, 739 So. 2d 523, 526–27 (Ala. Civ. App. 1999).

[7] ALASKA DIST. CT. R. CIV. P. 45(c) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."). Although I found no court decisions interpreting this provision, there is an administrative decision doing so. Atlas, AWCB Case No. 201617084, 2021 WL 5549020, at *17–18 (Alaska Workers' Comp. App. Comm'n Nov. 19, 2021) (personal service required).

[8] ARIZ. R. CIV. P. 45(d)(1) ("Serving a subpoena requires delivering a copy to the named person . . . ."). A court has held that this provision does not authorize serving a subpoena on a person's attorney. S & R Props. v. Maricopa Cnty., 875 P.2d 150, 162 (Ariz. Ct. App. 1993).

[9] ARK. R. CIV. P. 45(c) ("Service shall be made by delivering a copy of the subpoena to the person named therein . . . .").

There is a case that mistakenly identifies the notice requirements for parties in Arkansas Rule 5 as the mode of service of a subpoena on nonparties. *See* Blakes v. Ark. Dep't of Hum. Servs., 374 S.W.3d 898, 906–07 (Ark. Ct. App. 2010). Because the persons subpoenaed were not parties to the case, even if Rule 5 does apply to subpoenas served on parties in Arkansas, it should not have applied in *Blakes*.

Even so, *Blakes* does confirm that "delivery of a copy means handing the same to the attorney or to the party," albeit in the context of Rule 5. *Id.* at 907. This is evidence that "delivering" would be construed similarly in Rule 45(c).

5. Colorado[10]

6. Florida[11]

7. Idaho[12]

8. Kansas[13]

9. Kentucky[14]

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[10] COLO. R. CIV. P. 45(b)(2) ("Serving a subpoena requires delivering a copy to the named person . . . ."); 345(c) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."); 510(b) (incorporating Rule 345 by reference).

The primary case interpreting Rule 45(b)(2) reads it to provide for only personal service. *See* Stubblefield v. Dist. Ct. in & for 18th Jud. Dist., 603 P.2d 559, 572 (Colo. 1979) (en banc). A later case permitted use of the service-of-process rules from Rule 4 in the context of business entities. *See* Isis Litig., L.L.C. v. Svensk Filmindustri, 170 P.3d 742, 747 (Colo. Ct. App. 2007). One district-court case has read *Stubblefield* and *Isis* to find that Rule 4's service methods extend to subpoenas of individuals—despite *Stubblefield*'s clear statement that Rule 45 requires personal service and *Isis*'s confinement to business entities. Lynne v. Coldiron, No. 2021 CV 148, 2021 WL 7161555, at *3–4 (Colo. Dist. Ct. 2021). But *Lynne* does not appear to take the majority view. *See* Fogel v. Bankoff, 484 P.3d 788, 792 (Colo. Ct. App. 2021) (noting in passing that "C.R.C.P. 45(b)(2) . . . explains how the *physical* subpoena must be provided to the witness" (emphasis added)); KB Oreo, LLC v. Winnerman, Civil Action No. 20-mc-0073, 2020 WL 13412947, at *2 (D. Colo. Nov. 5, 2020) ("The Court agrees that service by certified mail did not strictly comply with the requirements of Rule 45.").

[11] FLA. STAT. § 48.031(1)(a) ("Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper . . . ."). Personal service is required. *See* Aero Costa Rica, Inc. v. Dispatch Servs., Inc., 710 So. 2d 218, 219 (Fla. Dist. Ct. App. 1998); Olin Corp. v. Haney, 245 So. 2d 669, 670 (Fla. Dist. Ct. App. 1971).

[12] IDAHO R. CIV. P. 45(b)(1) ("Serving a subpoena requires delivering a copy to the named person . . . ."). This provision requires personal service. Morgan v. New Sweden Irrigation Dist., 368 P.3d 990, 993, 997 (Idaho 2016).

[13] KAN. STAT. ANN. § 60-303(d)(1)(A) ("Personal service is effected by delivering or offering to deliver a copy of the process and petition or other document to the person to be served."). The use of "personal service" in the same sentence as "delivering or offering to deliver" has led courts to interpret the provision as requiring "physically handing documents to a person." *In re* A.P., 506 P.3d 988, 991 (Kan. Ct. App. 2022); Baker v. Hayden, No. 120,334, 2020 WL 1313814, at *3 (Kan. Ct. App. Mar. 20, 2020).

[14] KY. R. CIV. P. 45.03(1) ("Service of the subpoena shall be made by delivering or offering to deliver a copy thereof to the person to whom it is directed."); KY. R. CIV. P. 4.04(2) ("by delivering a copy . . . to an agent authorized by appointment or by law to receive service of process for such individual"). Case law suggests that "delivering" requires personal service. *See* Bishop v. Commonwealth, No. 2017-CA-001793-MR, 2019 WL 103924, at *7 (Ky. Ct. App. Jan. 4, 2019); Martin v. Popa, No. 2014-CA-001364-MR, 2016 WL 1558518, at *2 (Ky. Ct. App. Apr. 15, 2016); *see also* Fleishman v. Goodman, 67 S.W.2d 691, 692 (Ky. Ct. App. 1934)

10. Louisiana—using "tenders" instead of "delivers"[15]

11. Maryland[16]

12. Massachusetts—using both "delivering" and "giving"[17]

13. Minnesota[18]

14. Missouri[19]

(holding that a "paper is delivered to a person when placed within his reach and he accepts it").

[15] LA. CODE CIV. PROC. ANN. art. 1232 ("Personal service is made when a proper officer tenders the citation or other process to the person to be served."). The word "tenders" means in-person delivery. *See* Cordova v. LSU Agric. & Mech. Coll. Bd. of Supervisors, Case No. 6:19-CV-1027, 2019 WL 5493355, at *3 (W.D. La. Oct. 24, 2019); Roper v. Dailey, 393 So. 2d 85, 86–88 (La. 1980) (on rehearing); Wilson v. King, 79 So. 2d 877, 878 (La. 1955) (older version of the Code of Practice).

[16] MD. R. 2-422.1(e) ("A subpoena shall be served by delivering a copy to the person named . . . ."); 2-510(d) (same); 2-510.1(f) (same); 3-510(d) (same). These provisions require personal service. B.O. v. S.O., 259 A.3d 228, 246 (Md. Ct. Spec. App. 2021); *see also* Off. of Md. Att'y Gen., 82 Op. Att'y Gen. 154, Opinion Letter on Sheriffs – Courts and Judges – Jurisdiction and Procedure – Service of Process in Gated Communities (Aug. 21, 1997), 1997 WL 566390, at *3 (discussing the requirement of personal service or service on a designated agent before Rule 2-150 authorized service by certified mail).

[17] MASS. GEN. LAWS ch. 223, § 2 ("Such summons may be served in any county by an officer qualified to serve civil process or by a disinterested person by . . . giving [the witness] a copy thereof . . . ."); MASS. R. CIV. P. 45(c) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . .").

In an appendix to an opinion in a case involving tax-lien foreclosure, the Massachusetts Supreme Judicial Court stated that chapter 223, section 2 requires personal service. Tallage Lincoln, LLC v. Williams, 151 N.E.3d 344, 359 (Mass. 2020). Because serving notice of a tax taking was not at issue in *Tallage Lincoln*, this is not binding precedent. But the statement is a rare data point about the subpoena-service rules in a state where multiple secondary sources say that there is no case law interpreting what "giving" or "delivering a copy" of a subpoena means.

[18] MINN. R. CIV. P. 45.02(a) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."). A case from the state tax court read this provision to require personal service. Chambers Self-Storage Oakdale, LLC v. Cnty. of Washington, File Nos: 82-CV-17-1685, 82-CV-18-2123, 2021 WL 2546199, at *5 (Minn. T.C. Regular Div. June 17, 2021), *aff'd*, 971 N.W.2d 64 (Minn. 2022). Although the state supreme court did not clearly affirm the tax court's interpretation of Rule 45.02(a), it did seem to accept it, stating: "Here, Chambers failed to take basic steps to *locate* the County Assessor and effectuate service." *Chambers*, 971 N.W.2d at 74 (emphasis added). The implication is that the process server would have needed to either personally serve the county assessor or else leave the subpoena with someone at the assessor's home.

[19] One statutory provision governs only subpoenas to testify. MO. REV. STAT. § 491.120(1) ("The service of a subpoena to testify shall be by . . . delivering a copy thereof to the person

15. Nevada[20]

16. New Jersey[21]

17. New York[22]

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to be summoned . . . ."). This provision has been interpreted as requiring personal service. *See* Noell v. Bender, 295 S.W. 532, 533 (Mo. 1927) (en banc); State v. Rose, 535 S.W.2d 115, 118–19 (Mo. Ct. App. 1976).

A second, rule-based provision deals with subpoenas more generally. MO. SUP. CT. R. 57.09(d)(2) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."). A state court looked to a federal-court interpretation of Federal Rule 45(b)(1) to hold that "delivering" in Rule 57.09(d)(2) does not include transmitting by facsimile. Mehrer v. Diagnostic Imaging Ctr., P.C., 157 S.W.3d 315, 321 (Mo. Ct. App. 2005) (citing Firefighters' Inst. for Racial Equality v. City of St. Louis, 220 F.3d 898 (8th Cir. 2000) (holding that "delivering" in Federal Rule 45(b)(1) does not include sending by fax or ordinary mail))).

[20] NEV. R. CIV. P. 4.2(a)(3) ("delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process"); 4.2(d)(2) ("delivering a copy of the summons and complaint" to both the state attorney general or the public officer or employee being subpoenaed—or to agents they have designated to receive process); 4.2(d)(4) ("delivering a copy of the summons and complaint to the current or former public officer or employee, or an agent designated by him or her to receive service of process").

Courts have read "delivering" in these provisions to require personal service. Dep't of Corr. v. DeRosa, 466 P.3d 1253, 1254 (Nev. 2020) ("NRCP 4.2(a) requires personal service of a complaint or other document that initiates a civil action . . . ."); Bristow v. Sanchez, Case No. 2:22-cv-01092, 2022 WL 16575649, at *1–2 (D. Nev. Nov. 1, 2022) (in case involving Rule 4.2(d)(4), stating that Nevada requires "hand-delivery" service); Whitfield v. Nev. State Personnel, Case No. 3:20-cv-00637, 2022 WL 171138, at *5 (D. Nev. Jan. 18, 2022) (Rule 4.2(d)(2) requires personal service).

The new version of Nevada Justice Court Rules, effective July 11, 2023, will incorporate substantively identical rules. *See In re* Amend. of Nev. Just. Ct. Rules of Civ. Proc., ADKT 0607 (Nev. May 12, 2023), NV ORDER 23-0014 (Westlaw). (The current operative provision reads, "Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ." NEV. JUSTICE CT. R. CIV. P. 45(b)(1). I did not find any cases interpreting it, but it will be obsolete soon anyway.)

[21] N.J. CT. R. 1:9-3. Although the rule begins, "Service of a subpoena shall be made by delivering a copy thereof to the person named," it concludes by noting that a subpoena for production only may be served by mail and is enforceable "only upon receipt of a signed acknowledgment and waiver of *personal service*." *Id.* (emphasis added). In context, "delivering a copy" most reasonably means personal delivery. *Accord* State v. Perkins, 529 A.2d 1056, 1058 (N.J. Super. Ct. 1987).

[22] N.Y. C.P.L.R. 307(2) ("Personal service on a state officer sued solely in an official capacity . . . , shall be made by (1) delivering the summons to such officer . . . , or (2) by mailing the summons by certified mail, return receipt requested, to such officer . . . and by personal service upon the state in the manner provided by subdivision one of this section. . . ."); 307(1) ("Personal service upon the state shall be made by delivering the

18. North Carolina[23]

19. North Dakota[24]

20. South Carolina[25]

21. Texas[26]

22. Vermont[27]

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summons to an assistant attorney-general at an office of the attorney-general or to the attorney-general within the state."). In CPLR 307, "delivering" means personal service. Polletta v. McLoughlin, 156 N.Y.S.3d 880, 881 (App. Div. 2022); Dawkins v. Hudacs, 159 F.R.D. 9, 10 (N.D.N.Y. 1994).

[23] N.C. GEN. STAT. § 8-59 ("In obtaining the testimony of witnesses in causes pending in the trial divisions of the General Court of Justice, subpoenas shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure for civil actions."); N.C. R. CIV. P. 45(b)(1) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to that person . . . ."). Case law indicates that personal service is required under Rule 45(b)(1). *See* Blackburn v. Carbone, 703 S.E.2d 788, 795 & n.7 (N.C. Ct. App. 2010) (service ineffective when received by nurse employed in defendant's office).

[24] N.D. R. CIV. P. 4(d)(2)(A)(iv) ("delivering a copy of the summons to the individual's agent authorized by appointment or by law to receive service of process"). Rule 4(d)(2) has been interpreted to require personal service. Hughes v. Olheiser Masonry, Inc., 935 N.W.2d 530, 532–33 (N.D. 2019) ("delivery" requires defendant to take possession of process); Sanderson v. Walsh Cnty., 712 N.W.2d 842, 848–49 (N.D. 2006) ("delivery" distinct from mailing).

[25] S.C. R. CIV. P. 4(d)(1) ("by delivering a copy to an agent authorized by appointment or by law to receive service of process"); S.C. R. MAGIS. CT. 6(d)(1) (same); *see also* S.C. R. CIV. P. 4(d)(5) ("by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General"). The word "delivering" in Civil Rule 4(d)(5) means personal service. Bostic v. Gegg Middle Sch., No. 2018-CP-18-01615, 2019 WL 7041433, at *2 (S.C. Ct. C.P.); Mazyck v. Charleston Cnty. Sch. Dist., No. 217-CP-10-1970, 2018 WL 11188475, at *2 (S.C. Ct. C.P.).

[26] TEX. R. CIV. P. 176.5(a) ("A subpoena must be served by delivering a copy to the [nonparty] witness . . . ." But "[i]f the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record."). A nonparty must be served personally; substituted service is not effective. *In re* Berry, 578 S.W.3d 173, 178–81 (Tex. Ct. App. 2019).

[27] VT. R. CIV. P. 45(b)(1) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . .").

A state trial court has quoted approvingly a Fifth Circuit case holding that a subpoena must be served personally and witness fees tendered simultaneously under Federal Rule 45(b)(1). Labrecque v. Royce, No. 2651209, 2013 WL 2896296, at *1 (Vt. Super. Ct. Feb. 13, 2013) (citing *In re* Dennis, 330 F.3d 696, 704 (5th Cir. 2003)). The trial court applied that reading of the federal rule to Vermont Rule 45(b) because "[t]he Reporter's Notes to Vt. R. Civ. P. 45 indicate that it is modeled on and is 'basically similar' to Fed. R. Civ. P. 45." *Id.*; *see also* Watson v. Dimke, No. S1497-01 CnC, 2004 WL 5459774 (Vt. Super. Ct. Apr. 5, 2004) (reading Rule 45(b)(1) similarly).

23. Washington—using "giving" instead of "delivering"[28]

24. Wisconsin—using "giving" instead of "delivering"[29]

[28] WASH. SUPER CT. CIV. R. 45(b)(1) ("by giving the person named therein a copy thereof"); WASH CIV. R. CT. LTD. J. 45(b)(1) (same). These provisions require personal service. State v. Adamski, 761 P.2d 621, 623 (Wash. 1988) (en banc).

But see WASH. REV. CODE § 12.16.020 ("delivering to him or her a copy *at his or her usual place of abode*" (emphasis added)). I found no cases interpreting this statutory provision.

[29] WIS. STAT. § 885.03 ("by giving the witness a copy thereof"). Courts read this provision to require personal service. *See, e.g.*, *In re* Sanctions in State v. Tatum, Nos. 98-2702, 98-3142, 2000 WL 622970, at *3–5 (Wis. Ct. App. May 16, 2000); Hutchinson v. Custom Drywall, Inc., No. 97-1675, 1998 WL 557482, at *2 (Wis. Ct. App. Sept. 3, 1998); State v. Van Straten, No. 88-1174-CR, 1989 WL 26448, at *1–2 (Wis. Ct. App. Jan. 25, 1989).

B. 5 States Use an Unqualified "Delivering" More Expansively Than Meaning Only Personal Service in at Least Some Circumstances

These states interpret "delivering a copy" to be broader than just personal service. It may be that a state confines that interpretation only to certain situations (for example, serving a party a subpoena). These states may also permit other methods of service through other language in their rules.

1. Indiana[30]
2. Montana[31]
3. New Mexico[32]

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[30] IND. TRIAL R. 45(C). Although the rule begins, "Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person," it states immediately afterward, "Service may be made in the same manner as provided in Rule 4.1, Rule 4.16 and Rule 5(B)." From context, "delivering a copy" is best read as defined by the methods of service listed in Rules 4.1, 4.16, and 5(B). *Accord* Perkins v. Mem'l Hosp. of S. Bend, 141 N.E.3d 1231, 1237 n.1 (Ind. 2020); Collins v. State, 14 N.E.3d 80, 84 (Ind. Ct. App. 2014); Shoultz v. State, 995 N.E.2d 647, 658 (Ind. Ct. App. 2013).

[31] MONT. R. CIV. P. 45(b) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . .").

One case interprets nearly identical language in a statute governing subpoena service in criminal cases. The result implies that the person originally charged with delivering the subpoena need not personally deliver it—it suffices that whoever ultimately gives the subpoena to the named person satisfies the criteria to be a valid server. *See* State *ex rel.* Anderson v. Dist. Ct. of 8th Jud. Dist., 610 P.2d 1183, 1185 (Mont. 1980).

There is also a trial-court case finding that a subpoena duces tecum was properly served on a nonparty by certified mail under Rule 5. Hawkins v. Randall, No. DV061020, 2011 WL 11532454, at *4–5 (Mont. Dist. Ct. Feb. 8, 2011). But Rule 5 says nothing about nonparty service—it governs service on *parties*. The court appears to have conflated the methods of service under this rule, which are proper when used to notify parties that a subpoena duces tecum is being issued, with the methods of service on subjects of subpoenas duces tecum, which are not expressly defined. (There is an argument that Rule 5 may be used to serve a subpoena duces tecum on a party, but that was not the case in *Hawkins*.)

[32] N.M. DIST. CT. R. CIV. P. 1-045(B)(2) ("Service of a subpoena on a person named therein shall be made by delivering a copy thereof to that person . . . ."); N.M. MAGIS. CT. R. CIV. P. 2-502(B)(1) (same); N.M. METRO. CT. R. CIV. P. 3-502(B)(1) (same); N.M. MUN. CT. R. CIV. P. 8-602(C)(1) (same, substituting "to such person" for "to that person").

A New Mexico court has held that Rule 1-045(B)(2), as applied to service on a party, incorporates Rule 1-005 into the definition of "delivering." Khalsa v. Puri, 525 P.3d 394, 398–401 (N.M. Ct. App. 2022). I have not found case law interpreting "delivering" in the other rules, but they are likely susceptible to a similar interpretation because they have

4. Rhode Island[33]

5. Tennessee—adds "or offering to deliver"[34]

counterparts to Rule 1-005. *See* N.M. MAGIS. CT. R. CIV. P. 2-203; N.M. METRO. CT. R. CIV. P. 3-203; N.M. MUN. CT. R. CIV. P. 8-208.

[33] R.I. GEN. LAWS § 9-17-4 ("A subpoena to a witness shall be served by delivering a copy to him or her."); R.I. SUPER. CT. R. CIV. P. 45(b)(1) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."); R.I. DIST. CT. R. CIV. P. 45(c) (same).

The state supreme court has held that the methods of service in Superior Court Rule 5(b) and District Court Rule 5(b) may be used to serve a subpoena on a party. *See* Tel. Credit Union of R.I. v. Fetela, 569 A.2d 1059, 1061–62 (R.I. 1990) (holding that a subpoena duces tecum is "lawful process" and that service on a party out-of-state insurance company's appointed attorney under state law—the insurance commissioner—was effective under Rules 45 and 5).

[34] One use of an unqualified "delivering" has been interpreted as meaning personal service only. TENN. R. CIV. P. 4.04(5) ("by delivering a copy of the summons and of the complaint to the person in charge of the office or agency"). Rule 4.04(5) requires personal service on the person in charge. Allgood v. Gateway Health Sys., 309 S.W.3d 918, 921 (Tenn. Ct. App. 2009).

There are also other instances of an unqualified "delivering." TENN. CODE ANN. § 16-15-708(a) ("The subpoena . . . may be served . . . by delivering or offering to deliver a copy of the subpoena to the person to whom it is directed."); TENN. R. CIV. P. 45.03 ("Service of the subpoena shall be made by delivering or offering to deliver a copy thereof to the person to whom it is directed.").

But see TENN. R. CIV. P. 45.09 ("For purposes of issuance of any subpoena under Rule 45, the clerk of the court in which the action is pending may issue the subpoena in either written paper or electronic form. . . ."). I did not find any cases expressly saying so, but it seems that, at least since the adoption of Rule 45.09 in 2022, "delivering" in Rule 45.03 must include electronic delivery—how else would an electronic subpoena be served?

An advisory commission comment states that Rule 45.03 "requires personal service upon a witness, unlike the prior practice, authorized by Tenn. Code Ann. § 24-206 [repealed], of leaving a copy of a subpoena at the usual place of residence of a witness who could not be found." TENN. R. CIV. P. 45.03 advisory commission comment (alteration in original). The comment's continuing accuracy is in doubt following the adoption of Rule 45.09.

C. 11 Other States Use an Unqualified "Delivering," But There Was Insufficient Data to Determine Its Meaning in Those States

These states use language similar to "delivering a copy," but it was not clear from my survey how they interpret that language. This could be because I found no case law with reasonably clear holdings or dicta, or it could be because the evidence I found was weak or mixed.

1. California[35]
2. Delaware[36]
3. District of Columbia[37]
4. Hawai'i[38]

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[35] The general subpoena-service provision qualifies "delivering" with "personally." CAL. CIV. PROC. CODE § 1987(a) ("by delivering a copy . . . to the witness personally"). *But see* CAL. GOV'T CODE §§ 68097.1(a) ("by delivering two copies to [a state employee's] immediate superior at the public entity by which he or she is employed or an agent designated by that immediate superior to receive that service"); 68097.1(b) ("by delivering two copies to [a state employee's] immediate superior or agent designated by that immediate superior to receive that service"); 68097.3 ("by delivering a copy . . . to [a Highway Patrol member's] immediate superior or . . . to the person in charge of the office . . . where the member filed [the relevant] report").

One case remarked in dictum that "delivery" on an immediate superior need not be personal. Lopez v. Shiomoto, No. D076081, 2021 WL 21444, at *10 (Cal. Ct. App. Jan. 4, 2021) (mail delivery on immediate superior permissible). Otherwise, I did not find any cases discussing this provision.

[36] DEL. SUPER. CT. R. CIV. P. 45(b)(1) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person."); DEL. CH. CT. R. 45(b) (same); DEL. CT. C.P. CIV. R. 45(c) (same with very minor wording changes). I found no cases interpreting these provisions.

[37] D.C. SUPER. CT. CIV. R. 45(b)(1) ("Serving a subpoena requires delivering a copy to the named person . . . ."). I found no cases interpreting this provision.

[38] HAW. R. CIV. P. 45(c) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."). I found no cases interpreting this provision.

A practical-law resource states that "[i]n Hawaii, subpoenas can generally be served in the same manner as a summons." JASMINE M. FISHER, PRACTICAL LAW STATE Q&A, *Drafting and Issuing Discovery Subpoenas: Hawaii* § 9 (2022), W-005-5976 (Westlaw) (citing HAW. R. CIV. P. 4(c); 45(c)). Rule 4(c) states:

> (c) **Same: By Whom Served.** Service of all process shall be made: (1) anywhere in the State by the sheriff or the sheriff's deputy, by some

5. Iowa[39]

6. Maine[40]

7. Ohio[41]

8. Oklahoma[42]

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other person specially appointed by the court for that purpose, or by any person who is not a party and is not less than 18 years of age; or (2) in any county by the chief of police or the chief's duly authorized subordinate. A subpoena, however, may be served as provided in Rule 45.

The practical-law resource's claim appears to rely on the sentence: "A subpoena, however, may be served as provided in Rule 45." As written, this sentence does not support that claim. If the language is confined only to who may serve a subpoena, it is surplusage—anyone permitted to serve a subpoena under Rule 45(c) is already authorized under the rest of Rule 4(c) to serve process. Even if the "as provided in Rule 45" language is intended to apply more broadly to the manner of serving a subpoena, it is still surplusage. Rule 4(d) provides for serving process on many kinds of defendants in a variety of ways beyond "delivering."

[39] IOWA R. CIV. P. 1.1701(3)(a) ("Serving a subpoena requires delivering a copy to the named person . . . ."). I found no cases interpreting this provision.

[40] ME. R. CIV. P. 45(b)(1) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."). I found no cases interpreting this provision.

[41] OHIO R. CIV. P. 45(B) ("Service of a subpoena upon a person named therein shall be made by delivering a copy of the subpoena to the person . . . ."). The evidence of this provision's interpretation is mixed.

A staff note dating back to the rule's adoption explains that "delivering" has been interpreted as "delivering a copy of the subpoena *to the person* being served." OHIO R. CIV. P. 45(C), staff note to 1970 adoption (emphasis added). That same note also reads the corresponding *federal* rule to "provide[] for personal service only." *Id.*

Although one case did hold that an attorney's attempted service of a subpoena by certified mail was ineffective, GZK, Inc. v. Schumaker Ltd. P'ship, 858 N.E.2d 867, 871–72 (Ohio Ct. App. 2006), the reason does not jibe with an interpretation that "delivering" means personal service only. The court emphasized that the reason the service was defective was that the mail carrier delivering the subpoena was not necessarily one of the authorized process servers under Rule 45(B): "a sheriff, bailiff, coroner, clerk of court, constable, or a deputy of any, . . . an attorney at law, or . . . any other person designated by order of court who is not a party and is not less than eighteen years of age." Indeed, the court acknowledged that delivery by certified mail was not prohibited per se, but rather that "[t]here has been no suggestion in this case that the mail carrier who delivered GZK's subpoena fit within any of the foregoing categories." *Id.* n.3.

[42] OKLA. STAT. tit. 12, § 2004.1(B)(1) ("Service of a subpoena upon a person named therein shall be made by delivering . . . a copy thereof to such person . . . ."). It is uncertain whether this statute requires personal service on parties. *Compare* Waddle v. Waddle, 868 P.2d 751, 752–53 (Okla. Civ. App. 1994) (personal service required on a party; party's attorney is insufficient), *with* State *ex rel.* Mashburn v. $18,007.00 in U.S. Currency, 290 P.3d 771, 775

9. Oregon[43]

10. Utah[44]

11. Wyoming[45]

n.2 (Okla. Civ. App. 2012) (service of a subpoena duces tecum is made on a party through the party's attorney).

[43] In general, Oregon expressly requires personal delivery. OR. R. CIV. P. 55(B)(2)(a) (unless an exception applies, "the subpoena must be personally delivered to the witness"); 9(B) (expressly defining "delivery of a copy" for purposes of Rule 9).

But see OR. REV. STAT. § 44.552(1) (requiring either personal delivery to the officer or employer or else "delivering a copy" to the officer's or employee's immediate superior). I found no cases interpreting this provision.

[44] UTAH R. CIV. P. 4(d)(1)(A) ("by delivering them to an agent authorized by appointment or by law to receive process"). I did not find any cases addressing whether "delivering" to an agent requires personal service on the agent. One court thought it an "interesting question" but did not resolve the issue because it had been waived. Martinez v. Dale, 476 P.3d 136, 141 n.7 (Utah Ct. App. 2020).

[45] WYO. R. CIV. P. 45(b)(1) ("Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."). I found no cases interpreting this provision.

D. 11 States Do Not Use an Unqualified "Delivering" in Their Subpoena-Service Rules

These states either do not use language essentially the same as "delivering a copy" or else qualify that language with a term like "personally" to make unambiguous what is meant.

1. Connecticut[46]
2. Georgia[47]
3. Illinois[48]
4. Michigan[49]
5. Mississippi[50]
6. Nebraska[51]

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[46] CONN. GEN. STAT. § 52-143. Connecticut does not specify any means of service in its applicable statute. Rather, the test developed in the case law is whether the person subpoenaed was "given notice of [the subpoena] and its contents." State v. Burrows, 500 A.2d 970, 972 (Conn. App. Ct. 1985); *see also In re* Est. of D'Addario, No. X10UWYCV126016880, 2014 WL 1193554, at *6–7 (Conn. Super. Ct. Feb. 25, 2014) (collecting cases applying the test and describing the inquiry as "fact intensive").

[47] GA. CODE ANN. § 24-13-24 ("A subpoena may be served by any sheriff, by his or her deputy, or by any other person not less than 18 years of age. . . . Subpoenas may also be served by registered or certified mail or statutory overnight delivery . . . . Service upon a party may be made by serving his or her counsel of record."). Case law indicates that nonparties may be served only by personal service if not served by registered or certified mail or statutory overnight delivery. *See* Mijajlovic v. State, 347 S.E.2d 325, 326 (Ga. Ct. App. 1986); Edenfield v. State, 249 S.E.2d 316, 317 (Ga. Ct. App. 1978). (Note that these two cases dealt with previous versions of the statute.)

[48] ILL SUP. CT. R. 204(a)(2)–(3), 237(a)–(b). Illinois incorporates an "actual knowledge" standard into its subpoena-service rule; proof of service by mail is "prima facie" evidence of service.

[49] MICH. CT. R. 2.105(A) ("delivering . . . personally"); 2.107(C)(1)–(2) (expressly defining "delivery" for the purposes of Rule 2.107).

[50] MISS. R. CIV. P. 45(c)(1) ("Service of the subpoena shall be executed upon the witness personally.").

[51] NEB. CT. R. DISC. § 6-334(A)(a)(4) ("A subpoena pursuant to this rule shall be served either personally . . . ."); NEB. REV. STAT. § 25-1226(1) ("by leaving the subpoena with the person to be served").

7. New Hampshire[52]
8. Pennsylvania[53]
9. South Dakota[54]
10. Virginia[55]
11. West Virginia[56]

[52] N.H. REV. STAT. ANN. § 516:5 ("by giving to [the person] in hand an attested copy of[] the writ of summons").

[53] PA. R. CIV. P. 234.2(b) ("in the manner prescribed by Rule 402(a)"); 402(a)(1)–(2) ("by handing a copy").

[54] S.D. CODIFIED LAWS § 15-6-4(d) ("The summons shall be served by delivering a copy thereof. Service in the following manner shall constitute personal service:"). Because the listed manners of service qualify "delivery" with "personally," I do not consider this a use of an unqualified "delivering."

[55] In general, Virginia makes clear that delivery is in person. VA. CODE ANN. § 8.01-296(1) ("delivering a copy thereof in writing to the party in person").

Two provisions do use "delivery" without the "in person" qualification. *Id.* §§ 8.01-296(2)(a) ("If the [person] to be served is not found at [the person's] usual place of abode, by delivering a copy . . . and giving information of its purport" to a family member at least 16 years old who resides there); 8.01-298(1) ("At [the witness's] usual place of business or employment during business hours, by delivering a copy thereof and giving information of its purport to the person found there in charge"). But other context in the statutes makes clear that the subpoena is being delivered personally to *someone*. The first provision implies that the process-server is physically at the subpoenaed person's residence, giving information about the subpoena to the family member in residence. And the second provision implies that the process-server is physically at the subpoenaed person's place of business during business hours, again giving information about the subpoena to someone in charge. I therefore do not count this as an unqualified use of the word "delivering."

[56] W. VA. R. CIV. P. 45(b)(1) ("Service of a subpoena upon a person named therein shall be made in the same manner provided for service of process under Rule 4(d)(1)(A) . . . ."; 4(d)(1)(A) ("Delivering a copy of the summons and complaint to the individual personally").

Part II

A. 13 States Permit Serving a Subpoena in the Same Way as a Summons

This category attempts to capture states that treat service basically the same for a summons and a subpoena—or that are even more permissive for subpoena service. It does not include states that incorporate only a few select methods of service of a summons.

1. Indiana[57]
2. Kansas[58]
3. Kentucky[59]
4. Louisiana[60]
5. Michigan[61]
6. Nevada[62]
7. New York[63]
8. North Dakota[64]

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[57] IND. TRIAL R. 45(C) ("Service may be made in the same manner as provided in Rule 4.1, Rule 4.16 and Rule 5(B).").

[58] KAN. STAT. ANN. § 60-245 ("Service of a subpoena . . . must be made in accordance with K.S.A. 60-303, and amendments thereto . . . .").

[59] KY. R. CIV. P. 45.03(1) ("A subpoena may be served in any manner that a summons might be served.").

[60] LA. CODE CIV. PROC. ANN. art. 1355(A) ("[A] subpoena shall be served and a return thereon made in the same manner and with the same effect as a service of and return on a citation.").

[61] MICH. CT. R. 2.506(G)(1) ("A subpoena may be served . . . in the manner provided by MCR 2.105.").

[62] NEV. R. CIV. P. 45(b)(1) (subpoena may be served "as appropriate under Rule 4.2 or 4.3"); *see also In re* Amend. of Nev. Just. Ct. Rules of Civ. Proc., ADKT 0607 (Nev. May 12, 2023), NV ORDER 23-0014 (Westlaw) (new Rules 45, 4.2, and 4.3).

[63] N.Y. C.P.L.R. 2303(a) ("A subpoena . . . shall be served in the same manner as a summons . . . .").

[64] N.D. R. CIV. P. 45(b)(1)(A) ("A subpoena to a named person must be served under Rule 4(d).").

9. Pennsylvania[65]
10. South Carolina[66]
11. South Dakota—except for service by publication[67]
12. Utah[68]
13. Virginia[69]

[65] PA. R. CIV. P. 234.2(b) ("A copy of the subpoena may be served . . . in the manner prescribed by Rule 402(a) . . . .").

[66] S.C. R. CIV. P. 45(b)(1) ("Service of a subpoena upon a person named therein shall be made in the same manner prescribed for service of a summons and complaint in Rule 4(d) . . . ."); S.C. R. MAGIS. CT. 45(b) ("Service of a subpoena upon a person named in the subpoena shall be made as provided by Rule 6 . . . .").

[67] S.D. CODIFIED LAWS § 15-6-45(c) ("The subpoena shall be served in the same manner as a summons is served, excepting that no service by publication is authorized.").

[68] UTAH R. CIV. P. 45(b)(1) ("Service of a subpoena upon the person to whom it is directed shall be made as provided in Rule 4(d).").

[69] VA. CODE ANN. § 8.01-298 ("In addition to the manner of service on natural persons prescribed in § 8.01-296").

B. 28 States Permit Substituted Service in at Least Some Circumstances

This category intends to capture those states allowing service by leaving a copy of the subpoena with someone other than the person named. If substituted service may be made only on a restricted group of persons, that group is listed next to the state on the list below. Note that the survey excluded provisions for service on persons in the custody of another (e.g., minors, conservatees, inmates, etc.).

1. Alabama[70]
2. California—a state employee or Highway Patrol member[71]
3. Connecticut—a police officer, correctional officer, or physician[72]
4. Florida—any person[73]; potentially for a person with a certain kind of mailing address[74]

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[70] ALA. R. CIV. P. 45(b)(1) ("leaving a copy at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein"). *But see infra* note 117.

[71] CAL. GOV'T CODE §§ 68097.1(a)–(b) (may serve employee's immediate superior or agent designated by the superior); 68097.3 (may serve Highway Patrol member's immediate superior or person in charge of the relevant Highway Patrol office).

[72] CONN. GEN. STAT. §§ 52-143(b) (may serve police officer through chief of police or designee); 52-143(c) (may serve correctional officer through Commissioner of Correction's designee); 52-143(f) (may serve physician through office manager or person in charge at physician's office or principal place of business).

[73] FLA. STAT. § 48.031(1)(a) ("leaving [it] at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of [its] contents").

[74] *Id.* § 48.031(6) ("If the only address for a person to be served which is discoverable through public records is a private mailbox, a virtual office, or an executive office or mini suite, substituted service may be made by leaving a copy . . . with the person in charge" there.).

It is not clear that subsection (6) applies to subpoena service. Subsection (3) says that subpoena service in a civil case must be done under subsection (1), but subsection (6) usually applies in serving *process* under subsection (1). So it is not clear from the face of the statute whether subsection (3)'s mandatory reference to subsection (1) for serving *subpoenas* incorporates the exception from subsection (6).

A federal magistrate judge has opined, albeit in dictum, that subsection (6) does apply to subpoena service. Anthony v. FDE Mktg. Grp. LLC, Case No. 21-23345-MC, 2021 WL 5937683, at *3–4 (S.D. Fla. Dec. 16, 2021).

5. Idaho—a party to the action[75]

6. Illinois—a party to the action or a party's officer, director, or employee[76]

7. Indiana—any person;[77] a party to the action[78]

8. Kansas[79]

9. Kentucky—any person;[80] a person transacting business in the state[81]

10. Louisiana—any person;[82] an attorney acting as a designated agent for a client;[83] a physician[84]; a party to the action[85]

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[75] IDAHO R. CIV. P. 5(b)(2)(B)(i) ("at the [attorney]'s office with a clerk or other person in charge"); 5(b)(2)(B)(ii) ("if the [attorney] has no office or the office is closed, at the [attorney]'s dwelling or usual place of abode with someone over the age of 18 years who resides there").

[76] ILL. SUP. CT. R. 204(a)(3) (for depositions); 237(b) (for trials and evidentiary hearings).

[77] IND. TRIAL R. 4.1(A)(4) ("serving [the person's] agent as provided by rule, statute or valid agreement"); 4.1(B) ("[T]he person making the service also shall send by first class mail, a copy of the summons and the complaint to the last known address of the person being served . . . .").

[78] IND. TRIAL R. 5(B)(1)(b) ("leaving it at [the party or counsel's] office with a clerk or other person in charge thereof"); 5(B)(1)(c) ("leaving it at [the party or counsel's] dwelling house or usual place of abode with some person of suitable age and discretion then residing therein").

[79] KAN. STAT. ANN. § 60-303(d)(1)(B) ("leaving a copy . . . at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there").

[80] KY. R. CIV. P. 4.04(2) ("delivering a copy . . . to an agent authorized by appointment or by law to receive service of process for such individual).

[81] KY. R. CIV. P. 4.04(9) (for a "nonresident individual who transacts business through an office or agency in [Kentucky], or a resident individual who transacts business through an office or agency in any action growing out of or connected with the business of such office or agency, by serving the person in charge thereof").

[82] LA. CODE CIV. PROC. ANN. arts. 1231, 1234 ("Domiciliary service is made when a proper officer leaves the [subpoena] at the dwelling house or usual place of abode of the person to be served with a person of suitable age and discretion residing in the domiciliary establishment."); 1235(A) ("Service is made on a person who is represented by another by appointment of court, operation of law, or mandate, through personal or domiciliary service on such representative.").

[83] *Id.* art. 1235(B)–(C) (secretary at attorney's office may accept service).

[84] *Id.* art. 1236 (clerical employee at physician's office may accept service unless physician is party to the action).

[85] *Id.* art. 1355(A) ("When a party is summoned as a witness, service of the subpoena may be made by personal service on the witness' attorney of record.").

11. Maryland—any person;[86] a party to the action (except for a foreign subpoena in conjunction with a deposition)[87]

12. Michigan—any person;[88] a nonresident of the state;[89] a person doing business under an assumed name;[90] a party to the action or an officer, director, or managing agent of a party[91]

13. Minnesota—any person, but potentially not for a subpoena duces tecum[92]

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[86] MD. R. 2-422.1(e) ("by delivering a copy . . . to an agent authorized by appointment or by law to receive service for the person named"); 2-510(d) (same); 2-510.1(f) (same); 3-510(d) (same).

[87] MD. R. 2-422.1(e) ("Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney under Rule 1-321 (a)."); 2-510(d) (same); 3-510(d) (same); 1-321(a) ("leaving it at the office of the [party's attorney] to be served with an individual in charge . . . or, if the office is closed or the [attorney] has no office, leaving it at the dwelling house or usual place of abode of that [attorney] with some individual of suitable age and discretion who is residing there").

[88] MICH. CT. R. 2.105(I)(1) ("serving a summons and a copy of the complaint on an agent authorized by written appointment or by law to receive service of process").

[89] MICH. CT. R. 2.105(B)(1) ("by (a) serving [a copy] in Michigan on an agent, employee, representative, sales representative, or servant of the [named person], and (b) sending [a copy] by registered mail addressed to the [named person] at his or her last known address").

[90] MICH. CT. R. 2.105(B)(4) ("by (a) serving [a copy] on the person in charge of an office or business establishment of the individual, and (b) sending [a copy] by registered mail addressed to the individual at his or her usual residence or last known address").

[91] MICH. CT. R. 2.107(C)(1)(b) ("leaving it at the [party's] attorney's office with the person in charge"); 2.107(C)(1)(c) ("if the office is closed or the attorney has no office, by leaving it at the attorney's usual residence with some person of suitable age and discretion residing there"); 2.107(C)(2)(b) ("leaving it at the party's usual residence with some person of suitable age and discretion residing there").

[92] MINN. R. CIV. P. 45.02(a) ("leaving a copy at the person's usual place of abode with some person of suitable age and discretion then residing therein"); *id.* ("A subpoena commanding production . . . must be served on the subject of the subpoena . . . .").

There is conflict over whether a subpoena duces tecum can be served by leaving a copy with someone living at the named person's residence. *Compare* Norsetter v. Minnesota Twins, LLC, A19-1731, 2020 WL 4932350, at *3 (Minn. Ct. App. Aug. 24, 2020) ("[A] party must serve a subpoena *duces tecum* directly on the person or entity who must comply with the subpoena."), *with* Huber v. Vohnoutka, No. A14-140, 2015 WL 1514193, at *5 (Minn. Ct. App. Apr. 6, 2015) (interpreting personal service and residential service as the two proper ways to effect service of a subpoena duces tecum).

14. Nevada—any person;[93] a current or former public officer or employee, whether state or local[94]

15. New Mexico—a party to the action[95]

16. New York—any person;[96] a party to the action[97]

17. North Dakota[98]

[93] NEV. R. CIV. P. 4.2(a)(2) ("leaving a copy . . . at the individual's dwelling or usual place of abode with a person of suitable age and discretion who currently resides therein and is not an adverse party to the individual being served"); 4.2(a)(3) ("delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process").

[94] NEV. R. CIV. P. 4.2(d)(2) (for current or former state public officer or employee, must serve state attorney general and serve either officer or employee or designated agent); 4.2(d)(4) (for current or former local public officer or employee, may serve designated agent).

[95] N.M. DIST. CT. R. CIV. P. 1-005(B) ("delivering a copy to the attorney"); 1-005(C)(1) ("Delivering a copy" includes "(a) handing it to the attorney," "(c) leaving it at the attorney's . . . office with a clerk or other person in charge thereof," and (d) "leaving it at the [attorney]'s dwelling house or usual place of abode with some person of suitable age and discretion then residing there" if "the attorney's . . . office is closed or the [attorney] has no office."); *see also* N.M. MAGIS. CT. R. CIV. P. 2-203(B); 2-203(C)(1)(a), (c)–(d); N.M. METRO. CT. R. CIV. P. 3-203(B); 3-203(C)(1)(a), (c)–(d); N.M. MUN. CT. R. CIV. P. 8-208(B); 8-208(C)(1)(a), (c)–(d); *supra* note 32.

[96] N.Y. C.P.L.R. 308(2) ("delivering [a copy] within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served" and also mailing a copy); *see also* N.Y. C.P.L.R. 308(3) ("delivering [a copy] within the state to the agent for service of the person to be served as designated under rule 318"). *But see* Patrick M. Connors, *McKinney Practice Commentary*, N.Y. C.P.L.R. 2303, C2303:3 ("Such agencies are infrequent, and the use of CPLR 308(3) for service of a subpoena is as rare as a chipmunk with sun glasses.").

[97] N.Y. C.P.L.R. 2103(b)(3) ("if the [party's] attorney's office is open, by leaving the paper with a person in charge"); 2103(b)(4) ("leaving it at the attorney's residence within the state with a person of suitable age and discretion").

[98] N.D. R. CIV. P. 4(d)(2)(A)(ii) ("leaving a copy . . . at the individual's dwelling or usual place of residence in the presence of a person of suitable age and discretion who resides there"); 4(d)(2)(A)(iii) ("delivering, at the office of the process server, a copy . . . to the individual's spouse if the spouses reside together"); 4(d)(2)(A)(iv) ("delivering a copy . . . to the individual's agent authorized by appointment or by law to receive service of process").

18. Oregon—a peace officer served in a professional capacity;[99] a police officer or employee of state police department;[100] a party or an officer, director, or member of a party organization[101]

19. Pennsylvania[102]

20. Rhode Island—a party to the action[103]

21. South Carolina[104]

22. South Dakota[105]

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[99] OR. R. CIV. P. 55(B)(3)(b) ("substitute service of a copy . . . on an individual designated by the law enforcement agency that employs the peace officer or, if a designated individual is not available, then on the person in charge").

[100] OR. REV. STAT. § 44.552(1) ("delivering a copy . . . to the officer's or employee's immediate superior").

[101] OR. R. CIV. P. 9(B) ("leaving it at the [party's or party's attorney's] office with the person who is apparently in charge . . . or, if the office is closed or the person to be served has no office, leaving the copy at the person's dwelling house or usual place of abode with some person 14 years of age or older then residing therein").

[102] PA. R. CIV. P. 402(a)(2)(i) ("at the residence of the [named person] to an adult member of the family with whom he resides; but if no adult member of the family is found, then to an adult person in charge of such residence"); 402(a)(2)(ii) ("at the residence of the [named person] to the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which he resides"); 402(a)(2)(iii) ("at any office or usual place of business of the [named person] to [the person's] agent or to the person for the time being in charge thereof").

[103] R.I. SUPER. CT. R. CIV. P. 5(b)(3)(A) ("Delivering a copy to the [party's attorney] by: (i) Handing it to the [attorney] [or] (ii) Leaving it at the [attorney]'s office with a clerk or other person in charge . . . ; or (iii) Leaving it at the [attorney]'s dwelling house or usual place of abode with someone of suitable age and discretion residing there.").

The district-court version appears similar at first glance but has significant differences warranting separate treatment. R.I. DIST. CT. R. CIV. P. 5(b)(3)(A) ("Delivering a copy to the [party's attorney] by: (i) Handing it to the [attorney] [or] (ii) Leaving it at the [attorney]'s office with a clerk or other person in charge . . . .").

[104] S.C. R. CIV. P. 4(d)(1) ("leaving copies thereof at [the named person's] dwelling house or usual place of abode with some person of suitable age and discretion then residing therein"); S.C. R. MAGIS. CT. 6(d)(1) ("leaving copies of the summons and complaint at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion"); S.C. R. CIV. P. 4(d)(1) ("delivering a copy to an agent authorized by appointment or by law to receive service of process"); S.C. R. MAGIS. CT. 6(d)(1) (same).

[105] S.D. CODIFIED LAWS § 15-6-4(e) ("If the [named person] cannot be found conveniently, service may be made by leaving a copy at the [person]'s dwelling with someone over the age of fourteen years who resides there.").

23. Tennessee—(for a subpoena for discovery issued from out of state that has been domesticated in Tennessee[106]) a person evading or attempting to evade service;[107] a person with a designated agent for service;[108] certain persons transacting business in the state;[109] a person outside the state[110]

24. Texas—a party to the action[111]

25. Utah[112]

26. Virginia[113]

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[106] TENN. CODE ANN. § 24-9-204 ("A subpoena issued by a clerk of court under § 24-9-203 [domesticating a foreign subpoena for discovery] shall be served in compliance with the Tennessee Rules of Civil Procedure relative to service of process.").

[107] TENN. R. CIV. P. 4.04(1) ("if he or she evades or attempts to evade service, by leaving [a copy] at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein").

[108] *Id.* ("by delivering [a copy] to an agent authorized by appointment or by law to receive service on behalf of the individual served").

[109] TENN. R. CIV. P. 4.04(5) ("Upon a nonresident individual who transacts business through an office or agency in this state, or a resident individual who transacts business through an office or agency in a county other than the county in which the resident individual resides, in any action growing out of or connected with the business of that office or agency, by delivering a copy of the summons and of the complaint to the person in charge of the office or agency.").

[110] TENN. R. CIV. P. 4.05(1) ("Whenever the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made: (a) by any form of service authorized for service within this state pursuant to Rule 4.04 . . . ."); TENN. R. CIV. P. 4B(1) ("Whenever the law of this state permits service of any process, notice, or demand, upon a defendant outside the territorial limits of this state, the secretary of state may be served as the agent for that defendant. Service shall be made by delivering to the secretary of state the original and one copy of such process, notice, or demand, duly certified by the clerk of the court in which the suit or action is pending or brought, together with the proper fee.").

[111] TEX. R. CIV. P. 176.5(a) ("If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record."); 21a(a)(2) ("A document not filed electronically may be served in person" on the party's attorney.)

[112] UTAH R. CIV. P. 4(d)(1)(A) ("leaving [it] at the individual's dwelling house or usual place of abode with a person of suitable age and discretion who resides there"); *id.* ("delivering [it] to an agent authorized by appointment or by law to receive process").

[113] VA. CODE ANN. § 8.01-298(1) ("[a]t his or her usual place of business or employment during business hours, by delivering a copy thereof and giving information of its purport to the person found there in charge of such business or place of employment"); *id.* § 8.01-296(2)(a) ("delivering a copy . . . and giving information of its purport to any person found [at

27. Washington[114]

28. Wisconsin—any person;[115] an officer, director, or managing agent of a public or private corporation or a limited liability company who is subpoenaed in the person's official capacity[116]

the named person's usual place of abode], who is a member of [the named person's] family, other than a temporary sojourner or guest, and who is of the age of 16 years or older").

[114] WASH. SUPER. CT. CIV. R. 45(b)(1) ("leaving a copy at such person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein"); WASH. CIV. R. CT. LTD. J. 45(b)(1) (same).

[115] WIS. STAT. § 801.11(1)(b) ("by leaving a copy . . . at the [named person]'s usual place of abode: 1. In the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof; [or] 1m. In the presence of a competent adult, currently residing in the abode of the [named person], who shall be informed of the contents . . . .").

[116] *Id.* § 801.11(5)(a) ("[T]he copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.").

C. 13 States Permit Service by Leaving a Copy Unattended in at Least Some Circumstances

In some states, this method is permissible only if other methods are not available (e.g., if the named person's office is closed or nobody is found at the person's residence). If this form of service may be made only on a restricted group of persons, that group is listed next to the state.

1. Alabama[117]
2. Idaho—a party to the action[118]
3. Indiana—any person;[119] a party to the action or the party's attorney[120]
4. Kansas[121]
5. Maryland—a party to the action (except for a foreign subpoena in conjunction with a deposition)[122]

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[117] ALA. CODE § 12-21-180(c)(1) ("leaving a copy at the place of residence of the witness").

This statute conflicts with Rule 45(b)(1) on several points. For example, who may serve the subpoena (a sheriff under the statute; a broader range of servers under the rule) and how it may be served (certified mail not permitted under the statute; under the rule, if leaving copy at witness's residence, must be left with person of suitable age and discretion).

The rule probably supersedes the statute. The state constitution provides that "[t]he supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts." ALA. CONST. art. VI, § 150 (2022). Although "[t]hese rules may be changed by a general act of statewide application," *id.*, section 12-21-180 was last amended in 1980, while Rule 45(b)(1) was last amended in 2016.

[118] IDAHO R. CIV. P. 5(b)(2)(B)(i) (leaving it "in a conspicuous place in the office" of a party's attorney "if no one is in charge" there).

[119] IND. TRIAL R. 4.1(A)(3), (B) ("leaving a copy . . . at [the named person's] dwelling house or usual place of abode").

[120] IND. TRIAL R. 5(B)(1)(b) ("leaving it in a conspicuous place in" the [party's or party's attorney's] office if no one is in charge there); 5(B)(1)(d) ("leaving it at some other suitable place, selected by the attorney upon whom service is being made, pursuant to duly promulgated local rule").

[121] KAN. STAT. ANN. § 60-303(d)(1)(C) ("leaving a copy . . . at the individual's dwelling or usual place of abode and mailing to the individual by first-class mail, postage prepaid, a notice that the copy has been left at the individual's dwelling or usual place of abode").

[122] MD. R. 2-422.1(e) ("Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney under Rule 1-321 (a)."); 2-510(d) (same); 3-510(d) (same); 1-321(a) ("leaving it in a conspicuous place in the office" of the party's attorney "if there is no one in charge" there).

6. Massachusetts[123]

7. Michigan—a party to the action[124]

8. New Mexico—a party to the action[125]

9. New York—any person[126]; a party to the action[127]

10. Ohio[128]

11. Oregon—a party to the action[129]

12. Rhode Island—a party to the action[130]

13. Virginia[131]

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[123] MASS. R. CIV. P. 45(c) ("leaving a copy at [the named person's] place of abode").

[124] MICH. CT. R. 2.107(C)(1)(b) ("leaving it in a conspicuous place" at the [party's] attorney's office "if no one is in charge or present" there).

[125] N.M. DIST. CT. R. CIV. P. 1-005(B) ("delivering a copy to the attorney"); 1-005(C)(1) ("Delivering a copy" includes (c) "leaving it in a conspicuous place in [the attorney's] office" if no one is in charge there and "(e) leaving it at a location designated by the court for serving papers on attorneys" if certain conditions are met.); *see also* N.M. MAGIS. CT. R. CIV. P. 2-203(B); 2-203(C)(1)(c), (e); N.M. METRO. CT. R. CIV. P. 3-203(B); 3-203(C)(1)(c), (e); N.M. MUN. CT. R. CIV. P. 8-208(B); 8-208(C)(1)(c), (e); *supra* note 32.

[126] N.Y. C.P.L.R. 308(4) (failing other methods of service, "affixing [a copy] to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing [a copy] to such person at his or her last known residence or by mailing [a copy] by first class mail to the person to be served at his or her actual place of business").

[127] N.Y. C.P.L.R. 2103(b)(3) ("if the [party's] attorney's office is open [and] if no person is in charge, by leaving it in a conspicuous place; or if the attorney's office is not open, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney's office letter drop or box").

[128] OHIO R. CIV. P. 45(B) ("leaving it at the person's usual place of residence").

[129] OR. R. CIV. P. 9(B) ("leaving the copy in a conspicuous place" in the party's or counsel's office "if there is no one in charge").

[130] For unexplained reasons, a subpoena may be left unattended at a party's or attorney's *office* in superior-court cases but not district-court cases, and it may be left unattended at a party's or attorney's *home* in district-court cases but not superior-court cases. R.I. SUPER. CT. R. CIV. P. 5(b)(3)(A)(ii) ("at the [party's attorney's] office . . . if no one is in charge, leaving it in a conspicuous place in the office"); R.I. DIST. CT. R. CIV. P. 5(b)(3)(A)(iii) ("Leaving it at the [party's attorney's] dwelling house or usual place of abode.").

[131] VA. CODE ANN. § 8.01-296(2)(b) (failing to find a suitable person at the named person's residence with whom to leave a copy, "posting a copy . . . at the front door or at such other door as appears to be the main entrance of such place of abode").

D. 29 States Permit Service by Mail in at Least Some Circumstances

The type of mail required or permitted in each rule is italicized in the language cited in the footnotes in this section. (Added emphasis will not be marked in those instances.) If mail service may be made only on a restricted group of persons, that group is listed next to the state.

1. Alabama[132]
2. Alaska[133]
3. Arkansas[134]
4. Georgia[135]
5. Idaho—a party to the action[136]
6. Illinois[137]

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[132] ALA. R. CIV. P. 45(b)(1) ("A subpoena issued on behalf of any party may be served . . . by *certified mail* pursuant to the provisions of Rule 4."); 4(i)(2)(B)(i)–(ii).

Of note, Alabama amended Rule 45(b)(1) to include subpoena service by certified mail in order to conform to existing practice. ALA. R. CIV. P. 45(b)(1) committee comments to 2013 amendment ("In 1977, an amendment to then Rule 4.1 allowed service of a summons and complaint by certified mail, but Rule 45 was never amended to extend that practice to subpoenas. In practice, subpoenas are often served by certified mail, and it is reasonable for service of a subpoena to be no more restrictive than service of a summons and complaint or other process.").

[133] ALASKA DIST. CT. R. CIV. P. 45(c) ("A subpoena may also be served by *registered or certified mail*. In such case the clerk shall mail the subpoena *for delivery only to the person subpoenaed* . . . .").

[134] ARK. R. CIV. P. 45(c) ("A subpoena for a trial or hearing or for a deposition may also be served by an attorney of record for a party by *any form of mail* addressed to the person to be served with a *return receipt requested and delivery restricted* to the addressee or agent of the addressee.").

[135] GA. CODE ANN. § 24-13-24 ("Subpoenas may also be served by *registered or certified mail or statutory overnight delivery* . . . ."); *see also id.* § 9-10-12(b) (defining "statutory overnight delivery"). Priority Express U.S. Mail, for example, would qualify as statutory overnight delivery.

[136] IDAHO R. CIV. P. 5(b)(2)(C) ("*mailing* it to the [attorney]'s last known address"). No type of mail is specified.

[137] ILL. SUP. CT. R. 204(a)(2) ("Service of a subpoena by mail may be proved prima facie by a return receipt showing delivery to the deponent or [his or her] authorized agent by *certified or registered mail* . . . ."); 237(a) (same, substituting "witness" for "deponent").

7. Indiana—any person;[138] a party to the action[139]

8. Kansas[140]

9. Kentucky—a person outside the state[141]

10. Louisiana—a person outside the state[142]

[138] IND. TRIAL R. 4.1(A)(1) ("sending a copy of the summons and complaint by *registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained* to his residence, place of business or employment with *return receipt requested* and returned showing receipt of the letter"); 4.1(B) ("Whenever service is made under Clause (3) ['leaving a copy' at the person's 'dwelling house or usual place of abode'] or (4) ['serving [an] agent as provided by rule, statute or valid agreement'] of subdivision (A), the person making the service also shall send by *first class mail*, a copy of the summons and the complaint to the last known address of the person being served . . . .").

[139] IND. TRIAL R. 5(B) ("Service upon the attorney or party shall be made by delivering or mailing a copy of the papers to the last known address . . . ."); 5(B)(2) ("If service is made by mail, the papers shall be deposited in the United States mail addressed to the person on whom they are being served, with *postage prepaid*."). No further specification of mail is given.

[140] KAN. STAT. ANN. § 60-303(c)(1) ("Service of process may be made by return receipt delivery, which is effected by *certified mail*, *priority mail*, commercial courier service, overnight delivery service or other reliable personal delivery service to the party addressed . . . ."); 60-303(c)(5) ("If the sealed envelope is returned with an endorsement showing refusal to accept delivery, the sheriff, party or the party's attorney may send a copy of the process and petition or other document by *first-class mail, postage prepaid*[.] . . . Mere failure to claim the sealed envelope sent by return receipt delivery is not refusal of service within the meaning of this subsection."); 60-303(d)(1)(C) ("If personal or residence service cannot be made on an individual, other than a minor or a disabled person, service is effected by leaving a copy of the process and petition or other document at the individual's dwelling or usual place of abode and mailing to the individual by *first-class mail, postage prepaid*, a notice that the copy has been left at the individual's dwelling or usual place of abode.").

[141] KY. R. CIV. P. 4.04(8) ("Service may be made upon an individual out of this state . . . by *certified mail* in the manner prescribed in Rule 4.01(1)(a) . . . ."); 4.01(1)(a) (stating that the clerk of court must mail the summons and complaint as "*registered mail or certified mail return receipt requested* with instructions to the delivering postal employee to deliver to the addressee only").

[142] LA. STAT. ANN. § 13:3204(A) ("by *registered or certified mail*, or actually delivered to the defendant by commercial courier, when the person to be served is located outside of this state").

11. Maryland—a person in the state or a person outside the state when Maryland law permits it;[143] a party to the action (except for a foreign subpoena in conjunction with a deposition)[144]

12. Michigan—any person;[145] a person residing outside the state;[146] a person doing business under an assumed name;[147] service on a public officer on behalf of a nongovernmental entity;[148] a party to the action[149]

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[143] MD. R. 2-422.1(e) ("as permitted by Rule 2-121 (a)(3)"); 2-510(d) (same); 2-510.1(f) (same); 3-510(d) ("as permitted by Rule 3-121 (a)(3)"); 2-121(a)(3) ("by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by *certified mail requesting: 'Restricted Delivery—show to whom, date, address of delivery'*"); 3-121(a)(3) (same).

[144] MD. R. 2-422.1(e) ("Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney under Rule 1-321 (a)."); 2-510(d) (same); 3-510(d) (same); 1-321(a) ("by *mailing* it to the address most recently stated in a pleading or paper filed by the [party's attorney], or if not stated, to the last known address"). No type of mail is specified.

[145] MICH. CT. R. 2.506(G)(2) ("by *mailing* to a witness a copy of the subpoena and a postage-paid card acknowledging service and addressed to the party requesting service"). No type of mail is specified.

MICH. CT. R. 2.105(A)(2) ("sending a summons and a copy of the complaint by *registered or certified mail, return receipt requested, and delivery restricted* to the addressee").

[146] MICH. CT. R. 2.105(B)(1) ("by (a) serving a summons and a copy of the complaint in Michigan on an agent, employee, representative, sales representative, or servant of the defendant, and (b) sending a summons and a copy of the complaint by *registered mail* addressed to the defendant at his or her last known address"); *see also* MICH. CT. R. 2.105(L)(1) ("If a rule uses the term 'registered mail,' that term includes the term '*certified mail*' . . . .).

[147] MICH. CT. R. 2.105(B)(4) ("by (a) serving a summons and copy of the complaint on the person in charge of an office or business establishment of the individual, and (b) sending a summons and a copy of the complaint by *registered mail* addressed to the individual at his or her usual residence or last known address"); *see also* MICH. CT. R. 2.105(L)(1) (permitting *certified mail* too).

[148] MICH. CT. R. 2.105(I)(2) ("Whenever, pursuant to statute or court rule, service of process is to be made on a nongovernmental defendant by service on a public officer, service on the public officer may be made by *registered mail* addressed to his or her office."); *see also* MICH. CT. R. 2.105(L)(1) (permitting *certified mail* too).

[149] MICH. CT. R. 2.107(C) ("mailing to the attorney at his or her last known business address or, if the attorney does not have a business address, then to his or her last known residence address"); 2.107(C)(3) ("Mailing a copy under this rule means enclosing it in a sealed envelope with *first class postage fully prepaid*, addressed to the person to be served, and depositing the envelope and its contents in the United States mail.").

13. Nebraska—a nonparty from whom discovery is requested without a deposition[150]; a person from whom testimony at a trial or deposition is requested[151]

14. Nevada—a person outside the United States[152]

15. New Jersey[153]

16. New Mexico—any person in a district-court case;[154] a party to the action[155]

[150] NEB. CT. R. DISC. § 6-334(A)(a)(4) ("A subpoena pursuant to this rule shall be served either personally . . . or by *registered or certified mail* . . . .").

[151] NEB. REV. STAT. § 25-1226(1) ("A subpoena for a trial or deposition may be served . . . by sending the subpoena by *certified mail* with a *return receipt requested* . . . .").

[152] NEV. R. CIV. P. 4.3(b)(1)(B) ("[I]f there is no internationally agreed means, or if an international agreement allows but does not specify other means, . . . (iii) unless prohibited by the foreign country's law, by . . . (b) using *any form of mail* that the clerk addresses and sends to the individual *and that requires a signed receipt* . . . ."). No further mail specification is given.

[153] N.J. CT. R. 1:9-3 ("A subpoena which seeks only the production of documents or records may be served by *registered, certified or ordinary mail* and, if served in that manner, shall be enforceable only upon receipt of a signed acknowledgment and waiver of personal service.").

[154] N.M. DIST. CT. R. CIV. P. 1-004(E)(3) ("Service may be made by *mail* or commercial courier service provided that the envelope is addressed to the named defendant and further provided that the defendant or a person authorized by appointment, by law or by this rule to accept service of process upon the defendant *signs a receipt* for the envelope or package . . . ."). No further mail specification is given.

[155] N.M. DIST. CT. R. CIV. P. 1-005(B) ("mailing a copy to the attorney . . . at the attorney's . . . last known address"); 1-005(C)(2) ("Mailing a copy means sending a copy by *first class mail* with proper postage."); *see also* N.M. MAGIS. CT. R. CIV. P. 2-203(B); 2-203(C)(2); N.M. METRO. CT. R. CIV. P. 3-203(B); 3-203(C)(2); N.M. MUN. CT. R. CIV. P. 8-208(B); 8-208(C)(2); *supra* note 32.

17. New York—any person;[156]; a state officer in his or her official capacity;[157] a party to the action[158]

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[156] N.Y. C.P.L.R. 308(2) ("by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence [no type of mail specified] or by mailing the summons by *first class mail* to the person to be served at his or her actual place of business in an envelope *bearing the legend 'personal and confidential'* and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other"); 308(4) (same, but starting with "where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of . . ."). *See also* N.Y. C.P.L.R. 312-a(a) ("by mailing to the person or entity to be served, by *first class mail, postage prepaid*, a copy of the summons and complaint . . . together with two copies of a statement of service by mail and acknowledgement of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender"). *But see* Patrick M. Connors, *McKinney Practice Commentary*, N.Y. C.P.L.R. 2303, C2303:1 ("Some methods of summons service, on the face of things apparently available for subpoena service too because of this adoptive provision of CPLR 2303, are best avoided altogether for subpoena service. Personal service by mail under CPLR 312-a is an example.") (citing David D. Siegel, *New York Practice* § 383 (4th ed. 2005) (noting that recipients have an incentive to delay acknowledging service under the statute)).

There is also CPLR 313 ("A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state . . . ."), which could be reasonably construed to imply that "subpoena service without the state should also be available in certain instances. So the Advisory Committee intended, and so logic and current jurisprudence would dictate, but the law is still to the contrary." Patrick M. Connors, *McKinney Practice Commentary*, N.Y. C.P.L.R. 2303, C2303:6. This is because "Judiciary Law section 2-b, added as part of the 1962 package of CPLR legislation, speaks of a subpoena 'requiring the attendance of a person found in the state.' That language, despite ample Advisory Committee indication to the contrary, has been cited to preclude extrastate service of a subpoena regardless of the soundness of the basis that may exist for it." *Id.*

[157] N.Y. C.P.L.R. 307(2) ("Personal service on a state officer sued solely in an official capacity" may be made "(2) by mailing the summons by *certified mail, return receipt requested*, to such officer . . . and by personal service upon the state in the manner provided by subdivision one of this section.").

[158] N.Y. C.P.L.R. 2103(b)(2) ("mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney's last known address"); 2103(c) (authorizing mail service under CPLR 2103(b)(2) on a party who has not appeared or whose attorney cannot be served); 2013(f)(1) (in CPLR 2103, "'[m]ailing' means the deposit of a paper enclosed in a *first class postpaid* wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the United States").

18. North Carolina[159]

19. North Dakota[160]

20. Ohio[161]

21. Oklahoma[162]

22. Oregon—any person;[163] a person subpoenaed for production but not to appear and testify;[164] a party to the action[165]

23. Pennsylvania[166]

24. Rhode Island—a party to the action[167]

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[159] N.C. R. CIV. P. 45(b)(1) ("by *registered or certified mail, return receipt requested*").

[160] N.D. R. CIV. P. 4(d)(2)(A)(v) ("*any form of mail* or third-party commercial delivery addressed to the individual to be served and *requiring a signed receipt* and resulting in delivery to that individual"); 4(d)(2)(G) ("If service is made on an agent who is not expressly authorized by appointment or by law to receive service of process . . . , a copy . . . must be *mailed* or delivered via a third-party commercial carrier . . . *with return receipt requested* not later than ten days after service by depositing a copy of the summons and complaint, with *postage or shipping prepaid*, in a post office or with a commercial carrier in this state and directed to the defendant to be served at the defendant's last reasonably ascertainable address."). No further mail specification is given in Rule 4(d)(2)(G).

[161] OHIO R. CIV. P. 45(B) ("by placing a sealed envelope containing the subpoena in the United States mail as *certified or express mail return receipt requested*").

[162] OKLA. STAT. tit. 12, § 2004.1(B)(2) ("Service of a subpoena by mail may be accomplished . . . by *certified mail* with *return receipt requested and delivery restricted* to the person named in the subpoena. . . . Failure to make proof of service does not affect the validity of the service, but service of a subpoena by mail shall not be effective if the mailing was not accepted by the person named in the subpoena.").

[163] OR. R. CIV. P. 55(B)(2)(c) ("If the witness waives personal service, the subpoena may be *mailed* to the witness" provided certain conditions are satisfied.). No type of mail specified.

[164] OR. R. CIV. P. 55(C)(2) ("A copy of a subpoena for production that does not contain a command to appear and testify may be served by *mail*."). No type of mail specified.

[165] OR. R. CIV. P. 9(B) ("by *mailing* it to the attorney's or party's last known address"). No type of mail specified.

[166] PA. R. CIV. P. 234.2(b)(2) ("by *any form of mail requiring a return receipt, postage prepaid, restricted delivery*"); 234.2(b)(3) & note ("by *ordinary mail*," but "[a] subpoena served by ordinary mail is not enforceable unless the witness acknowledges having received it").

[167] R.I. SUPER. CT. R. CIV. P. 5(b)(3)(B) ("*Mailing* a copy to the last known address of the [party or attorney]."); R.I. DIST. CT. R. CIV. P. 5(b)(3)(B) (same). No type of mail is specified.

25. South Carolina—in a case in a court of general jurisdiction; [168] a state officer;[169] in a case in the magistrate court[170]

26. South Dakota—any person;[171] a state officer, employee, or agent;[172] a person outside the United States[173]

27. Tennessee—(for a subpoena for discovery issued from out of state that has been domesticated in Tennessee[174]) a person in the United States;[175] a person outside the United States[176]

28. Texas—a party to the action[177]

29. Utah—any person;[178] a person outside the United States[179]

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[168] S.C. R. CIV. P. 4(d)(8) ("by *registered or certified mail, return receipt requested and delivery restricted to the addressee*").

[169] S.C. R. CIV. P. 4(d)(5) ("Upon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by *registered or certified mail* to the Attorney General at Columbia").

[170] S.C. R. MAGIS. CT. 6(d)(6) ("by *certified mail, return receipt requested and delivery restricted to the addressee*").

[171] S.D. CODIFIED LAWS § 15-6-4(i) ("mailing a copy of the summons, two copies of the notice and admission of service, . . . and a return envelope, postage prepaid, addressed to the sender"). No type of mail is specified.

[172] *Id.* § 15-6-4(d)(6) ("*certified mail*, *postage prepaid* to the attorney general together with an admission of service and a return envelope, postage prepaid, addressed to the sender").

[173] *Id.* § 15-6-4(d)(9)(ii) ("If there is no internationally agreed means of service, service reasonably calculated to give notice may be made: . . . (C) Unless prohibited by the law of the foreign country; by delivery to the individual . . . by *any form of mail requiring a signed receipt* . . . ."). No further mail specification is given.

[174] TENN. CODE ANN. § 24-9-204; *see supra* note 106.

[175] TENN. R. CIV. P. 4.05(1) ("Whenever the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made: (a) by any form of service authorized for service within this state pursuant to Rule 4.04 . . . ."); TENN. R. CIV. P. 4.04(10) ("by *registered return receipt or certified return receipt* mail").

[176] TENN. R. CIV. P. 4A(2) ("[I]f there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice: . . . (C) unless prohibited by the law of the foreign country, by . . . (ii) *any form of mail requiring a signed receipt*, to be addressed and dispatched by the clerk of the court to the party to be served . . . ."). No further mail specification is given.

[177] TEX. R. CIV. P. 21a(a)(2) ("A document not filed electronically may be served" on the party's attorney "by *mail* . . . ."). No type of mail is specified. *See also supra* note 111.

[178] UTAH R. CIV. P. 4(d)(2)(A) ("by *mail* or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt"). No further mail specification is given.

[179] UTAH R. CIV. P. 4(d)(4)(B) ("[I]f there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service

E. 9 States Permit Service by Commercial Courier in at Least Some Circumstances

If commercial-courier service may be made only on a restricted group of persons, that group is listed next to the state.

1. Georgia[180]
2. Kansas[181]
3. Louisiana—a person outside the state[182]
4. New Mexico—in a district-court case[183]
5. New York—a party to the action[184]
6. North Dakota[185]
7. South Carolina[186]
8. Texas—a party to the action[187]
9. Utah[188]

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is reasonably calculated to give notice: . . . (iii) unless prohibited by the law of the foreign country, by delivering a copy of the summons and complaint to the individual . . . by *any form of mail requiring a signed receipt*, addressed and dispatched by the clerk of the court to the party to be served . . . ."). No further mail specification is given.

[180] GA. CODE ANN. §§ 24-13-24 (permitting delivery by "statutory overnight delivery"); 9-10-12(b) (defining "statutory overnight delivery" to include commercial firms).

[181] KAN. STAT. ANN. § 60-303(c)(1); *see also supra* note 140.

[182] LA. STAT. ANN. § 13:3204(A), 13:3204(D) (defining "commercial courier"); *see also supra* note 142.

[183] N.M. DIST. CT. R. CIV. P. 1-004(E)(3); *see also supra* note 154.

[184] N.Y. C.P.L.R. 2103(b)(6) ("by dispatching the paper to the attorney by overnight delivery service at the address designated by the attorney for that purpose or, if none is designated, at the attorney's last known address"; "'Overnight delivery service' means any delivery service which regularly accepts items for overnight delivery to any address in the state[.]").

[185] N.D. R. CIV. P. 4(d)(2)(A)(v); 4(d)(2)(G); *see also supra* note 160.

[186] S.C. R. CIV. P. 4(d)(9) ("by a commercial delivery service which meets the requirements to be considered a designated delivery service in accordance with 26 U.S.C. § 7502(f)(2)"); S.C. R. MAGIS. CT. 6(d)(7) (same).

[187] TEX. R. CIV. P. 21a(a)(2) ("A document not filed electronically may be served" on the party's attorney "by commercial delivery service . . . ."). *See also supra* note 111.

[188] UTAH R. CIV. P. 4(d)(2)(A); *see also supra* note 178.

F. 11 States Permit Some Form of Electronic Service in at Least Some Circumstances

The type of electronic service permitted is italicized in the language cited in the footnotes in this section. (Added emphasis will not be marked in those instances.) If electronic service may be made only on a restricted group of persons, that group is listed next to the state.

1. Arkansas—a person residing in the county where the hearing will be held[189]
2. Idaho—a party to the action[190]
3. Indiana—a party to the action[191]
4. Michigan—a representative of a government agency;[192] a party to the action[193]

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[189] ARK. R. CIV. P. 45(c) ("by *telephone* by a sheriff or his deputy when the trial or hearing is to be held in the county of the witness' residence").

[190] IDAHO R. CIV. P. 5(b)(2)(E) ("sending it by *electronic means* if the [party's attorney] consented in writing"); 5(b)(2)(F) ("transmitting the copy by a *facsimile machine process*").

[191] IND. TRIAL R. 5(B) ("where service is by electronic means approved by the Indiana Office of Judicial Administration (IOJA) a copy of the documents to the *fax number or e-mail address* set out in the appearance form or correction as required by Rule 3.1(E)"); 5(B)(3)(b) ("A party who has consented to service by electronic means approved by IOJA may be served by *transmitting a link to or copy of the document*.").

[192] MICH. CT. R. 2.506(G)(3) ("A subpoena or order to attend directed to the Michigan Department of Corrections, Michigan Department of Health and Human Services, Michigan State Police Forensic Laboratory, other accredited forensic laboratory, law enforcement, or other governmental agency may be served by *electronic transmission, including by facsimile or over a computer network*, provided there is a memorandum of understanding between the parties indicating the contact person, the method of transmission, and the e-mail or facsimile number where the subpoena or order to attend should be sent.").

[193] MICH. CT. R. 2.107(C)(1)(a) ("serving it [on the party's attorney] electronically under MCR 1.109(G)(6)(a)"); 2.107(C)(2)(a) ("serving it [on the party] electronically under MCR 1.109(G)(6)(a)"); 1.109(G)(6)(a)(iii) ("Delivery of documents *through the electronic-filing system* in conformity with these rules is valid and effective personal service and is proof of service under Michigan Court Rules."); MICH. CT. R. 2.107(C)(4) (permitting parties to agree to service by *email*, *text message*, or an "*alert* consisting of an e-mail or text message to log into a secure website to view notices and court papers").

Indeed, electronic service is strongly encouraged by Michigan's rules in a COVID-era amendment; the requirement for parties to agree on email service under Rule 2.017(C)(4) has been relaxed. MICH. CT. R. 2.107(G) ("Notwithstanding any other provision of this rule, until

5. New Mexico—a party to the action[194]

6. New York—a party to the action[195]

7. North Carolina—a person subpoenaed for attendance only, not for production[196]

8. Oregon—a party to the action[197]

9. Rhode Island—a party to the action[198]

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further order of the Court, all service of process except for case initiation must be performed using electronic means (*e-Filing* where available, *email*, or *fax*, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of subsection (C)(4).").

[194] N.M. DIST. CT. R. CIV. P. 1-005(B) ("delivering a copy to the attorney"); 1-005(C)(1) ("Delivering a copy" includes "(b) sending a copy by *facsimile* or *electronic transmission* when permitted by Rule 1-005.1 NMRA or Rule 1-005.2 NMRA."); *see also* N.M. MAGIS. CT. R. CIV. P. 2-203(B); 2-203(C)(1)(b); N.M. METRO. CT. R. CIV. P. 3-203(B); 3-203(C)(1)(b); N.M. MUN. CT. R. CIV. P. 8-208(B); 8-208(C)(1)(b); *supra* note 32.

[195] N.Y. C.P.L.R. 2103(b)(5) ("by transmitting the paper to the [party's] attorney by *facsimile transmission*"); 2103(b)(7) ("by transmitting the paper to the attorney by *electronic means where and in the manner authorized by the chief administrator of the courts by rule*").

Although not expressly permitted by statute, there has been a case in which a court allowed service (of a summons) by Facebook message under CPLR 308(5). *See* Vincent C. Alexander, *McKinney Practice Commentary*, CPLR 308, C308:6 (2015) ("[A] court has found that a defendant's Facebook page [author's note—probably "Facebook account" is intended; notice was ordered sent by direct message, not posted on the defendant's public Facebook page] can be a reasonably effective medium for the service of process . . . provided the plaintiff advised the defendant by phone and text message that service by Facebook was being made.") (citing Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709 (Sup. Ct. 2015)).

[196] N.C. R. CIV. P. 45(b)(1) ("Service of a subpoena for the attendance of a witness only may also be made by *telephone* communication with the person named therein only by a sheriff, the sheriff's designee who is not less than 18 years of age and is not a party, or a coroner.").

[197] OR. R. CIV. P. 9(B) (service on a party or party's attorney may be made by "by *e-mail* as provided in section G of this rule; by *electronic service* as provided in section H of this rule; or, if the party is represented by an attorney, by *facsimile communication* as provided in section F of this rule."); 9(F)–(H) (putting mild conditions on the three means of electronic service).

[198] R.I. SUPER. CT. R. CIV. P. 5(b)(2) ("For attorneys and self-represented litigants who are Registered Users, service is made electronically using the EFS."). R.I. DIST. CT. R. CIV. P. 5(b)(2) (same).

10. Tennessee[199]

11. Texas—a party to the action[200]

[199] TENN. R. CIV. P. 45.09 ("For purposes of issuance of any subpoena under Rule 45, the clerk of the court in which the action is pending may issue the subpoena in either written paper or electronic form. . . ."). I did not find any cases expressly saying so, but it seems that "delivering" in Rule 45.03 must—at least since the adoption of Rule 45.09 in 2022—now include at least electronic delivery.

[200] TEX. R. CIV. P. 21a(a)(1) ("A document filed electronically under Rule 21 must be served electronically through the *electronic filing manager* if the email address of the . . . attorney to be served is on file with the electronic filing manager."); 21a(a)(2) ("A document not filed electronically may be served" on the party's attorney "by *fax*" or "by *email* . . . ."). *See also supra* note 111.

G. 6 States Permit Reading a Subpoena Aloud as a Form of Service

If this form of service may be made only on a restricted group of persons, that group is listed next to the state.

1. Massachusetts[201]
2. Missouri—a person subpoenaed to testify[202]
3. New Hampshire[203]
4. Ohio[204]
5. Washington—in a case in the district court (a court of limited jurisdiction)[205]
6. Wisconsin[206]

[201] MASS. R. CIV. P. 45(c) ("by exhibiting it and reading it to [the person]").

[202] MO. REV. STAT. § 491.120(1) ("by reading the [subpoena]").

[203] N.H. REV. STAT. ANN. § 516:5 ("by reading to [the person] . . . an attested copy of[] the writ of summons").

[204] OHIO R. CIV. P. 45(B) ("by reading it to him or her in person").

[205] *See* WASH. REV. CODE § 12.16.020 (subpoena may be served in district-court case "by reading it to the witness").

But see WASH. CIV. R. CT. LTD. J. 45(b)(1) (not specifying reading aloud as a method of service). The statute above applies to civil procedure in the district court, which is a court of limited jurisdiction in Washington. Civil Rule 81(b) for Courts of Limited Jurisdiction provides that the rules "supersede all procedural statutes and other rules that may be in conflict."

Even so, the statute likely supersedes Civil Rule 45 for Courts of Limited Jurisdiction in district-court cases. The statute was last amended effective June 10, 2010, which is later than the most recent amendment of Civil Rule 45 for Courts of Limited Jurisdiction, on Sept. 1, 2009.

[206] WIS. STAT. § 885.03 ("by exhibiting and reading it to the witness").

H. At Least 6 States Recognize an Offer of Service or a Refusal to Accept Service as Effective Service

These states express in their subpoena-service rules or statutes (or rules or statutes incorporated by reference) that refusal of service is an effective. It is possible that other states have incorporated similar provisions through case law; my survey did not attempt to catalog those states.

1. Indiana—only on a party to the action[207]
2. Kansas[208]
3. Kentucky[209]
4. Missouri[210]
5. Tennessee[211]

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[207] IND. TRIAL R. 4.16(A)(1) ("Offering or tendering the papers to the person being served and advising the person that he or she is being served is adequate service."); 4.16(A)(2) ("A person who has refused to accept the offer or tender of the papers being served thereafter may not challenge the service of those papers."); 5(B)(1)(a) ("Refusal to accept an offered or tendered document is a waiver of any objection to the sufficiency or adequacy of service of that document.").

[208] KAN. STAT. ANN. § 60-303(d)(4) ("In all cases when the person to be served, or an agent authorized by the person to accept service of process, refuses to receive the process, the offer of the duly authorized process server to deliver the process, and the refusal, is sufficient service of process.").

[209] KY. R. CIV. P. 4.04(2) (service is effective "by offering personal delivery to [the named] person" "if "acceptance is refused").

[210] MO. REV. STAT. § 491.120(1) ("in all cases where the witness shall refuse to hear such subpoena read or to receive a copy thereof, the offer of the officer or other person to read the same or to deliver a copy thereof, and such refusal, shall be a sufficient service of such subpoena").

[211] TENN. CODE ANN. § 16-15-708(a) ("offering to deliver a copy of the subpoena to the person to whom it is directed"); TENN. R. CIV. P. 45.03 ("offering to deliver a copy of the subpoena to the person to whom it is directed"); TENN. R. CIV. P. 4.04(11) ("When service of a summons, process, or notice is provided for or permitted by registered or certified mail under the laws of Tennessee and the addressee or the addressee's agent refuses to accept delivery and it is so stated in the return receipt of the United States Postal Service, the written return receipt if returned and filed in the action shall be deemed an actual and valid service of the summons, process, or notice."); TENN. R. CIV. P. 4.05(5) (same); TENN. R. CIV. P. 4B(6) ("The refusal or failure of a defendant, or the defendant's agent, to accept delivery of the registered or certified mail provided for in subpart (1) [sic—"subpart (2)" probably intended], or the refusal or failure to sign the return receipt, shall not affect the validity of such service; and

6. Utah[212]

any such defendant refusing or failing to accept delivery of such registered or certified mail shall be charged with knowledge of the contents of any process, notice, or demand contained therein.")

[212] UTAH R. CIV. P. 4(d)(1) ("If the person to be served refuses to accept a copy . . . , service is sufficient if the person serving [it] states the name of the process and offers to deliver [it].").

I. At Least 11 States Potentially Permit a Form of Constructive Service

The text of the subpoena-service rules in the following states could allow for constructive service in some situations. I have not confirmed through case law that these states in fact do allow constructive subpoena service (and at least in New York, it seems unlikely that a court would allow it). It is also possible that other states have incorporated similar provisions through case law; my survey did not attempt to catalog those states.

1. Colorado—in a case in a court of general jurisdiction[213]
2. Idaho—a party to the action[214]
3. Kentucky—specific kinds of persons[215]
4. Michigan—any person[216]; a party to the action[217]

[213] COLO. R. CIV. P. 45(b)(2) (court may order means of service "consistent with due process").

[214] IDAHO R. CIV. P. 5(b)(2)(D) ("leaving it with the court clerk if the [party's attorney] has no known address").

[215] KY. R. CIV. P. 4.05 (may constructively serve "(a) [a]n individual who is a nonresident of this state and known or believed to be absent therefrom"; "(c) an individual who has been absent from the state for four months or who has departed therefrom with the intent to delay or defraud his creditors;" "(d) an individual who has left the county of his residence to avoid the service of a summons or has so concealed himself that a summons cannot be served upon him"; or "(e) an individual whose name or place of residence is unknown"; "the clerk shall forthwith, subject to the provisions of Rule 4.06, make an order upon the complaint warning the party to appear and defend the action within 50 days"); 4.08 (person "constructively summoned shall be deemed to have been summoned on the 30th day after the entry of a warning order and the action may proceed accordingly").

[216] MICH. CT. R. 2.105(J)(1) (if service cannot reasonably be made as provided by Rule 2.105, the court may order service "made in any other manner reasonably calculated to give the [named person] actual notice of the proceedings and an opportunity to be heard").

[217] MICH. CT. R. 2.107(E) (when service on a party or party's counsel "cannot reasonably be made because there is no attorney of record, because the party cannot be found, or for any other reason, the court, for good cause on ex parte application, may direct in what manner and on whom service may be made").

5. Nevada—a person not in the United States[218]

6. New York—any person;[219] in certain kinds of cases;[220] a party to the action[221]

7. South Dakota—a person outside the United States[222]

8. Tennessee—for a subpoena for discovery issued from out of state that has been domesticated in Tennessee[223]

9. Texas—a party to the action[224]

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[218] NEV. R. CIV. P. 4.3(b)(1)(C) ("by other means not prohibited by international agreement, as the court orders"); NEV. JUSTICE CT. R. CIV. P. 4.3(b)(1)(C) (same, effective July 11, 2023).

[219] N.Y. C.P.L.R. 308(5) ("in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section").

But see Snyder v. Alternate Energy Inc., 857 N.Y.S.2d 442, 448 (Civ. Ct. 2008) ("A prime example of a type of alternate service that is almost certain not to provide actual notice to a defendant turns out to be one of the most frequently used. This is service by publication. Buried in small type in the back pages of a newspaper, legal notices may very well be some of the least read prose ever composed. It is clearly no secret that the chances of a defendant leafing through the *New York Law Journal* or the *Village Voice* and happening upon a summons intended for him or her are remote at best."). Because New York courts do not often subject a subpoenaed witness to contempt "if the delay between . . . substituted service and the witness's actual learning of it is explainable," Patrick M. Connors, *McKinney Practice Commentary*, N.Y. C.P.L.R. 2303, C2303:2, it is likewise unlikely that a New York court would punish a witness who failed to respond to a constructive subpoena—the witness would have a ready-made plausible excuse.

[220] N.Y. C.P.L.R. 315 (service by publication may be authorized in the kinds of actions listed in CPLR 314 "if service cannot be made by another prescribed method with due diligence"). But see the caveat in *supra* note 219.

[221] N.Y. C.P.L.R. 2103(d) ("If a paper cannot be served by any of the methods specified in subdivisions (b) and (c), service may be made by filing the paper as if it were a paper required to be filed."). But see the caveat in *supra* note 219. *See also* N.Y. Adv. Comm. on Prac. & Proc., Second Prelim. Rep., Legis. Doc. No. 13, p. 179 (1958) ("The least adequate notice is given by service by filing and should be allowed only as a last resort.").

[222] S.D. CODIFIED LAWS §§ 15-6-4(d)(9)(iii) ("As directed by the court"); 15-6-45(c) (excepting service by publication).

[223] TENN. CODE ANN. § 24-9-204 (*see supra* note 106); TENN. R. CIV. P. 4.08 ("In cases where constructive service of process is permissible under the statutes of this state, such service shall be made in the manner prescribed by those statutes, unless otherwise expressly provided in these rules."); 4A(4) ("by other means not prohibited by international agreement as may be directed by the court").

[224] TEX. R. CIV. P. 21a(a)(2) ("A document not filed electronically may be served" on the party's attorney "by such other manner as the court in its discretion may direct."); *see also supra* note 111.

10. Utah—any person;[225] a person not in the United States[226]

11. Virginia[227]

[225] UTAH R. CIV. P. 4(d)(5) (may seek court order for different means of service that is "reasonably calculated, under all the circumstances, to apprise the named" person; may include service by publication).

[226] UTAH R. CIV. P. 4(c) ("by other means not prohibited by international agreement as may be directed by the court").

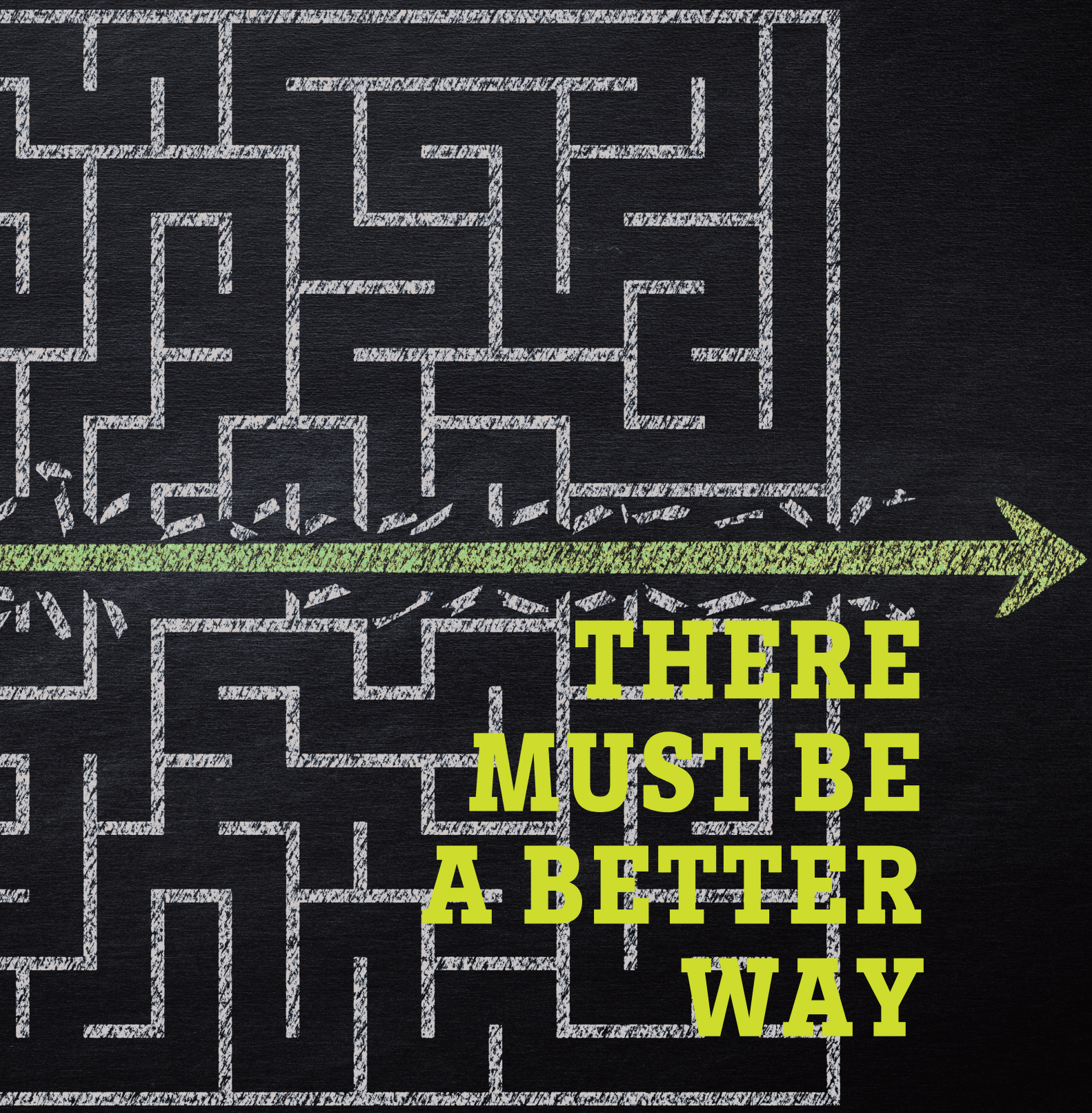
[227] VA. CODE ANN. § 8.01-296(3) ("by order of publication in appropriate cases" if service cannot be made by other prescribed methods).

Mandatory Initial Discovery Pilot (MIDP) − Final Report

Emery G. Lee, Jason A. Cantone
November 1, 2022

This study presents findings related to the Mandatory Initial Discovery Pilot (MIDP) project in new civil cases initiated in district courts. The Center conducted the study at the request of the Advisory Committee on Civil Rules.

Downloadable file:
Mandatory Initial Discovery Pilot (MIDP) − Final Report 195 pages


THERE
MUST BE
A BETTER
WAY

SHOULD THE FEDERAL RULES OF CIVIL PROCEDURE BE AMENDED TO ADDRESS CROSS-BORDER DISCOVERY?

BY MICHAEL M. BAYLSON[1] AND STEVEN S. GENSLER

In today's world of borderless commerce, digital documents, and cloud storage, information relevant to U.S. litigation frequently is located outside of the United States. When discovery in a U.S. case crosses the border to reach that non-U.S. information, the lawyers and judges face a complex web of issues. Can a party use the federal court discovery scheme to get the information? Maybe. Must the party seek the information through the government of the foreign country where it is located? Maybe. Will that process be governed by a treaty like the Hague Evidence Convention[2] (HEC)? Maybe. If the HEC or another treaty exists, will it ultimately yield the information sought? Maybe. And when a party seeks discovery through a foreign country's process, what role does the federal judge play, to what extent are the federal rules discovery mechanisms involved, and do any of the duties and certifications associated with the discovery rules apply?

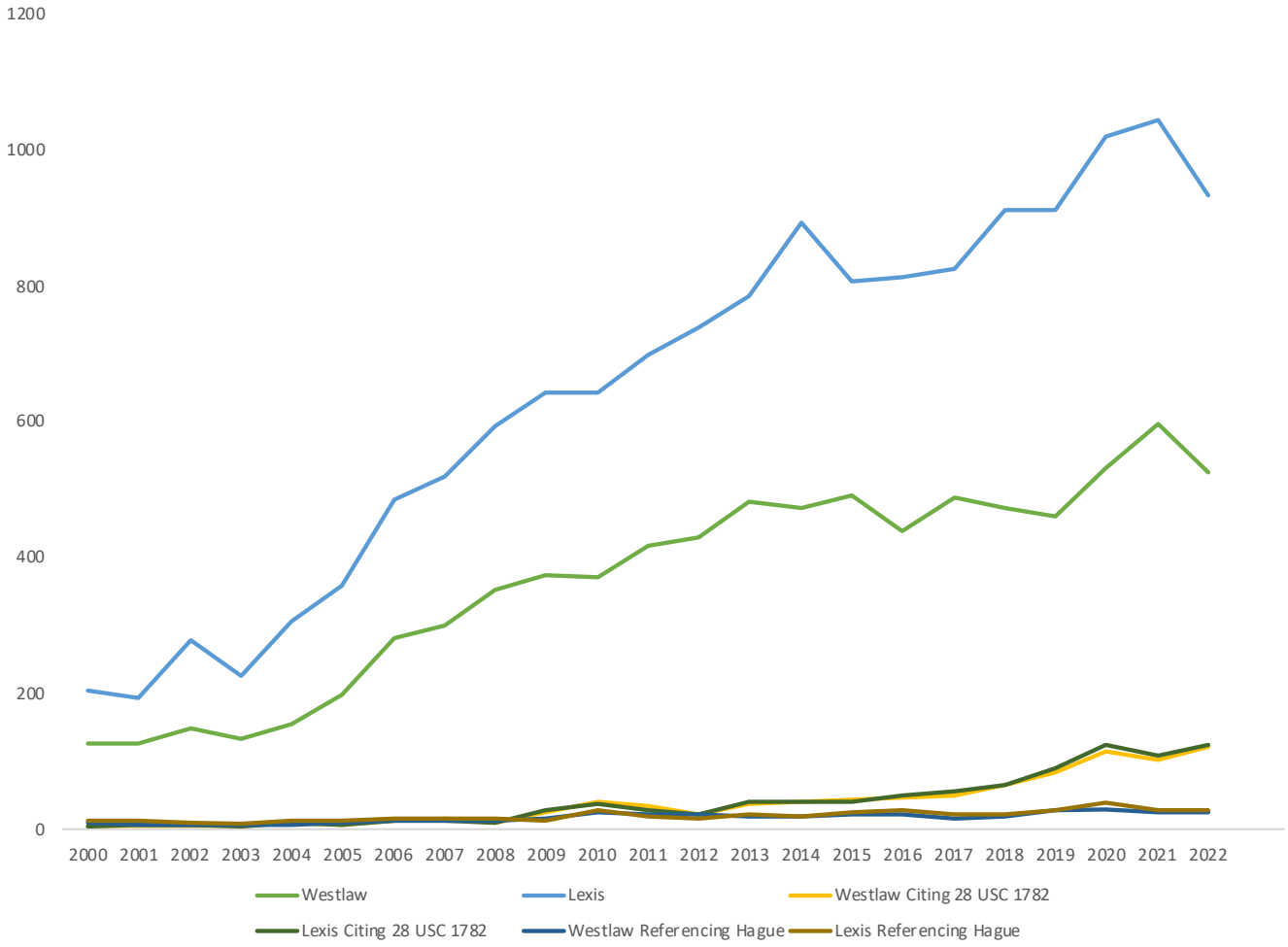
One might expect the civil rules to establish a procedural framework for judges and attorneys to follow when confronted with the daunting prospect of seeking cross-border discovery. But they largely don't — with the most glaring void being the lack of any framework for seeking documents and electronically stored information (ESI) located overseas.[3]

We propose that the Advisory Committee on Civil Rules examine how the civil rules might be amended to better guide judges and attorneys through the cross-border discovery maze.[4] One of the greatest features of the rule-making process is its ability to brainstorm ideas and then evaluate them in a public and iterative process, with the best ideas emerging at the end. We have every faith that the rule-making process, if deployed, will answer the question posed by the title of this article and reveal whether and how the civil rules should be amended to address cross-border discovery. We think that, at a minimum, that inquiry will demonstrate the need for cross-border discovery to be added to the rules that govern the discovery-planning process. We believe it will show that even more could, and should, be done in this crucial area. But the question for today is whether rule-makers should initiate a cross-border discovery project to explore what that might look like.[5] We think the answer is a resounding "yes."

SURGING CROSS-BORDER DISCOVERY

Information is everywhere. And in litigation, it is increasingly located outside the U.S., continuing a trend noted by the Supreme Court more than 35 years ago.[6] This trend has accelerated since then with an even more globalized economy, the development of the internet, and advances in communications technology. To get a window into how much cross-border discovery has increased since the turn of the 21st century, we searched the LexisNexis and Westlaw databases for terms associated with international or cross-border ▸

CASES MENTIONING INTERNATIONAL OR CROSS-BORDER DISCOVERY



discovery. As the timeline graph above shows, case references to those terms have risen significantly and steadily during over the last 20-plus years.[7]

This exponential growth is likely to persist as international trade continues to expand. There is no reason to think that foreign companies will stop expanding their operations worldwide, including into the United States, while keeping their corporate headquarters — and the bulk of their records — overseas. Nor is there any reason to think that domestic companies will discontinue their own overseas activities — both with directly managed operations and with operational relationships with foreign entities — generating large amounts of records kept overseas as well.

SETTING THE SCENE

Our thesis is that the civil rules could do more — possibly much more — to provide guidance to lawyers and judges dealing with cross-border discovery. Before exploring what that might entail, however, we need to explain what we mean by cross-border discovery and what that process currently looks like.

Cross-border discovery is the gathering of evidence from sources located outside the U.S. One important type involves getting help from the foreign country where the information is located. This often involves a process created by a treaty defining how requests may be made and prescribing the foreign country's duty to respond. The best-known and most important treaty is the Hague Evidence Convention (which we will discuss in greater detail later). In the absence of a treaty, requests for help can be made through diplomatic channels, but whether and how to respond will be entirely up to the foreign country.

Most cross-border discovery probably occurs without asking the foreign country for its help. That's because

when the source is a party to the lawsuit subject to U.S. jurisdiction, the U.S. court can compel that party to produce information regardless of the information's location. For example, imagine that a foreign company is a defendant in a case in federal court. Assuming the company is subject to the court's jurisdiction, the court can order the company to gather records located at its foreign headquarters and produce them in the U.S. Similarly, the U.S. court can order the company to produce its business officers to be deposed — at a location that could be abroad or in the U.S. — even if those officers work at the company's foreign headquarters.

What determines which cross-border discovery pathway will be used? The most important variable is whether the foreign source is subject to the U.S. court's jurisdiction. If it isn't, the court will have no power to enforce a discovery request. So unless the source produces the evidence voluntarily, help from the foreign country will be needed to compel compliance. Things get trickier when the foreign source is subject to the U.S. court's jurisdiction. Now, both pathways are on the table. Nothing prevents the parties or the court from reaching out to the foreign country for help. But the party seeking the information is likely to want the U.S. court to "go it alone" and compel production through U.S. discovery rules.

In its landmark 1987 *Aerospatiale* decision, the U.S. Supreme Court answered what is arguably the thorniest "pathway" question by finding that the HEC is neither mandatory nor exclusive.[8] The issue in *Aerospatiale* was whether cross-border discovery *must* go through the HEC process when the information being sought is located in a country that is also a party to the HEC. The Court said no, holding that the HEC creates an *optional* pathway that need not be used if another way of getting evidence is available. The Court also held that parties have no obligation to try the HEC process first before seeking the information through "regular" civil discovery. However, the trial court has ultimate authority to choose which pathway to take, and thus can require parties to go through the HEC process when the court concludes it is the better pathway.

The fact that the U.S. court has authorized the discovery — and may be willing to compel compliance — doesn't stop the foreign country from regulating in-country activities or from penalizing actors who violate local law. This might leave a party caught between the rock of being sanctioned by the U.S. court if they don't comply and the hard place of being sanctioned by the foreign country if they do.

There is another layer to this big-picture overview. When the U.S. court allows the parties to conduct "regular" discovery to obtain information from foreign sources, is that foreign country cut out of the picture? Not at all. It means only that the U.S. court isn't *asking* the foreign country for help. It doesn't stop the foreign country from asserting its own interests. The foreign country may view the taking of evidence by private parties as an illegal act. The foreign country may have adopted a so-called blocking statute, making it illegal for the source to provide the information in question. And, increasingly, such information may be subject to data-protection laws in the foreign country. The fact that the U.S. court has authorized the discovery — and may be willing to compel compliance — doesn't stop the foreign country from regulating in-country activities or from penalizing actors who violate local law. This might leave a party caught between the rock of being sanctioned by the U.S. court if they don't comply and the hard place of being sanctioned by the foreign country if they do.

The Federal Rules of Civil Procedure say very little about cross-border or foreign discovery. The discovery rules mention "foreign" discovery only twice, and both mentions are narrow and obscure.[9] The first reference occurs in the little-known Rule 28, "Persons Before Whom Depositions May Be Taken." Rule 28(b) addresses the taking of depositions "[i]n a foreign country." It lists four options: taking depositions "under an applicable treaty," "under a letter of request," "on notice," or "before a person commissioned by the court." Rule 28(b) concludes with the important evidentiary principle that evidence taken in pursuant to a letter of request "need not be excluded merely because it is not a verbatim transcript [or] because the testimony was not taken under oath." Foreign discovery isn't mentioned again until Rule 45, and there's even less substance there. Rule 45(b)(3), "Service in a Foreign Country," is just a cross-reference to the statute authorizing federal courts to issue and ▸

serve subpoenas on U.S. citizens residing in a foreign country.[10]

Think about what *isn't* addressed in the current civil rules. There's nothing about planning for cross-border discovery, or about case management. There's nothing that explicitly addresses document discovery — a much bigger part of modern cross-border discovery than depositions. And there's nothing addressing what aspects of the civil rules' discovery scheme apply when parties seek information through the HEC or other process that utilizes a foreign country's evidence-gathering force. Indeed, nothing in the civil rules even tells us whether that is considered "discovery" at all.

Before delving further into those topics, however, we need to explore more fully what the HEC does and how its evidence-gathering tools operate. We also need to discuss some structural limits and operational problems that constrain its effectiveness as a substitute for civil discovery.

THE HAGUE EVIDENCE CONVENTION

The U.S. has been a party to the HEC since 1972.[11] The HEC creates a process by which a court in one country can ask a second country to help secure evidence located in the second country. While such requests have always been possible through diplomatic channels, treaties allow countries to create standard mechanisms for the submission of requests and to define the duties of response. The HEC does so in a way designed to address an inherent difficulty in cross-border discovery.

The HEC is structured to bridge the gap between countries' different views about the nature of gathering evidence in litigation. We in the U.S. view the gathering of evidence as a task for attorneys, with judges regulating the process and enforcing compliance. But many countries view evidence gathering as a task for the state and consider party efforts to gather evidence as an intrusion on their sovereign authority.[12] To address that disconnect, the HEC creates a process by which foreign litigants can tap into the evidence-gathering methods of the country where the information is located, thereby ensuring due respect for that country's norms. The HEC also provides methods for parties to ask that evidence gathered through the foreign country's mechanisms be collected in ways so it is usable in the requesting court. As the Supreme Court put it, "[t]he Convention's purpose was to establish a system for obtaining evidence located abroad that would be 'tolerable' to the state executing the request and would produce evidence 'utilizable' in the requesting state."[13]

The Hague Evidence Convention allows participating countries to decide whether to go along with U.S.-style pretrial document discovery, and many continue to reject our approach entirely.

The HEC's best-known means for seeking foreign-country assistance is the letter of request (LOR).[14] Under this process, a party asks the U.S. judge to send a request to the foreign country's central authority, which then coordinates with an appropriate official in that country to take the requested evidence and return it to the central authority for forwarding to the U.S. The LOR method can be used to take witness testimony or to secure documents. While the foreign country presumptively follows its own practices for taking evidence, the foreign country can be asked to employ special methods and procedures to ensure that the evidence is captured in ways that ensure its usability in the requesting country.[15]

While the LOR process can be useful, several frustrating limitations have prevented it from reaching its full potential. Most significantly, Article 23 of the HEC permits countries to opt out of executing LORs "issued for the purpose of obtaining pretrial discovery of documents as known in the Common Law countries."[16] Of the 61 participating countries, 26 have made full Article 23 declarations barring execution of any LOR for pretrial discovery, while another 17 have made partial Article 23 declarations that set restrictions on the type and amount of evidence that may be sought. In short, the HEC allows participating countries to decide whether to go along with U.S.-style pretrial document discovery, and many continue to reject our approach entirely. Others reject so-called "fishing expedition" requests but will enforce narrowly tailored requests for known documents that are described with particularity and obviously relevant to the case. Second, the LOR process has developed a reputation for bureaucracy and delay. Hard data is tough to come by, but anecdotes are common about LORs being held up by a central authority or by officials designated to take the evidence. While some anecdotes may be exaggerated, what is certain is that if an LOR gets slow played in the foreign country, the requesting court (or parties) can do little under the HEC to speed things up.

A second, lesser-known method for seeking foreign-country assistance is

sometimes available. Under Chapter II of the HEC, the judge handling the case can appoint a commissioner to take witness testimony or receive documents in the foreign country.[17] The commissioner — often a local attorney — can act as soon as the appointment is approved, frequently within just a few weeks. The process is especially helpful in France because it has been held that evidence taken by a Chapter II commissioner does not violate France's blocking statute. For example, Judge Baylson appointed a Chapter II commissioner in *Behrens v. Arconic Inc.* — a case concerning the tragic 2017 fire at the Grenfell Tower in London that killed 72 people and injured hundreds more — to collect important documents possessed by the defendant's French subsidiary and located in France.[18]

However, the Chapter II commissioner process comes with substantial limits. Countries can opt out of the Chapter II process entirely, and many have.[19] Of those participating, most require permission to use the process, and conditions can be imposed. Finally, and most importantly, Chapter II commissioners lack the power to compel cooperation from unwilling sources.[20] While countries can opt under the HEC to supply compulsive aid, very few do so.[21] So although a Chapter II commissioner may be the fastest and easiest way to get information from a *willing* foreign source, the LOR remains the standard HEC method for getting evidence from uncooperative sources.

AEROSPATIALE AND THE CIVIL RULES SCHEME

As discussed earlier, the Supreme Court held in *Aerospatiale* that the HEC is *not* the exclusive means of securing discovery from foreign sources. Rather, it described the HEC as creating an optional procedure that did not displace the power of U.S. courts "to order a foreign national party before it to produce evidence physically located within a signatory country."[22] Taking the matter one step further, the Court declined to require U.S. litigants to resort to the HEC process before initiating discovery.[23] Rather, trial courts must decide in each situation whether to require resort to the HEC process or allow discovery under the civil rules, taking into account "the particular facts, sovereign interests, and likelihood that resort to [the HEC] procedures will prove effective."[24] The Court went on to reference and implicitly endorse factors set out in a draft of what would become Section 442(1) of the Restatement (Third) of Foreign Relations Law of the United States:

1. The importance to the litigation of the documents or other information requested
2. The degree of specificity of the request
3. Whether the information originated in the United States
4. The availability of alternative means of securing the information
5. The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[25]

To illustrate what this means in practice, imagine a suit by a U.S. plaintiff against a German defendant with records (in its "possession, custody, or control") located in Germany. Imagine further that the plaintiff filed a Rule 34 document request. Using its power over the German defendant as a party, the court could compel compliance and require the defendant to gather documents in Germany and produce them in the U.S. Or the court could decline to enforce the Rule 34 request and instead direct the plaintiff to seek the records through the HEC process. The court would make that decision based on its evaluation of the *Aerospatiale* factors, with no presumption in favor of requiring the party seeking the evidence to use the HEC. In contrast, imagine that the same plaintiff also wished to obtain documents from a second German entity that was not party to the U.S. lawsuit. The court would then lack jurisdiction to compel production through the discovery rules, forcing the plaintiff to ask the judge to initiate the HEC process.

Aerospatiale provides clear guidance in one respect — it clearly tells the parties and the judge that they can sidestep the HEC process in many cases. And while one would scarcely call the *Aerospatiale* analysis predictable in its outcome, it does provide a test for courts to apply.

But *Aerospatiale* provides only hints at how the "optional" HEC process fits within the larger framework of civil discovery. Consider case management. In *Aerospatiale*, the question of whether to resort to the HEC arose in the context of a motion to compel after the French defendant objected to the plaintiff's Rule 34 request. Technically, all the trial court did was resolve a discrete discovery dispute. But the *Aerospatiale* analysis strongly implies a larger management role for courts. Surely the trial court can address potential *Aerospatiale* questions in advance as part of the discovery-management process. Indeed, the Supreme Court recognized that requiring a party to attempt HEC procedures was but a step in the larger discovery process since the trial court retains authority to order rules-based discov-

ery if such attempts fail. In many ways, the *Aerospatiale* analysis anticipates today's more actively managed and iterative discovery process.

Aerospatiale is essentially silent on other questions regarding the intersection of HEC discovery and the federal rules scheme. Is it subject to the early moratorium under Rule 26(d) or the discovery deadline set in the Rule 16(b) scheduling order? Does it count toward any numerical limits on discovery? Does the Rule 26(e) duty to supplement apply? Are requests to use the HEC process subject to Rule 26(g)'s duties and certifications? What about objections and responses? Do any aspects of HEC discovery fall within the sanctions provisions of Rule 37? For example, what happens if a court learns that documents produced were fake, or that the production was materially incomplete? One might view all of these questions as variations on a larger theme: To what extent is the use of the HEC process (or other diplomatic channels) "discovery" under the rules in the first place?

We pause to emphasize two things. First, we don't fault the Supreme Court for not answering these questions; they were neither raised in nor necessary to the Court's decision. Our point is only that if one is looking to *Aerospatiale* to locate the HEC process within the discovery rules, it is no more helpful than those rules themselves. Second, we appreciate that federal judges can answer all of the questions we posed above. And if those answers created or identified serious regulatory gaps, those judges likely could provide sensible solutions through the exercise of their inherent authority. But that doesn't mean we shouldn't think more carefully and deeply about how HEC discovery fits into the rules-based scheme as it stands.

We think the time has come for rule-makers to systematically explore how the federal rules might address the gathering of evidence located outside the United States. We emphasize the word "systematically." While we have our own ideas about issues that should be looked into, the greater task would be to examine how cross-border discovery fits into the entire civil rules scheme. This is the type of task to which the rule-making process is especially suited.

THE TIME HAS COME

When rule-makers revised Rule 28(b) in 1963, it was part of a larger, congressionally mandated examination of the rules and statutes governing cross-border discovery.[26] A product of its times, it reflected an era when depositions were king and document requests still required advance court approval.[27] Since then, the discovery scheme has become more complicated. The advent of electronic discovery has transformed the process. And litigation increasingly plays out on a global stage that seeks to protect data privacy.

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An easy starting point might be to integrate *Aerospatiale* and the HEC process into the discovery-management and case-management rules. Rule 26(f) requires parties to consider a broad range of discovery topics and submit a plan setting forth their views on those topics. Developing that plan forces parties to think ahead and prompts judges to consider ways to keep the process on track and prevent problems from festering. Should cross-border discovery be on that list? Should it also be on the list of items for consideration at the initial Rule 16 case-management conference?

We think the answers to these questions are obvious. Over 35 years ago, the Supreme Court remarked that "[w]hen it is necessary to seek evidence abroad . . . the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses."[28] More generally, the need for advance planning is heightened in cross-border discovery because the court might require parties to at least try to use the HEC before considering next steps.[29] The need for early and active management is all the more important today because of the emergence of

robust data-protection laws that may require the parties and the court to interact with data-protection regulators in the source country.

The civil rules might explicitly address what parties can do to obtain documents located outside the U.S. Can they be obtained through the Rule 28(b) deposition process by requiring a witness to bring them to the deposition? Although Rule 28(b) allows for depositions in a foreign country, it says nothing about securing documents from the witness or the witness's employer. Allowing depositions but not allowing documents is like an opera without a libretto — you can hear the music, but there are no words to explain the story. Rule 28(b) might be amended to require deponents to bring requested and relevant documents to depositions unless disclosure is constrained by a foreign law.

More broadly, the rules say nothing about the role of document requests when documents are located overseas. As *Aerospatiale* illustrates, Rule 34 has no geographic limit. A party must produce documents within its "possession, custody, or control" whether they are located next door to the courthouse or halfway around the world. But what about documents outside the party's possession, custody, or control — and how is "control" defined when disclosure or production may be constrained by the host country's law? What about documents that are within party control but the court determines the better path is to use methods set out in the HEC? Should Rule 34 include a list, similar to Rule 28(b), outlining the options? Similar questions might be asked with respect to document subpoenas under Rule 45.

Taking the analysis one step further, could there be a "master" rule comprehensively addressing cross-border discovery? Recall the many questions we posed earlier about how the HEC process intersects with the civil discovery scheme. Answers could be provided in the specific rules dealing with these topics. Or maybe an overarching rule is needed that collects those answers in a single place — or possibly even answers them in the aggregate.

A "master" rule might provide a roadmap for lawyers and judges to follow. Consider again the scenario discussed above, in which a party seeks records located in Germany. Nothing in the current rules scheme alerts litigants or the court to the *Aerospatiale* choice of seeking the documents through the Rule 34 process or the HEC. A "master" rule might also address depositions. Rule 28(b) provides options once the decision has been made to take a witness' testimony in a foreign country, but it doesn't address what might be the antecedent choice of whether to require foreign-based parties (or their officers or managing agents) to appear for depositions in the U.S. Moreover, Rule 28(b)'s list of options is buried where many lawyers and judges wouldn't even know to look. A "master" rule for cross-border discovery could also clearly address the relationship between *Aerospatiale* and interrogatories and requests for admission.

We're not saying this would be the best course. Rule drafting is tricky. Pesky details and complications often emerge only once the drafting starts. Sometimes the drafting process can refine or even change how we think about a topic, leading rule-makers to reject what seemed like a clear fix in favor of a different path.[30] But that's a feature of the system, not a bug, and perhaps even more reason to think about whether cross-border discovery is or is not susceptible to road mapping or comprehensive treatment.

We save for last what might be the most controversial topic: Should rule-makers revisit the result reached in *Aerospatiale* itself? Recall *Aerospatiale*'s reasoning. The Court held that nothing in the HEC provided any "plain statement" sufficient to cut off the pre-existing authority of U.S. courts to exercise their traditional discovery powers over parties subject to their jurisdiction.[31] That holding described the state of the law as the Supreme Court found it. Nothing in *Aerospatiale* stops the U.S. from choosing a different path as a matter of internal law.

Indeed, nothing in *Aerospatiale* would be contravened if the civil discovery rules were to provide a nudge in favor of greater reliance on the HEC. Should there be a nudge? That was the view Justice Harry Blackmun took in his concurring *Aerospatiale* opinion (joined by three other justices). He worried that judges would gravitate toward using the known and liberal federal discovery scheme whenever possible rather than navigate the unfamiliar and potentially more restrictive HEC process. He supported the "first resort" rule rejected by the majority:

> In my view, the Convention provides effective discovery procedures that largely eliminate the conflicts between United States and foreign law on evidence gathering. I therefore would apply a general presumption that, in most cases, courts should first resort to the Convention procedures.[32]

Longtime followers of the rule-making process may recall that the civil rules committee considered just such an amendment to Rule 26 in 1988, publishing a proposal to require parties to use treaty-based methods unless they ▸

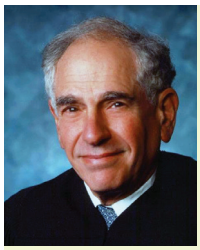
"afford discovery that is inadequate."[33] The proposal was modified in response to criticism in the public comments, but the modified version drew even more vigorous criticism.[34] Though the modified version was approved by the Judicial Conference, it was rejected by the Supreme Court.[35] The Advisory Committee tried once more after making some changes to the accompanying Committee Note, but this effort failed, too, when the Standing Committee on Rules of Practice and Procedure refused to recommend it to the Judicial Conference.[36] The proposal was then abandoned.

In one sense, Justice Blackmun's prediction seems to have been spot on.[37] Lawyers and judges seem no better versed in the HEC now than they were in 1987. In our experience, many lawyers view the HEC process as a quagmire to be avoided whenever possible. But is that view well-founded, or do lawyers not know how to use the HEC effectively because we've made it too easy to avoid? Perhaps a nudge is needed. Rule-makers could also take a fresh look at the factors to be considered.

The operative word is "could." Rule-makers could follow Justice Blackmun's lead and include some type of presumption or nudge toward using the HEC process. Or not. Analysis of and reflection upon 35 years of experience under *Aerospatiale* might persuade rule-makers that the *Aerospatiale* approach more or less gets it right as a matter of policy. Rule-makers could reach that conclusion and then choose to embed it in the rules. Or they could reach that conclusion and decide that it remains better left out of the rule scheme. They could even decide to leave the matter outside the scope of the project.

CONCLUSION

Cross-border discovery has become increasingly important to U.S. litigation practice. But the process remains confusing to most and avoided by many. It is also a part of discovery practice that has never really been integrated into the modern civil rules' discovery scheme. We think that more and better guidance is needed — and possible. Accordingly, we propose that the Advisory Committee on Civil Rules should undertake consideration of whether and how the civil rules might be amended to bring clarity and guidance to the realm of cross-border discovery, for the benefit of lawyers and judges alike.



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1 Judge Baylson sincerely appreciates the assistance of his law clerks, Carolyn Jackson and Christopher Goetz, and an intern in chambers, Blair Williams, for their valuable inputs on this article. For further reading on this topic, *see* Michael Baylson and Sandra Jeskie, *Overseas Obligations: An Update on Cross-Border Discovery*, Judicature Vol. 103 No. 1 (2019), and Michael Baylson, *Cross Border Discovery at a Crossroads*, Judicature Vol. 100 No. 4 (2016).

2 *See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter Hague Evidence Convention] (codified as 28 U.S.C. § 1781).

3 For simplicity, we will use the term "document" to include both paper documents and ESI.

4 The issues we explore in this article can also arise in state court proceedings. *See, e.g.*, *In re Cote d'Azur Est. Corp.*, 286 A.3d 504 (Del. Ch. 2022) (issuing letter of request under the Hague Evidence Convention to Switzerland). Though we limit our focus to the intersection of cross-border discovery and the federal civil discovery rules, any changes made to the federal rules might serve as a model for states to follow.

5 Commentators have also identified legitimate concerns with how federal courts handle petitions under 28 U.S.C. § 1782 seeking evidence for use in foreign tribunals. *See* Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2089 (2020) (suggesting that the civil rules be amended to require notice to the foreign tribunal and opposing parties). While we would support including § 1782 in a cross-border discovery project, we note that the distinct nature of § 1782 petitions — in which the court plays a very limited role and does not adjudicate the merits of the claims for which assistance is sought — likely suggests that any civil rules provisions addressing § 1782 practice be kept distinct from those governing discovery generally.

6 *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. Iowa*, 482 U.S. 522, 531 (1987) (quoting secretary of state's submittal letter to the president). The trend is but one aspect of how globalization has affected litigation in the U.S. *See* Stephen Breyer, *America's Courts Can't Ignore the World*, Atlantic, Oct. 2018, at 100.

7 The slight decline in the 2020–2022 period reflects the decline relating to the global COVID-19 pandemic, but the growth of cross-border discovery is sure to increase as normal litigation resumes.

8 *See Aerospatiale*, 482 U.S. at 539–40.

9 The only rule with the word "foreign" in the title is Rule 44.1, which deals with the issue of what a party must do when it intends to rely on a foreign country's law. *See* Fed. R. Civ. P. 44.1.

10 *See* 28 U.S.C. § 1783.

11 *See* Hague Evidence Convention, *supra* note 2.

12 *See* Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. Pitt. L. Rev. 903, 913 (1989) ("Common law jurisdictions entrust the gathering and presentation of evidence to counsel comparatively free of governmental oversight. That process contrasts sharply with the civil law system in which investigation and development of the facts are governmental activities assigned exclusively to, and jealously guarded by, the judiciary.").

13 *Aerospatiale*, 482 U.S. at 530–31 (citation omitted).

14 *See* Hague Evidence Convention, *supra* note 2, at ch. I, art. 1; *see also* Fed. R. Civ. P. 28(b) advisory committee's note to1993 amendment (noting that the term "letter of request" has been sub-

stituted for the term "letter rogatory" because it is the primary method provided by the Hague Evidence Convention).

15 *See* Hague Evidence Convention, *supra* note 2, at ch. I, art. 9.

16 *See id.* at ch. III, art. 23. For a table listing which countries have made reservations and exclusions to the optional parts of the Hague Evidence Convention, *see* Hague Convention on Private International Law, *Table reflecting applicability of Articles 15, 16, 17, 18, and 23 of the Hague Evidence Convention* (June 2017), *available at* https://www.hcch.net/en/instruments/conventions/specialised-sections/evidence [hereinafter Exclusions Table].

17 *See* Hague Evidence Convention, *supra* note 2, at ch. II, art. 17. Related provisions in Chapter II also allow for discovery to be taken by the forum country's diplomats residing in the foreign country where the evidence is to be gathered. *See, e.g., id.* at ch. II, art. 15–16.

18 *See Behrens v. Arconic, Inc.*, 487 F. Supp. 3d 283, 300–01 (E.D. Pa. 2020); *see also Salt River Project Agric. Improvement & Power Dist. v. Trench France SAS*, 303 F. Supp. 3d 1004 (D. Ariz. 2018) (appointing Chapter II commissioner to oversee production of documents in France).

19 *See* Hague Evidence Convention, *supra* note 2, at ch. III, art. 33; *see also* Exclusions Table, *supra* note 16.

20 *See* Hague Evidence Convention, *supra* note 2, at ch. II, art. 17.

21 *See id. at* ch. II, art. 18; *see also* Exclusions Table, *supra* note 16.

22 *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. Iowa*, 482 U.S. 522, 539–40 (1987).

23 *See id.* at 541–42.

24 *Id.* at 544.

25 *Id.* at 544 n.28 (quoting Restatement (Third) of Foreign Relations Law of the U.S. (Revised) § 437(1)(C) (Am. L. Inst. Tentative Draft No. 7, 1986) (approved May 14, 1986) (subsequently adopted as Restatement (Third) of Foreign Relations Law of the U.S. § 442(1)(C)) (incorporated in Restatement (Fourth) of Foreign Relations Law of the U.S. § 426 cmt. a). The American Law Institute published its Restatement (Fourth) of Foreign Relations Law in 2018. Due to some restructuring, this topic is now addressed in Section 426, with the list of factors moving from the Black Letter to the Comment. *See* Restatement (Fourth) of Foreign Relations Law of the U.S. § 426 cmt. A.

26 *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248–49 (2004).

27 *See* Fed. R. Civ. P. 34 advisory committee's note to 1970 amendment (asserting that a goal of the revision was to eliminate the requirement of good cause).

28 *Aerospatiale*, 482 U.S. at 546.

29 *See* Michael M. Baylson, *Cross-Border Discovery at a Crossroads*, 100 Judicature 56, 58 (2016).

30 For example, one person with whom we've discussed this topic has suggested that any rules amendments that would address the Hague Evidence Convention process describe it as providing for "disclosure" rather than "discovery" due to the negative view many countries have of U.S.-style discovery.

31 *See Aerospatiale*, 482 U.S. at 539 (stating that the Hague Evidence Convention contains "no such plain statement of a pre-emptive intent").

32 *Aerospatiale*, 482 U.S. at 548–49 (Blackmun, J., concurring).

33 *See* Advisory Committee on Civil Rules, Report to the Committee on Rules of Practice and Procedure 47–48 (1988), *available at* https://www.uscourts.gov/sites/default/files/fr_import/1988-12-Committee_Report-Civil.pdf. The draft Advisory Committee Note cites to a law review article by Judge Joseph F. Weis, Jr., then the Chair of the "Standing Committee" on Rules of Practice and Procedure, in which he specifically endorses Justice Blackmun's approach and proposes that the civil rules be amended to require first resort to the HEC process. *See also* Weis, *supra* note 12, at 930–31.

34 *See* Gary B. Born & Andrew N. Vollmer, *The Effect of The Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221, 243 (1993).

35 *Id.* at 244.

36 *Id.* at 245.

37 For a recent scholarly assessment of how courts have applied the *Aerospatiale* test, see Maggie Gardner, *Parochial Procedure*, 69 Stan. L. Rev. 941, 970–72 (2017) ("Justice Blackmun's prediction . . . has been borne out by the practice of the district courts.").

TAB 7

7. Rule 41 Subcommittee Report

Since its formation at the October 2022 Committee meeting, following submissions in June 2021 by Judges Furman and Halpern (21-CV-O) and July 2022 by Messrs. Wenthold and Reynolds, former W.D. Ky. law clerks (22-CV-J), the Subcommittee has wrestled with the availability of voluntary dismissal without prejudice under Rule 41(a).

Rule 41(a)(1)(A), which remains substantially the same as when it was promulgated in 1938, provides that "the plaintiff may dismiss an action without a court order" by filing a notice of dismissal "before the opposing party serves either an answer or a motion for summary judgment" or a "stipulation of dismissal signed by all parties who have appeared." Such a dismissal is without prejudice unless the notice of dismissal or stipulation states otherwise, per Rule 41(a)(1)(B). Rule 41(a)(2) provides that "[e]xcept as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Again, such a dismissal is without prejudice unless the order states otherwise.

The primary disagreement among federal courts is over whether a voluntary dismissal, either unilateral or by stipulation, must be of the entire action or may be of something less, like the dismissal of only some of the asserted claims or parties, leaving the remaining claims pending in the district court. For instance, in a multi-defendant case, must a plaintiff dismiss all claims against all defendants to dismiss without a court order, or may a plaintiff dismiss only the claims against one or more defendants, while the others remain live? Or, in a multi-plaintiff case, must all plaintiffs dismiss all of the claims asserted, or may only one plaintiff achieve a unilateral dismissal while the others continue the litigation? An array of other configurations is possible.

Research by then-Rules Law Clerk Burton DeWitt revealed that the most common issue in the reported cases concerned whether a plaintiff in multi-defendant cases may dismiss as to some but not all defendants, a question on which the circuits are split.[1] Similar issues have arisen in multi-plaintiff actions in which some but not all plaintiffs wish to dismiss claims against one or more defendants. As to dismissal of some but not all claims against a given defendant, no circuit has explicitly permitted Rule 41(a) to be used to effect such a dismissal, though intra-circuit splits have developed at the district court level. Rules Law Clerk DeWitt therefore also suggested that there might soon be a split among the circuits on whether the rule can be used to dismiss some but not all claims against a given defendant.

The ramifications of interpreting the rule as allowing only dismissal of an "entire action" go beyond just voluntary dismissals early on in the litigation or by stipulation. For example, the "entire action" interpretation has also been applied to dismissals *by court order* under Rule 41(a)(2), which provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." That is, in circuits where only an entire action may be dismissed *without* a court order under Rule 41(a)(1), then only an entire action may be

[1] The Second, Sixth, and Seventh Circuits take the view that only an entire action may be dismissed under Rule 41(a); the First, Third, Fifth, Ninth, and Eleventh Circuits take the view that in a multi-defendant case, a plaintiff may dismiss all claims (though not fewer than all claims) against a single defendant under Rule 41. The Eighth and Tenth Circuits have not definitively addressed the issue. The state of play was recently comprehensively summarized in *Interfocus Inc. v., Hirobi*, No. 22-CV-2259, 2023 WL 4137886 (N.D. Ill. June 7, 2023). The Fourth, Tenth, and D.C. Circuits have not explicitly considered the issue, and the district courts within these circuits are split.

dismissed *with* a court order under Rule 41(a)(2) The Eleventh Circuit recently adopted this view in *Rosell v. VSMB LLC*, 67 F.4th 1141, 1143 (11th Cir. 2023) ("Today we make explicit what our precedent has implied for almost two decades: Federal Rule of Civil Procedure 41(a)(2) provides only for the dismissal of an entire action. Any attempt to use this rule to dismiss a single claim, or anything less than the entire action, will be invalid—just like it would be under Rule 41(a)(1).") Ultimately, then, if "action" means "entire action," then there is no explicit mechanism to dismiss only part of the action, whether by stipulation or court order.

Debates over the meaning of the current rule tend to focus on the text. Circuits adopting the more restrictive approach focus on the plain meaning of the words (i.e., "action" means "action," and nothing less), while courts adopting the less restrictive approach focus more on the purpose of the rule (i.e., parties should be allowed to narrow the case prior to trial to eliminate one or more defendants as a matter of judicial economy).[2] Such debates, which are at least as much about the proper approach to interpretation of statutes and rules as the substance of Rule 41, are unlikely to go away.

Ultimately, beyond the meaning of the current rule, the underlying policy question is what degree of flexibility a plaintiff should have to dismiss something less than an entire lawsuit without giving up the possibility of raising the abandoned claims anew in another proceeding. If the plaintiff should have any such flexibility, how and when may it be used? Undertaking a revision of the rule requires analysis of these questions (including how Rule 41 interacts with other rules addressing how a case might change during the course of pretrial proceedings, such as Rule 15 and Rule 42).

Even beyond the question of how much of a case the plaintiff should be allowed to dismiss voluntarily (either unilaterally or by stipulation) without prejudice, there remain other questions, such as until when a plaintiff should be allowed to do so without a court order. Currently, the rule allows such dismissals prior to service of an answer or motion for summary judgment, though it could be further tightened by adding a Rule 12 motion to dismiss to the acts that cut off unilateral dismissal, or loosened by extending the time for unilateral dismissal to a time closer to trial, as in some states). Another question is, if dismissal of all claims against a single defendant by stipulation is allowed, who must consent? Currently, the rule requires that such a stipulation be "signed by all parties that have appeared," but courts are split as to whether that language demands that such a stipulation be signed by every party that has *ever* appeared in the case, even parties that already been dismissed from the action. *See City of Jacksonville v. Jacksonville Hospitality Holdings*, No. 22-12419, 2023 WL 5944193 (11th Cir., Sept. 13, 2023) (requiring "each and every party that has thus far appeared in a lawsuit to sign a stipulation of dismissal").

Setting aside these somewhat ancillary questions, a rule that allows dismissal of nothing less than an entire action places emphasis on the need for plaintiffs to carefully consider the contours of their case prior to filing, since the only route to voluntarily dismissing claims or parties is to amend the complaint under Rule 15. Arguably, Rule 41 should be addressed only to dismissals of the entire action, and anything less should be left to Rule 15. But this solution is not without some complication. As Judge Seeger recently explained, "[a]mending a complaint again and again

[2] The debate over how to properly interpret the rule is well ventilated in several dueling opinions in a recent *en banc* case in the Fifth Circuit, *Williams v. Seidenbach*, 958 F.3d 341 (5th Cir. 2020).

can clog up the docket and create confusion about which complaint is the operative pleading. Imagine a docket with a sixth amended complaint, followed by a seventh amended complaint, followed by an eighth amended complaint, and so on. Heads will start spinning." *Interfocus Inc. v. Hirobi*, No. 22-CV-2259, 2023 WL 4137886, at *2 (N.D. Ill. June 7, 2023). Judge Seeger also noted that amending a complaint typically requires a motion and an amended answer—as he summarizes it: "More pleadings equal more filings equal more burdens equal more expense." *Id.* at *3. It is possible that there are other avenues to dropping a party from a case, such as Rule 21 ("the court may at any time, on just terms, add or drop a party"), but such rules have not been typically used in this way.

If voluntary dismissal of less than an entire case is permitted, it would make it easier to narrow the factual and legal issues, or for parties to settle their claims and exit, along the way to trial—an efficiency-enhancing practice that the rule should arguably encourage. A revised rule might also be framed in a way that clarifies the effect of voluntary dismissal on attempts to achieve an appealable final judgment, a problem that also crops up in the case law. Consider a plaintiff who seeks immediate appellate review of a judgment dismissing some but not all claims. Absent a finding that Rule 54(b) applies, judgment for a defendant on some but not all claims may not be immediately appealed. But a plaintiff may prefer to seek immediate appeal of the adverse decision on some claims to continuing to pursue the surviving claims. A more flexible approach to voluntary dismissal would allow the plaintiff to forgo the remaining claims and pursue the appeal. Courts that read Rule 41(a) to require voluntary dismissal of an entire lawsuit have rejected this approach—even if a plaintiff has amended the complaint in an attempt to excise the surviving claims. *See*, *e.g.*, *GEICO v. Glassco*, 58 F.4th 1338 (11th Cir. 2023).

Although a circuit split on the meaning of Rule 41 has existed since at least the 1960s, and cases demonstrating that the split has consequences are easily found, the case for revising the rule is weaker if lawyers and judges are not encountering real-world problems with the operation of the rule. Perhaps disuniform interpretation of the rule across the circuits is alone a sufficient reason to undertake a revision. If the text does not accomplish the goals of the rule, or courts are ignoring the text to accomplish such goals, perhaps the text requires an update. On the other hand, if the current text works well enough, and revision might sow additional confusion or lead to unintended consequences, perhaps muddling through is the best option.

In an attempt to answer that question more fully, the Subcommittee has engaged in several outreach efforts to the bench and bar. On May 1, 2023, the Subcommittee met, via Zoom, with members of Lawyers for Civil Justice (LCJ), and on May 2, 2023, the Subcommittee met, also via Zoom, with members of the American Association for Justice (AAJ) to seek their feedback on the current operation of Rule 41. Both groups expressed concerns about the current disuniformity among the circuits and agreed that more clarity would be helpful. Both groups also agreed that it should be easy to drop a defendant early on in a case if the plaintiff has erred by suing a party that is clearly not liable. But, perhaps somewhat predictably, they disagreed sharply on the period of time in which a plaintiff should be allowed to do so without a court order. Some members of LCJ expressed that they would prefer that the cutoff for unilateral voluntary dismissal be moved back to prior to service of a Rule 12 motion to dismiss, on the ground that voluntary dismissal without prejudice after the filing of the Rule 12 motion renders the time and effort spent preparing that motion a waste, despite that it results in dismissal of the pending action. In their view, states that permit more flexibility by allowing voluntary dismissals of claims or parties without prejudice all

the way up to trial open the door to excessive gamesmanship by plaintiffs. For their part, AAJ representatives advocated in favor of more flexibility in dismissing claims and parties based on what emerges during discovery without the burden and expense of amending the complaint.

The Subcommittee has also recently sought feedback from federal judges, via the Federal Judges Association. A letter from Judges Rosenberg and Bissoon (appended to this memo) was sent to federal judges on September 5, 2023, seeking feedback to be sent via email by September 29, 2023. Once such feedback has come in, it will be summarized in an upcoming meeting.

In sum, Rule 41 presents a series of challenges. The circuit split over the meaning of the rule is likely to persist. Consistent nationwide application of the rule is preferable, though completely uniform interpretation of the rules is perhaps an unrealistic expectation. Whether the circumstances on the ground require revision of Rule 41 to resolve the split among the circuits is a challenging question.

Should the Subcommittee proceed to draft possible rule amendments, the subsequent question will be: what should the rule accomplish, increased or reduced flexibility to unilaterally dismiss claims without prejudice? If writing on a blank slate, there are several levers the Committee could use to achieve that goal, including what can be dismissed (a claim, a party, the entire action), when (by filing of a pre-answer motion to dismiss, answer, motion for summary judgment, or some time prior to trial), by whom (unilaterally by the plaintiff, by stipulation of some or all parties, or by the court after a motion), and to what effect (without prejudice, presumptively without prejudice, or presumptively with prejudice). All options remain open, and the Subcommittee is eager to hear reactions at the upcoming meeting. Resolving some or all of these questions, and determining whether sufficient consensus exists on the path forward, can help narrow the range of drafting possibilities.

September 5, 2023

Dear Colleagues:

We write on behalf of the Advisory Committee on Civil Rules. In response to several proposals, the committee has created a subcommittee, chaired by Judge Cathy Bissoon, to address whether, due to a circuit split, any amendments should be made to Federal Rule of Civil Procedure 41(a), which pertains to voluntary dismissal of actions by plaintiffs. At its March 2023 meeting, the Advisory Committee expressed a desire to seek additional feedback from the bench and bar. This letter is one example of that effort. Does 41(a) create confusion or complication, in your experience? And, should the committee undertake the project of amending the rule, do you have any suggestions with respect to what any such amendment should attempt to accomplish, and how it might accomplish it? The current text of the rule is:

Rule 41. Dismissal of Actions

(a) VOLUNTARY DISMISSAL.

(1) *By the Plaintiff.*

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

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

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

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

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

****

Currently, the circuits interpret the meaning of the word "action" in the rule differently. In some circuits, a plaintiff seeking to dismiss a case under this rule must dismiss her entire

case—that is, all claims against all defendants. Under this interpretation of the rule, voluntary dismissal of less than the entire action may not be achievable with or without a court order. Other circuits have interpreted the scope of the rule more flexibly to permit a plaintiff either to dismiss: (a) all claims against one of multiple defendants, while allowing the claims against any other defendants to go forward or (b) one of multiple claims against a defendant.

One threshold question, on which we would appreciate your feedback, is whether this disuniformity alone should prompt a rule amendment. In this case, the circuits diverge significantly on the meaning and applicability of the rule, and the differences in interpretation have spillover effects on the application of other rules, availability of appeal, and preclusive effect of judgments.

At the same time, however, it is not clear whether, despite the different application of the rule and its effects in different circuits, there is a "real-world problem" to solve, or whether a rule amendment, with its inherent risks of unanticipated consequences, is prudent. For example, any such rule amendment inevitably would affect the panoply of rules that govern modification of a case after it is filed, including amendments under Rule 15. Ultimately, should the committee decide to amend the rule, it will need to face a set of fundamental policy questions about how flexible the rules should be with respect to allowing parties to streamline cases prior to trial.

The original purpose of Rule 41(a), the text of which has remained essentially unchanged since the 1938 promulgation of the Federal Rules, was to shorten the time frame in which a plaintiff could dismiss unilaterally (that is, without a court order) and without prejudice. Prior to the adoption of the Federal Rules—and presently in some states—a plaintiff may voluntarily dismiss an action without prejudice when the litigation is well advanced, including at trial, and refile the case anew in another court. Rule 41(a) therefore serves to restrict the time period in which a plaintiff may unilaterally dismiss without prejudice to before the filing of an answer or motion for summary judgment. After that period, a court order is necessary to dismiss, and the judge may place conditions on that order. There does not appear to be any suggestion that the drafters of the rule considered the question that causes confusion today—perhaps understandably, given the increase in complex multiparty and multiclaim litigation since 1938. Some courts have responded to this development by permitting flexible application of the rule or by permitting parties to stipulate to dismissal of some but not all claims after a court order, while other courts have streamlined through the use of other rules. This diversity of approaches may serve as evidence that the rule needs to be amended, or that it is best left alone.

If you have any insights, experiences or concerns regarding Rule 41(a), we would ask that you send an email detailing those issues to [redacted] **no later than September 29, 2023**. Unattributed responses will be compiled and made public by the Civil Rules Advisory Committee. Thank you.

Robin L. Rosenberg
United States District Judge
for the Southern District of Florida
Chair, Advisory Committee on Civil Rules

Cathy Bissoon
United States District Judge
for the Western District of Pennsylvania
Chair, Rule 41 Subcommittee

From: Jesse Furman 21-CV-O
Sent: Monday, June 21, 2021 9:36 AM
To: Robert Dow; Edward Cooper; Richard Marcus
Cc: John Bates
Subject: Suggestion for the Civil Rules Advisory Committee: Rule 41(a)

Dear Bob et al.,

With my S.D.N.Y. colleague, District Judge Philip Halpern, I have a suggestion for consideration by the Civil Rules Advisory Committee: whether Rule 41(a) should be amended to make clear whether it does or does not permit dismissal of some, but not all claims in an action. At present, courts appear to be divided on the question. *Compare, e.g.*, *CBX Res., L.L.C. v. ACE Am. Ins. Co.*, 959 F.3d 175, 177 (5th Cir. 2020) ("Rule 41(a) should not be available to dismiss only some claims a plaintiff has against a defendant."), *and Taylor v. Brown*, 787 F.3d 851, 857 (7th Cir. 2015) ("Since we give the Federal Rules of Civil Procedure their plain meaning, Rule 41(a) should be limited to dismissal of an entire action." (internal quotation marks, citation, and alterations omitted)), *with Azkour v. Haouzi*, No. 11-CV-5780 (RJS) (KNF), 2013 WL 3972462, at *3 (S.D.N.Y. Aug. 1, 2013) (Sullivan, J.) (joining "other courts in [the Second] Circuit in interpreting Rule 41(a)(1)(A) as permitting the withdrawal of individual claims" (citing cases)). In case you are interested, the issue is discussed in my opinion in *Alix v. McKinsey & Co.*, 470 F. Supp. 3d 310, 315 (S.D.N.Y. 2020), although I ultimately avoided the issue on which courts are split by concluding that the notice of dismissal there was with respect to the whole action as the only other claim (a federal RICO claim) had already been dismissed. If the Committee takes up the issue, it may also want to consider whether the Rule permits dismissal of an action as to one defendant in a multi-defendant case. My impression is that most, if not all, courts have held that it does - in which case there may be no need for amendment - but it might make sense to do a more comprehensive survey of the case law than I've done.

Please let me know if I should submit this suggestion through more formal channels and/or if you need anything else from me.

Many thanks,
Jesse Furman

Jesse M. Furman
United States District Judge
United States District Court
Southern District of New York
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New York, NY 10007
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July 24, 2022

Committee on Rules of Practice and Procedure
c/o Rules Committee Staff
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

We write to bring to the Committee's attention a deficiency in Rule 41 of the Federal Rules of Civil Procedure. In regularly recurring circumstances, courts lack express authorization to dismiss one of several defendants at the plaintiff's behest and without objection from the remaining parties. We identified this issue while clerking for Judge Benjamin Beaton[1] and decided to bring it to the Committee's attention after seeing it repeatedly during our time with the court. And we're not alone. As the Committee is aware, federal judges throughout the county have wrestled with and requested resolution of this issue.[2]

Federal Rule of Civil Procedure 41(a) allows a plaintiff to voluntarily dismiss an action (in some circumstances) or ask the court to do so (in other circumstances).[3]

But what happens when a plaintiff, without objection from the defendants, wishes to dismiss one (or fewer than all) of several defendants? By its plain language, Rule 41 doesn't apply because it allows parties to dismiss only an "action"—a term that, read literally, "refers to the whole of the lawsuit."[4] There remain only two avenues under the Rules for a plaintiff seeking to dismiss against fewer than all defendants. First, she could amend her complaint under Federal Rule of Civil Procedure 15. Or second, in the case of misjoinder, a plaintiff could move for dismissal under Federal Rule of Civil Procedure 21.

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[1] Judge Beaton sits on the United States District Court for the Western District of Kentucky.

[2] *See* Letter from Hon. Jesse Furman & Hon. Philip Halpern (21-CV-0), released on June 21, 2021, available at https://www.uscourts.gov/rules-policies/archives/suggestions/hon-jesse-furman-and-hon-philip-halpern-21-cv-o.

[3] *See* Fed. R. Civ. P. 41(a).

[4] *Brownback v. King*, 141 S. Ct. 740, 751 (2021) (Sotomayor, J., concurring). In full, Justice Sotomayor stated:

> An "action" refers to the whole of the lawsuit. *See* Black's Law Dictionary, at 37 (defining "action" as a "civil or criminal judicial proceeding"); Black's Law Dictionary 43 (3d ed. 1933) ("The terms 'action' and 'suit' are now nearly, if not entirely, synonymous"). Individual demands for relief within a lawsuit, by contrast, are "claims." *See* Black's Law Dictionary, at 311 (2019) (defining a "claim" as "the part of a complaint in a civil action specifying what relief the plaintiff asks for"); Black's Law Dictionary, at 333 (1933) (defining a "claim" as "any demand held or asserted as of right" or "cause of action").

Id. (Sotomayor, J., concurring); *see also Columbia Gas Transmission, LLC v. Raven Co., Inc.*, No. 12-72-ART, 2014 WL 12650688, at *1 (E.D. Ky. March 6, 2014) (Thapar, J.) ("Rule 41(a)(1)(A) only permits voluntary dismissal of an "action," which according to the Sixth Circuit means the *entire* controversy—all claims against all defendants, not individual claims or parties.").

Somewhere along the line, however, the courts blurred any Rules-based distinctions in this context by using Rules 15, 21, and 41(a) interchangeably, though inconsistently, in cases where a plaintiff sought to dismiss one of several defendants in a case.[5] According to Wright & Miller's *Federal Practice and Procedure*, "the net result is that there is a certain amount of inconsistency in the cases."[6] An understatement, to be sure. In reality, there are inter- and intra-circuit splits leaving litigants without clear guidance on this issue.[7] Another regrettable result of the widespread discrepancies is that district courts are left to do the best they can to muddle through "to secure the just, speedy, and inexpensive determination of every action and proceeding."[8]

With an eye toward practicality and judicial economy, we agree with Wright & Miller's assessment that it would "seem[] undesirable and unnecessary to invoke inherent power to avoid an artificial limit on Rule 41(a) that results from a highly literal reading of one word in that Rule."[9] But fortunately, stretching the Rules beyond their plain meaning to cover these common circumstances isn't the only answer. The Committee can amend the Rules to resolve this inconsistency.

We ask the Committee to step in and help clear the confusion. We also propose an amendment to Rule 41(a)(1)(A)—simply adding the words "or a claim." The relevant part of the rule would then read: "Without a Court Order. Subject to Rules 23(e), 23.1(c), and 66 and any applicable federal statute, the plaintiff may dismiss an action ***or a claim*** without a court order …."[10] The addition of these three words would simply and efficiently resolve what has become an unnecessarily murky issue by allowing a plaintiff to dismiss her cause(s) of action against individual defendants.

A potential (and perhaps obvious) objection to this revision comes to mind. One might argue that the proposed revisions miss the mark because Rule 41 is titled "Dismissal of Actions," not "Dismissal of Actions and Claims." True. But the title misrepresents the Rule as it currently

[5] 9 Fed. Prac. & Proc. Civ. § 2362 (4th ed.) (collecting cases that run the gamut).

[6] *Id.*

[7] *See, e.g., id.* (collecting cases from around the nation that take different approaches to this issue); *United States ex rel. Doe v. Preferred Care, Inc.*, 326 F.R.D. 462, 464 (E.D. Ky. 2018) (noting the inconsistency *within the Sixth Circuit* on this issue).

[8] Fed. R. Civ. P. 1. In the Western District of Kentucky, for example, Judge Beaton settled on the following text order: "Plaintiff and Defendant Experian Information Solutions, Inc. have filed and signed a proposed agreed order of dismissal with prejudice (DN 11). The Court therefore acknowledges the dismissal of Experian Information Solutions, Inc. only from this case in accordance with Fed. R. Civ. P. 41, or, in the alternative, dismisses Experian Information Solutions, Inc. in accordance with Fed. R. Civ. P. 21." *Jones v. Edfinancial, et al.*, 3:21-cv-721, ECF No. 13. A game of legal twister if there ever were one.

[9] 9 Fed. Prac. & Proc. Civ. § 2362 (4th ed.).

[10] (emphasis added to suggested addition).

exists; Rule 41 already allows the dismissal of claims in some instances.[11] And if the Committee is concerned with this inconsistency, it can always amend the title accordingly.

On behalf of litigants, law clerks, and judges everywhere, we thank the Committee for its attention to this matter.

Sincerely,

David J. Wenthold & Zachary T. Reynolds.

[11] *See* Fed. R. Civ. P. 41(b) (allowing a defendant to "move to dismiss the action *or any claim* against it" where a "plaintiff fails to prosecute or to comply with these rules or a court order") (emphasis added).

TAB 8

8. Rule 7.1 Subcommittee Report

The Rule 7.1 Subcommittee was created at the March 2023 Committee meeting. It is chaired by Justice Jane N. Bland, and its other members are Judge Manish Shah and David Burman, Esq. The Subcommittee had its first meeting on August 11, 2023, and has begun its work, as detailed below. The Subcommittee's ambit is to investigate possible amendments to Rule 7.1(a), which governs disclosure of a party or potential intervenor's corporate ownership. The Rule currently reads:

Rule 7.1 Disclosure Statements

(a) Who Must File; Contents.

> **(1)** ***Nongovernmental Corporations.*** A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene must file a statement that:
>
> > **(A)** identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or
> >
> > **(B)** states that there is no such corporation.

The purpose of Rule 7.1(a), drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, is to provide district judges with the information necessary to comply with the recusal statute, 28 U.S.C. § 455(b)(4). The statute provides that a judge "shall" recuse when:

> He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding[.]

28 U.S.C. § 455(b)(4). The statute defines "financial interest" as "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party," with exceptions for mutual funds and other investment vehicles not central to our efforts. *Id.* § 455(d)(4).

The language of § 455(b)(4) is echoed in the Code of Conduct for United States Judges, Canon 3C(1)(c). As the Committee Note to Rule 7.1 explains, "the information required by Rule 7.1(a) reflects the 'financial interest' standard of Canon 3C(1)(c) [and] will support properly informed disqualification decisions. . . ."

Two submissions to the Committee prompted the Subcommittee's formation: one from Judge Erickson (8th Cir.), and one from Magistrate Judge Barksdale (M.D. Fla.). In addition, the Judicial Conference Code of Conduct Committee is examining recusal as it relates to interests held in corporate affiliates.

Judge Erickson's proposal (22-CV-H) addresses concerns that several judges own significant interests in a wide array of other companies. Under current 7.1, for example, the Orange Julius corporation would have to disclose that it is wholly owned by International Dairy Queen.

But the Rule would not expressly require the further disclosure that International Dairy Queen is wholly owned by Berkshire Hathaway, potentially leaving a presiding judge with an ownership interest in Berkshire Hathaway unaware of any need to evaluate whether such an interest presents a basis for recusal.[3] Berkshire Hathaway is, of course, one example of the general problem. We have been informally referring to relative opacity of a judge's ownership interest in a corporation that in turn owns an interest in a subsidiary that, in further turn, owns an interest in a party to a case as the "grandparent problem," though it may also apply to great-grandparents, and so on.

Separately, Magistrate Judge Barksdale has proposed that Rule 7.1 be amended to add a certification requirement that appears to make use of the newly created database on judges' stock holdings (22-CV-F). This proposal would require a party to certify "that the party has checked the assigned judge or judges' publicly available financial disclosures and, if a conflict or possible conflict exists, will file a motion to recuse or a notice of a possible conflict within 14 days of filing the disclosure." This proposal does not appear to address the "grandparent" issue directly, though such investigation might have the effect of revealing such a relationship in some cases.

At the March 2023 Committee meeting, several members suggested that Judge Erickson's proposal may hold more promise for the time being. The Subcommittee preliminarily considered both proposals at its August meeting and agreed to prioritize the issue as it relates to the scope of disclosure (including, perhaps, the grandparent problem), in large part because of concerns about whether the database of judicial holdings is reliably current. The database represents a snapshot of a judge's holdings at one moment in time, in the prior year, and it may thus be out of date by the time of any particular litigation. Moreover, conflicts-check systems currently in use in the district courts are thought to be reasonably effective at checking Rule 7.1 disclosures against judicial financial disclosures. Yet another concern is the uncertain effect of a party's failure to comply with such a requirement, which could not relieve a judge of the statutory duty to recuse if it was later determined that the judge had a financial conflict of interest that required recusal.

Zooming out from the grandparent problem, the primary concern about current Rule 7.1 is that it does not sufficiently apprise judges of all situations in which they may be required to recuse. That is, the Rule mandates disclosure of "any parent corporation and any publicly held corporation owning 10% or more of its stock." But the recusal statute and canon provide a different governing standard than the Rule, requiring recusal if the judge has a financial interest "however small" in the "subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(d). The recusal statute therefore potentially covers more than a financial interest in a parent of a party, or in a 10%+ owner of shares in a party.

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[3] Nor would Federal Rule of Appellate Procedure 26.1, on which Rule 7.1 is modeled. But the *Committee Note* to Rule 26.1 states that the "rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well." The degree to which this guidance is followed is uncertain. No such guidance appears in the Committee Note to Rule 7.1, but at least two district courts have read Rule 7.1 to require disclosure of a grandparent. *See* A. Benjamin Spencer, 5 FEDERAL PRACTICE & PROCEDURE § 1197 n.5 (4th ed. 2022 update) (citing *Faraj v. 6th and Island Investments LLC*, No. 16-cv-00181, 2017 WL 385741, at *4 (S.D. Cal. Jan. 27, 2017); *Harris v. Wells Fargo Bank, N.A.*, No. EDCV 16-645, 2016 WL 11486587, at *2 (C.D. Cal. July 14, 2016)). Additional research has thus far not revealed additional cases requiring disclosure; one other case rejected the reading that Rule 7.1 requires grandparent disclosure. *McAllister v. Adecco Group*, No. 16-00447, 2017 WL 11151050, at *1 (D. Haw. May 19, 2017).

Indeed, the current provisions are not designed to comprehensively apprise judges of every imaginable instance in which they should evaluate whether a basis for recusal exists. Rather, the provisions requiring disclosure of a 10% owner in a party in both our Rule 7.1 and Appellate Rule 26.1 are thought to be a proxy for control of a party on the theory that if the judge has a financial interest in a company that controls a party, that may be a basis for recusal either on the ground of financial interest or an interest that "could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). The Judicial Conference Committee on Codes of Conduct has published a formal advisory opinion (no. 57) interpreting the Canon that holds this view. It states, in pertinent part:

> The Committee concludes that under the Code the owner of stock in a parent corporation has a financial interest in a controlled subsidiary. Therefore, when a judge knows that a party is controlled by a corporation in which the judge owns stock, the judge should recuse. See Canon 3C(3)(c). When a parent company does not own all or a majority of stock in the subsidiary, the judge should determine whether the parent has control of the subsidiary. The Committee advises that the 10% disclosure requirement in Fed. R. App. P. 26.1 is a benchmark measure of parental control for recusal purposes.

The Committee Note to Rule 7.1 recognizes that the 10% disclosure requirement "does not cover all of the circumstances that may call for disqualification under the financial interest standard." Rather, the Note explains:

> Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

To some degree, then, the Subcommittee's task is to determine whether the considerations underlying the Committee Note remain sound, particularly in a period where judicial recusal has garnered increased attention of the media and lawmakers.

Additionally, the Committee is not working in a vacuum. The Judicial Conference Code of Conduct Committee is considering revisions to its guidance. There is also Congressional activity in the form of a bill sponsored by Sen. Warren (which in part echoes a bill that failed to gain traction in the prior Congress). The Judicial Ethics and Anti-Corruption Act of 2023 (S. 1908) would bar a justice or judge from owning any interest in any security, trust, commercial real estate, or privately held company, with exceptions for mutual funds and government (or government-managed) securities. The legislation would also require justices and judges to "maintain and submit to the Judicial Conference a list of each association or interest that would require the justice, judge, or magistrate to be recused" and "any financial interests of the judge, the spouse of the

judge, or any minor child of the judge residing in the household of the judge." The bill has been referred to the Judiciary Committee and future action is uncertain, but continued legislative attention is likely.

Some Committee members indicated at the March 2023 meeting that financial disclosure is a significant, albeit delicate, problem that requires additional examination, despite the possibility that Congress might act in a way that makes a rule amendment unnecessary. Such inquiry includes investigating whether this is a "real-world problem" that is solvable by a Federal Rule. For instance, at the March 2023 meeting, some Committee members expressed skepticism about a rule's ability to cover all of the complex and ever-changing potential ownership interests in a party, which, as one member put it, are changing "by the minute." Moreover, the Subcommittee is mindful of the burden enhanced disclosures may place on parties, especially those with complex corporate structures.

Should the Subcommittee pursue drafting possibilities, there are several paths it could take. Some inspiration may be drawn from local rules. Under Rule 83, districts may craft their own local rules on disclosure, so long as they are not inconsistent with Federal Rules. At the Subcommittee's request, Rules Law Clerk Christopher Pryby prepared a very thorough memo (included in this agenda book) detailing the local rules in this area. Although 44 of the 94 districts do not have local rules on this subject, the others do, and they illustrate several different approaches that I have grouped into three rough categories.

First, some districts expand the general categories of entities to be disclosed beyond a parent or an owner of 10% or more of the stock of a party. For instance, the Northern District of Texas requires parties to submit a "certificate of interested persons" including "all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are financially interested in the outcome of the case."[4] As Rules Law Clerk Pryby's memo reveals, there is an array of variations on this language in the districts that have gone down this path. Another example is the Middle District of Tennessee, which focuses directly on the grandparent problem by requiring parties to "identify . . . all parent corporations, including grandparent and great-grandparent corporations."[5]

Second, some districts require disclosure of entities owning a smaller percentage of a party's stock than 10%. For instance, the Northern District of Illinois requires disclosure of all "affiliates known to the party after a diligent review," defined as "any entity or individual owning, directly or indirectly (through ownership of one or more other entities), 5% or more of a party."[6]

Third, some districts require disclosure of defined financial relationships beyond those mandated by Rule 7.1. For example, the Central District of California requires disclosure to the court of "any insurance carrier that may be liable in whole or in part (directly or indirectly) for a

[4] N.D. Tex. Civ. R. 3.1(c).
[5] M.D. Tenn. Business Entity Disclosure Form (https://www.tnmd.uscourts.gov/sites/tnmd/files/forms/Business%20Entity%20disclosure%20form.pdf), pursuant to M.D. Tenn. R. 7.02.
[6] N.D. Ill. Civ. R. 3.2. The Eastern District of Missouri also requires disclosure of "any publicly held corporation or company that owns five percent (5%) or more of the subject's stock." E.D. Mo. R. 2.09.

judgment in the action or for the cost of defense."[7] For its part, the District of New Jersey requires disclosure of third-party litigation funding, but that implicates a complex and evolving area that is the scope of the Subcommittee's charge.[8]

This is, of course, a non-exclusive list. Both the efficacy of these various local rules, and courts' and parties' experience under them, may be subjects for further investigation. States also have their own creative approaches to this problem, and further research into those may be warranted. Whether these approaches lead to better information and more accurate application of the recusal statute than current Rule 7.1 is an open question, as is whether the gains in information further disclosure requirements would provide justifies the additional burdens placed on parties to comply with them.

The Subcommittee welcomes the thoughts of the full Committee as this discussion moves forward.

[7] C.D. Cal. R. 7.1-1.
[8] D.N.J. Civ. R 7.1.1.

Memorandum

To: Hon. Robin L. Rosenberg, Advisory Committee Chair
Hon. Jane N. Bland, Rule 7.1 Subcommittee Chair
Prof. Richard L. Marcus, Reporter
Prof. Andrew Bradt, Associate Reporter
Advisory Committee on the Federal Rules of Civil Procedure

From: Christopher Ian Pryby, Rules Law Clerk

Re: Survey of Local Rules Governing Corporate-Disclosure Statements in Federal District Courts

Date: August 27, 2023

Federal Rule of Civil Procedure 7.1 requires a nongovernmental corporate party, upon its first appearance in a case, to file a statement disclosing "any parent corporation" of the party and "any publicly held corporation owning 10% or more of" the party's stock.[1] The rule's purpose, among other things, is to provide judges enough information to know whether the judge should recuse from the case. The Rule 7.1 Subcommittee (the "Subcommittee") of the Advisory Committee on Civil Rules is

[1] Rule 7.1. Disclosure Statement.

(a) Who Must File; Contents.

(1) Nongovernmental Corporations. A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene must file a statement that:

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

(B) states that there is no such corporation.

. . .

(b) Time to File; Supplemental Filing. A party, intervenor, or proposed intervenor must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement if any required information changes.

FED. R. CIV. P. 7.1.

investigating whether to amend the rule—and, if so, how—to better serve that purpose.

District courts are free to promulgate local rules that require additional disclosures beyond those that Rule 7.1 mandates.[2] The Subcommittee is interested in what kinds of local disclosure rules the district courts have adopted. To that end, I have surveyed the 89 sets of district-court local civil rules, and this memorandum catalogs my findings.[3] Part I lists the district courts for which I could not find any local rules imposing requirements on corporate-disclosure statements, and Part II lists those local rules I did find. In Part II, I have underlined the portions prescribing the contents of the disclosures with respect to corporate financial interests. Last, for the reader's convenience, I have included an appendix of links to each district court's local civil rules.

[2] *See* FED. R. CIV. P. 83(a)(1).

[3] Although there are 94 district courts, five pairs of courts share local rules: the Eastern and Western Districts of Arkansas, the Northern and Southern Districts of Iowa; the Eastern and Western Districts of Kentucky; the Northern and Southern Districts of Mississippi; and the Eastern and Southern Districts of New York.

Note that this survey does not include other local rules (criminal, bankruptcy, tax, etc.), nor does it include local forms or orders that were not attached to or referenced by a court's local civil rules. For a survey with broader coverage, see Memorandum from Ahmad Al Dajani to Judge Robert Dow et al. on Third Party Litigation Finance (June 28, 2019) (on file with the Rules Committee Staff).

I. District Courts Without Local Civil Rules Regarding Corporate-Disclosure Statements

1. Northern District of Alabama
2. District of Alaska
3. Eastern & Western Districts of Arkansas
4. Eastern District of California
5. District of Colorado
6. District of Delaware
7. Northern District of Florida
8. Southern District of Florida
9. District Court of Guam
10. District of Hawaii
11. District of Idaho
12. Southern District of Illinois
13. Northern District of Indiana
14. Southern District of Indiana
15. District of Kansas
16. Eastern & Western Districts of Kentucky
17. Eastern District of Louisiana
18. District of Massachusetts
19. Western District of Michigan
20. District of Minnesota
21. District of Nebraska
22. District of New Mexico
23. Northern District of New York
24. Western District of North Carolina
25. District of North Dakota
26. District Court of the Northern Mariana Islands
27. Eastern District of Oklahoma
28. District of Oregon
29. Eastern District of Pennsylvania
30. Middle District of Pennsylvania

31. District of Rhode Island
32. Eastern District of Tennessee
33. Western District of Tennessee
34. Eastern District of Texas
35. Southern District of Texas
36. Western District of Texas
37. District Court of the Virgin Islands
38. Western District of Virginia
39. Eastern District of Washington
40. Southern District of West Virginia
41. Western District of Wisconsin
42. District of Wyoming

II. District Courts with Local Civil Rules Regarding Corporate-Disclosure Statements

1. Middle District of Alabama

Local Rule 7.1. Conflict Disclosure Statement.

(a) All parties and amici curiae (including individuals and governmental entities) shall file a Conflict Disclosure Statement at the time of the filing of the initial pleading, or other Court paper on behalf of that party or as otherwise ordered by the Court, identifying all parent companies, subsidiaries, partners, limited liability entity members and managers, trustees (but not trust beneficiaries), affiliates, or similar entities that could potentially pose a financial or professional conflict for a judge. . . . . For the purposes of this rule, "affiliate" shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity; "parent" shall be an affiliate which controls such entity directly, or indirectly through intermediaries; and "subsidiary" shall be an affiliate controlled by such entity directly, or indirectly through one or more intermediaries.

(b) The purpose of this Disclosure Statement is to enable the judges of this Court to determine the need for recusal pursuant to 28 U.S.C. §455 or otherwise. Counsel shall have the continuing obligation to amend the disclosure statement to reflect relevant changes.

(c) The statement shall identify the represented entity's general nature and purpose and if the entity is unincorporated, the statement shall include the names of any members of the entity that have issued shares or debt securities to the public. No such listing need be made, however, of the names of members of a trade association or professional association. For purposes of this rule, a "trade association" is a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership. . . . .

2. Southern District of Alabama

Civil L.R. 7.1. Disclosure Statements.

(a) All non-governmental artificial entities appearing as parties or amici curiae shall file a Disclosure Statement along with the initial filing on behalf of that party or amicus. Where filing the Disclosure Statement with the initial filing is impossible or impracticable, it shall be filed within seven (7) days after the initial filing, or within such other time as the Court may direct.

(b) The Disclosure Statement shall identify the represented entity's general nature and shall identify all parents, subsidiaries, partners, members, managers, trustees, affiliates, and similarly related persons and entities. Members of a trade association or professional association need not be identified. For purposes of this Rule, an "affiliate" is an entity that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity; a "parent" is an affiliate that controls such entity directly, or indirectly through intermediaries; a "subsidiary" is an affiliate controlled by such entity directly, or indirectly through one or more intermediaries; and a "trade association" is a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative or other interests of the membership.

(c) The purpose of the Disclosure Statement is to enable the Judges of this Court to determine the need for recusal pursuant to 28 U.S.C. § 455 or otherwise. Counsel shall have the continuing obligation to amend the Disclosure Statement to reflect relevant changes.

. . .

3. District of Arizona

LRCiv 7.1.1. Corporate Disclosure Statement.

The disclosure statement required by Rule 7.1 of the Federal Rules of Civil Procedure and Rule[] 12.4(a) of the Federal Rules of Criminal Procedure must be made on a form provided by the Clerk and must be supplemented if new information is obtained.

4. Central District of California

L.R. 7.1-1. Notice of Interested Parties.

To enable the Court to evaluate possible disqualification or recusal, counsel for all non-governmental parties must file with their first appearance a Notice of Interested Parties, which must list all persons, associations of persons, firms, partnerships, and corporations (including parent corporations, clearly identified as such) that may have a pecuniary interest in the outcome of the case, including any insurance carrier that may be liable in whole or in part (directly or indirectly) for a judgment in the action or for the cost of defense. . . . .

. . . . Counsel must promptly file an amended Notice if any material change occurs in the status of interested parties, as through merger or acquisition or a change in the carrier that may be liable for any part of a judgment. . . . .

5. Northern District of California

3-15. Disclosure of Conflicts and Interested Entities or Persons

(a) Requirements. Each non-governmental party must:

(1) file a "Certification of Conflicts and Interested Entities or Persons" with its first appearance, filing, or other request addressed to the court;

(2) file such Certification as a separate document; and

(3) promptly file a supplemental Certification if any required information changes.

(b) Contents.

(1) The Certification must disclose whether the party is aware of any conflict, financial or otherwise, that the presiding judge may have with the parties to the litigation.

(2) The Certification must also disclose any persons, associations of persons, firms, partnerships, corporations (including, but not limited to, parent corporations), or any other entities, other than the parties themselves, known by the party to have either: (i) a financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

(3) For purposes of this Rule, the terms "proceeding" and "financial interest" shall have the meaning assigned by 28 U.S.C. § 455 (d)(1), (3) and (4), respectively.

. . .

6. Southern District of California

Civil Rule 40.2. Notice of Party with Financial Interest.

Any non-governmental corporate party to an action in this court must file a "Corporate Disclosure Statement" identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock. A party will file a separate statement entitled Notice of Party with Financial Interest with its initial appearance in the Court and will supplement the statement within a reasonable time of any change in the information.

7. District of Columbia

LCvR 26.1. Disclosure of Corporate Affiliations and Financial Interests

In all civil, agency, or criminal cases where a corporation is a party or intervener, counsel of record for that party or intervener shall file a certificate listing any parent, subsidiary, affiliate, or any company which owns 10% or more of the stock of that party or intervener which, to the knowledge of counsel, has any outstanding securities in the hands of the public. Such certificate shall be filed at the time the party's first pleading is filed. The purpose of this certificate is to enable the judges of this Court to determine the need for recusal. Counsel shall have the continuing obligation to advise the Court of any change. . . . .

8. District of Connecticut

Order re: Disclosure Statement (Amended December 19, 2022)

Any non-governmental corporate party to an action in this court, or any non-governmental party who seeks to intervene, shall file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock. A party shall file the statement with its initial pleading filed in the court and shall supplement the statement within a reasonable time of any change in the information.

9. Middle District of Florida

Rule 3.03. Disclosure Statement.

(a) Disclosure Statement. With the first appearance, each party must file a disclosure statement identifying:

(1) each person—including each lawyer, association, firm, partnership, corporation, limited liability company, subsidiary, conglomerate, affiliate, member, and other identifiable and related legal entity—that has or might have an interest in the outcome;

(2) each entity with publicly traded shares or debt potentially affected by the outcome;

(3) each additional entity likely to actively participate, including in a bankruptcy proceeding the debtor and each member of the creditors' committee; and

(4) each person arguably eligible for restitution.

(b) Certification. The disclosure statement must include this certification: "I certify that, except as disclosed, I am unaware of an actual or potential conflict of interest affecting the district judge or the magistrate judge in this action, and I will immediately notify the judge in writing within fourteen days after I know of a conflict."

10. Middle District of Georgia

Local Rule 87. Corporate Disclosure Statement.

87.1. Who Must File. Any nongovernmental corporate party to an action in this court shall file a separate statement identifying all of its parent and subsidiary corporations and listing any publicly held company that owns 10% or more of the party's stock.

. . .

87.3 Time for Filing. A party shall file the statements with its initial pleading filed in this court and shall supplement the statements within a reasonable time of any change in the information.

11. Northern District of Georgia

LR 3.3. Certificate of Interested Persons and Corporate Disclosure Statement.

(A) Scope. Counsel for all private (non-governmental) parties in civil cases, including those that seek to intervene, must at the time of first appearance file a certificate containing:

(1) A complete list of the parties, including proposed intervenors, and the corporate disclosure statement required by FRCP 7.1.

(2) A complete list of other persons, associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case.

(3) A complete list of each person serving as an attorney in the case.

. . .

(B) Duties of Counsel. Each attorney has a continuing duty to notify the Court of any changes to the information reported on the certificate . . . .

. . .

12. Southern District of Georgia

LR 7.1.1. Disclosure Statement.

The disclosure statement required by Federal Rule of Civil Procedure 7.1 shall be furnished by counsel for all private (non-government) parties, both plaintiffs and defendants, and shall be filed with the Complaint and Answer. It shall certify a full and complete list of all parties, all officers, directors, or trustees of parties, and all other persons, associations of persons, firms, partnerships, subsidiary or parent corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case, including any parent or publicly-held corporation that holds ten percent (10%) or more of a party's stock. Should a merger or acquisition occur during the pendency of litigation, counsel shall so notify the Court thereof in writing. . . . .

13. Central District of Illinois

Rule 11.3. Certificate of Interest.

To enable the presiding judge to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or an amicus curiae must file a Certificate of Interest stating the following information:

(1) The full name of every party or amicus the attorney represents in the case;

(2) If such party or amicus is a corporation:

(a) its parent corporation, if any; and

(b) a list of corporate stockholders which are publicly held companies owning 10 percent or more of the stock of the party or amicus if it is a publicly held company.

(3) The name of all law firms whose partners or associates appear for a party or are expected to appear for the party in the case.

. . .

14. Northern District of Illinois

LR3.2. Notification as to Affiliates.

(a) Definition. For purposes of this rule, "affiliate" is defined as any entity or individual owning, directly or indirectly (through ownership of one or more other entities), 5% or more of a party.[4]

(b) Who Must File. Any nongovernmental party, other than an individual or sole proprietorship, shall file a Notification of Affiliates.

(c) Required Information. A Notification of Affiliates shall identify all of the party's affiliates known to the party after a diligent review; or state that after a diligent review the party has identified no affiliates.

(d) Time for Filing. A party must file the statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court.

. . .

(f) Supplemental Statement. A supplement to the statement shall be filed within thirty (30) days of the party becoming aware of any change in the information reported. A party shall undertake good faith efforts to remain apprised of any such changes.

[4] At the August 2023 subcommittee meeting, I characterized this rule as "recursive." That characterization applies to an older version of the rule, in which an affiliate was defined to include "[a]ny entity or individual who owns 5% or more of" an affiliate. *See* Gen. Order 21-0045, at 2 (Dec. 21, 2021), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/admin/pdf-orders/General%20Order%2021-0045%20-%20Local%20Rule%203.2%20-%20Notification%20as%20to%20Affiliates%20(final).pdf. The rule has since been amended to remove that "recursive" language.

15. Northern & Southern Districts of Iowa

LR 7.1. Disclosure Statement.

a. Plaintiff's Disclosure Statement. Within 21 days after a civil complaint is filed, each nongovernmental plaintiff that is not a natural person must file with the Clerk of Court a disclosure form containing the following:

   1. The names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to the plaintiff as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the plaintiff's outcome in the case; and

   2. With respect to each such entity, a description of its connection to or interest in the litigation.

b. Defendant's Disclosure Statement. Within 30 days after service of a civil complaint on a nongovernmental defendant that is not a natural person, such defendant must file with the Clerk of Court a statement containing the following:

   1. The names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to the defendant as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the defendant's outcome in the case; and

   2. With respect to each such entity, a description of its connection to or interest in the litigation.

c. Intervenor's Disclosure Statement. Concurrently with the filing of a request to intervene, each nongovernmental intervenor that is not a natural person must file with the Clerk of Court a statement containing the following:

   1. The names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to the intervenor as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the intervenor's outcome in the case; and

   2. With respect to each such entity, a description of its connection to or interest in the litigation.

d. Disclosure Statement Forms. The disclosure form is available on the courts' websites. The disclosure statement form is designed to enable the involved federal judges to evaluate possible bases for disqualification or recusal.

e. Conflicts List. After entering an appearance in a pending civil case, the lawyers for the parties must determine promptly if a presiding judge has filed a conflicts list with the Clerk of Court by doing one of the following:

   1. Inspecting the conflicts information on the courts' websites; or

   2. Inquiring of the Clerk of Court of the district.

   If a conflicts list for the presiding judge has been filed with the Clerk of Court, the lawyer must review the list and notify the Clerk of Court immediately if it appears a presiding judge may have a conflict with any association, firm, partnership, corporation, or other artificial entity either related to any party or having a pecuniary interest in the case.

16. Middle District of Louisiana

Local Civil Rule 7.1. Certificate of Interested Persons.

All parties, including parties added during the pendency of a civil action, are required to file a certificate of interested persons. In addition to the requirements of Fed. R. Civ. P. 7.1(a), civil complaints and the initial responsive pleading or motion filed in lieu of responsive pleadings that a defendant files in a civil action must be accompanied by a separately filed and signed certificate of interested persons that contains a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are financially interested in the outcome of the case or else a statement that there are no such persons to identify.

If a civil action is removed, the plaintiff shall file a signed certificate of interested persons, which shall neither constitute a general appearance nor prejudice the party's ability to file a motion for remand.

All parties must promptly file a supplemental certificate if any required information changes.

Local Civil Rule 10. Form of Pleadings.

(a) . . .

. . .

(4) In addition to the requirements of Fed. R. Civ. P. 7.1(a), civil complaints must also be accompanied by a separately filed and signed certificate of interested persons that contains a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are financially interested in the outcome of the case or else a statement that there are no such persons to identify. This requirement shall not apply to persons in the custody of civil, state or federal institutions or to persons filing cases pro se.

. . .

17. Western District of Louisiana

LR5.6. Corporate Disclosure.

Any non-governmental corporate party to an action in this court shall file a statement identifying all its parent corporations and any publicly traded company that owns 10 percent or more of the party's stock, unless such filing is waived by the presiding judge. A party shall file the statement as soon as practicable and in no event later than the preliminary conference or the scheduled hearing date for any dispositive motion, whichever is earlier. A party shall supplement the statement within a reasonable time of any relevant change in the information. Nothing herein is intended to require the disclosure of confidential information except *in camera* to the judge.

18. District of Maine

Rule 7.1. Disclosure Statement.

(a) Who Must File; Contents

(1) Non-Governmental Corporations. A non-governmental corporate party or non-governmental corporate party that seeks to intervene must file a disclosure statement.

(i) Definition: A non-governmental corporate party is any non-governmental entity that is not an individual, including but not limited to a corporation, limited liability company, sole proprietorship, partnership, firm, joint venture, trust, or similar entity.

(ii) Contents: The disclosure statement of a non-governmental corporate party must identify any parent corporation, publicly held corporation, affiliated corporation, limited liability company, partnership, firm, joint venture, trust, or other entity, or any individual owning 10% more of the stock or having 10% or more ownership interest in the non-governmental corporate party, or state that there is no such entity or individual.

. . .

(b) Time to File; Obligation to Supplement. A party or intervenor must:

(1) File a disclosure statement required by 7.1(a)(1) and/or (a)(2) above with its first appearance, pleading, petition, application, motion, notice, response, or other request addressed to the Court; and

(2) Promptly file a supplemental disclosure statement identifying

(i) any change of ownership of a non-governmental corporate party or intervenor resulting in a previously undisclosed entity or individual owning 10% or more of the stock or having 10% or more ownership interest in the non-governmental corporate party . . .

. . .

Rule 83.6. Bankruptcy.

. . .

(d) Statement of Interested Parties. Statement Regarding Interested Parties. [sic] Any party, other than governmental parties, filing in either the United States Bankruptcy Court for the District of Maine or the United States District Court for the District of Maine, as the case may be, a notice of appeal, a motion for leave to appeal, an election to the United States District Court for the District of Maine, or an appellate brief, under Federal Rules of Bankruptcy Procedure Rules 8003, 8004, 8005, or 8014, must file along with the first such filing a Statement indicating whether it knows of any Interested Party who is not listed in the notice of appeal, or motion for leave to appeal if no such notice of appeal has been filed. An "Interested Party" includes all persons, associations of persons, firms, guarantors, partnerships, insurers, affiliates, limited liability companies, joint ventures, corporations (including parent or affiliated corporations, clearly identified as such), or any similar entity owning 10% or more of any corporate party to the appeal, that are financially interested in the outcome of the appeal. Parties shall be under a continuing obligation to file an amended Statement of Interested Parties if any

material change occurs in the status of an Interested Party, such as through merger, acquisition, or a new/additional membership. The Statement of Interested Parties must include the names of attorneys who have previously appeared for a party in the case or proceeding below, but who have not entered an appearance in the appeal to this Court.

19. District of Maryland

L.R. 103. Institution of Suit and Pleadings.

. . .

3. Disclosure of Affiliations and Financial Interest. When filing an initial pleading, including the removal of a state action, or promptly after learning of the information to be disclosed, counsel shall file a statement (separate from any pleading) containing the following information.

   a) Corporate Affiliation. The identity of <u>any parent or other affiliate of a corporate party and the description of the relationship between the party and such affiliates.</u> The identity of <u>all members of any party that is a business entity established under state law, other than a corporation</u>; and in cases based on diversity jurisdiction, the state of citizenship of each member.

   b) Financial Interests in the Outcome of the Litigation. The identity of <u>any corporation, unincorporated association, partnership, or other business entity, not a party to the case, which may have any financial interest whatsoever in the outcome of the litigation, and the nature of its financial interest</u>. The term <u>"financial interest in the outcome of the litigation" includes a potential obligation of an insurance company or other person to represent or to indemnify any party to the case</u>. Any notice given to the Clerk under this Rule shall not be considered as an admission by the insurance company or other person that it does in fact have an obligation to defend the litigation or to indemnify a party or as a waiver of any rights that it might have in connection with the subject matter of the litigation.

. . .

L.R. 105. Motions, Briefs, and Memoranda.

. . .

12. Amicus Briefs.

    . . .

    h) Disclosure of Corporate Affiliation. If the amicus curiae is a corporation, it must file a disclosure statement like that required of parties by L.R. 103.3.a.

20. Eastern District of Michigan

LR 83.4. Disclosure of Corporate Affiliations and Financial Interest.

(a) Parties Required to Make Disclosure. With the exception of the United States Government or agencies thereof, or a state government or agencies or political subdivisions thereof, all corporate parties to a civil case and all corporate defendants in a criminal case must file a Statement of Disclosure of Corporate Affiliations and Financial Interest. A negative report is also required.

(b) Financial Interest to Be Disclosed.

(1) Whenever a corporation which is a party to a case is a subsidiary or affiliate of any publicly owned corporation not named in the case, counsel for the corporation which is a party must file the statement of disclosure provided in (c) identifying the parent corporation or affiliate and the relationship between it and the corporation which is a party to the case. A corporation is considered an affiliate of a publicly owned corporation for purposes of this Rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, lease, profit sharing agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the case, has a substantial financial interest in the outcome of the litigation, counsel for the party whose interest is aligned with that of the publicly owned corporation or its affiliate must file the statement of disclosure provided in (c) identifying the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Statement of Disclosure. The statement of disclosure must be made on a form provided by the Clerk and filed, as part of the first pleading or paper filed by the party in this Court, or as soon as the party becomes aware of the corporate affiliation or financial interest, or as otherwise ordered by the judge to whom the case is assigned.

Comment: LR 83.4 is based on 6th Cir. R. 26.1. It is the responsibility of the courtroom deputy clerk for the judge to whom the case is assigned to monitor compliance with this Rule, including but not limited to sending out copies of the statement of disclosure to new defendants, third-party defendants, and others affected under (b).

21. Northern & Southern Districts of Mississippi

Local Rule 7. Motions and Other Papers.

. . .

(c) Corporate Disclosure Statement. A non-governmental corporate party must file a statement identifying all of its parent corporations and listing any publicly-held company that owns ten percent or more of the party's stock. The Corporate Disclosure Statement must be filed as a separate pleading with the party's initial pleading. Each party must supplement the statement within a reasonable time of any change in the disclosure information.

22. Eastern District of Missouri

Rule 2.09 (FRCP 7.1). Disclosure Statement.

(A) Statement. Every nongovernmental corporate party or nongovernmental corporation that seeks to intervene in any case, and every party or intervenor in an action in which jurisdiction is based upon diversity under 28 U.S.C. § 1332(a), must file a Disclosure Statement provided by and available from the Clerk of Court. Information provided in the Disclosure Statement may be used by the judge assigned to a case to determine recusal and jurisdictional issues. The Disclosure Statement may be filed under seal if so ordered by the Court in accordance with Local Rule 13.05 (A). When a negative or "not applicable" response is required, the Disclosure Statement must so state.

(B) Content. If the subject is a nongovernmental corporate party or a nongovernmental corporation that seeks to intervene, the Disclosure Statement must identify <u>whether it is publicly traded and if so on which exchange(s); parent companies or corporations; subsidiaries not wholly owned, and any publicly held corporation or company that owns five percent (5%) or more of the subject's stock</u>.

. . .

(C) Time to File; Supplemental Filing. A party, intervenor, or proposed intervenor must file:

(1) the Disclosure Statement with its first appearance, pleading, petition, motion, response, or other request addressed to the Court; and

(2) a supplemental Disclosure Statement if any required information changes and/or if any later event occurs that could affect the Court's jurisdiction under 28 U.S.C.§ 1332(a), within seven (7) days of the change or event.

23. Western District of Missouri

Local Rule 7.1. Disclosure of Corporation Interests.

(a) Certificate of Interest. Every non-governmental corporate party must file a certificate of interest. The Court may consider the information provided in the certificate, but only to determine whether recusal is appropriate. The party must file this certificate with its first pleading or entry of appearance. Unless the Court orders otherwise, the party may not file the certificate of interest under seal.

(b) Content. The certificate of interest must identify <u>all associations, firms, partnerships, corporations, and other entities that either are related to the party as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the outcome in the case, including a description of its connection to or interest in the litigation</u>. The certificate must indicate when its answer is negative or not applicable.

(c) Changes and Updates. If the information contained in the certificate of interest changes after the certificate is filed and before time has expired for filing a notice of appeal from a final judgment in the case, the party must file an amended certificate within 7 days after the change.

24. District of Montana

Civil Rule 7.5. Amicus Brief.

. . .

(b) Motion for Leave.

. . .

(2) The motion must:

. . .

(B) include, if the amicus is a corporation, a disclosure statement like that required of parties by Fed. R. Civ. P. 7.1(a);

. . .

. . .

. . .

Civil Rule 24.1. Motion to Intervene.

. . .

(b) Motion and Supporting Documents.

(1) A motion to intervene must include:

. . .

(D) if the prospective intervenor is a corporation, a disclosure statement pursuant to Fed. R. Civ. P. 7.1(a);

. . .

. . .

. . .

25. District of Nevada

LR 7.1-1. Certificate of Interested Parties.

(a) Unless the court orders otherwise, in all cases except habeas corpus cases, pro se parties and attorneys for private non-governmental parties must identify in the disclosure statement all persons, associations of persons, firms, partnerships or corporations (including parent corporations) that have a direct, pecuniary interest in the outcome of the case.

. . .

(b) If there are no known interested parties other than those participating in the case, a statement to that effect will satisfy this rule.

(c) A party must file its disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A party must promptly file a supplemental certification upon any change in the information that this rule requires.

26. District of New Hampshire

LR 7.1.1. Disclosure Statement.

(a) Form of Filing. The disclosure statement for nongovernmental corporate parties and intervenors required by Fed. R. Civ. P. 7.1(a)(1) and this rule shall substantially conform to Civil Form 4, Nongovernmental Corporate Disclosure Statement. In cases in which jurisdiction is based on diversity of citizenship, the disclosure statement for parties and intervenors required by Fed. R. Civ. P. 7.1(a)(2) and this rule shall substantially conform to Civil Form 4.1, Diversity Disclosure Statement. These disclosure statements must be filed as separate documents and may not be combined into one document.

(b) Additional Information. The disclosure statement shall also identify any publicly held corporation with which a merger agreement exists.

(c) Partnerships and Limited Liability Companies. When a partnership or a limited liability company (LLC) is a party or intervenor to an action or proceeding, the partnership/LLC shall file a disclosure statement providing the information required in Fed. R. Civ. P. 7.1 and § (b) of this rule or shall state that there is no such corporate entity that holds such an interest in the partnership/LLC.

(d) Time for Filing in Removal Actions. In removal actions, a nongovernmental plaintiff or intervenor that is a corporation, partnership or LLC, or a party or intervenor in a diversity case, must file a disclosure statement within twenty-one (21) days from the date the notice of removal is filed or with the first appearance, pleading, petition, motion, response, objection, or request, whichever is filed sooner.

Civil Form 4. Nongovernmental Corporate Disclosure Statement.

❒ The filing party, a nongovernmental corporation, identifies the following parent corporation and any publicly held corporation that owns 10% or more of its stock:

- OR -

❒ The filing party, a partnership, identifies the following parent corporation and any publicly held corporation that owns 10% or more of the corporate partner's stock:

- OR -

❒ The filing party, a limited liability company (LLC), identifies the following parent corporation and any publicly held corporation that owns a 10% or more membership or stock interest in the LLC:

- AND/OR -

❒ The filing party identifies the following publicly held corporations with which a merger agreement exists:

- OR -

❒ The filing party has none of the above.

27. District of New Jersey

Civ. Rule 7.1.1. Disclosure of Third-Party Litigation Funding.

(a) Within 30 days of filing an initial pleading or transfer of the matter to this district, including the removal of a state action, or promptly after learning of the information to be disclosed, all parties, including intervening parties, shall file a statement (separate from any pleading) containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance:

1. The identity of the funder(s), including the name, address, and if a legal entity, its place of formation;

2. Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and

3. A brief description of the nature of the financial interest.

(b) The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.

. . .

28. Eastern & Southern Districts of New York

Local Civil Rule 7.1.1. Disclosure Statement.

For purposes of Fed. R. Civ. P. 7.1(b)(2), "promptly" shall mean "within fourteen days," that is, parties are required to file a supplemental disclosure statement within fourteen days of the time there is any change in the information required in a disclosure statement filed pursuant to those rules.

Committee Note

The Committee believes that Local Civil Rule 7.1.1 continues to serve a useful purpose in helping to ensure that Judges will be given prompt notice of changes that might require consideration of possible recusal.

29. Western District of New York

Rule 7.1. Business Organizat[i]on Party Disclosures.

In all cases, business organization parties (including corporations, LLCs, and partnerships) must identify any person (including but not limited to members, shareholders, partners, or individuals with direct decision making authority/in leadership positions) whose identities the party has reason to believe may bear on the Court's decision whether to recuse, on motion or sua sponte, including by reason of financial interest in the outcome of the litigation or involvement in the events that form the basis for any claim. Such identification must be made within the timeframe for corporate disclosure statements set forth in Federal Rule of Civil Procedure 7.1(b).

30. Eastern District of North Carolina

Rule 5.3. Removal and Post-Removal Procedure.

. . .

(d) Disclosure of Affiliations and Financial Interest. Within 14 days after the filing of a notice of removal, all parties shall make the disclosures required by Local Civil Rule 7.3, irrespective of the provisions of subsection (b) of this rule and Local Civil Rule 5.2(a).

. . .

Rule 7.3. Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation.

(a) All parties to a civil or bankruptcy case, whether or not they are covered by the terms of Fed. R. Civ. P. 7.1, shall file a corporate affiliate/financial interest disclosure statement. This rule does not apply to the United States or to state and local governments in cases in which the opposing party is proceeding without counsel.

(b) The statement shall set forth the information required by Fed. R. Civ. P. 7.1 and the following:

(1) A trade association shall identify in the disclosure statement all members of the association, their parent corporations, and any publicly held companies that own ten percent or more of a member's stock;

(2) All parties shall identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement;

(3) Whenever required by Fed. R. Civ. P. 7.1 or this rule to disclose information about a corporation that has issued shares to the public, a party shall also disclose information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded.

(c) The disclosure statement shall be on a form provided by the clerk. A negative statement is required if a party has no disclosures to make.

(d) The disclosure statement shall be filed when the party makes an initial appearance in the action. The parties are required to amend their disclosure statements when necessary to maintain their current accuracy.

Rule 11.2. Disclosure Statements.

(a) As part of making an appearance in every case, an attorney shall include the attorney's name and the name of the attorney's law firm. The attorney also shall file contemporaneously a client disclosure statement in accordance with Fed. R. Civ. P. 7.1 and Local Civil Rule 7.3.

(b) As part of making an appearance in every case, all pro se litigants (other than prisoners) shall file contemporaneously a disclosure statement in accordance with Fed. R. Civ. P. 7.1 and Local Civil Rule 7.3.

Rule 83.8. Bankruptcy Appeals.

(a) General Provisions. The following Local Civil Rules apply to appeals from the bankruptcy courts in this district:

. . .

7.3 (Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation)

. . .

11.2 (Disclosure Statements)

. . .

31. Middle District of North Carolina

LR 7.5. Brief of an Amicus Curiae.

. . .

(e) Disclosure Statement. If the movant is a corporation, a disclosure statement like that required of parties by Fed. R. Civ. P. 7.1 shall also be filed.

. . .

32. Northern District of Ohio

Local Rule 3.13. Commencement of an Action.

. . .

(b) Corporate Disclosure Statement.

(1) Information Disclosed. Any nongovernmental corporate party or any nongovernmental corporation that seeks to intervene in a case must file a corporate disclosure statement identifying the following:

(a) Any parent, subsidiary, or affiliate corporation;

(b) Any publicly held corporation that owns 10% or more of the party's stock; and

(c) Any publicly held corporation or its affiliate that has a substantial financial interest in the outcome of the case by reason of insurance, a franchise agreement or indemnity agreement.

A corporation is an affiliate for purposes of this rule if it controls, is under the control of, or is under common control with a publicly owned corporation.

. . .

(3) Time for Disclosure. A party, intervenor, or proposed intervenor must file the disclosure statement upon the filing of a complaint, answer, motion, response, or other pleading in this Court, whichever occurs first. The obligation to report any changes in the information originally disclosed continues throughout the pendency of the case. . . . .

. . .

33. Southern District of Ohio

Civ. R. 7.1.1. Disclosure Statements and Judicial Disqualification

(a) Parties Required to Make Disclosure. The disclosure requirements set forth in Fed. R. Civ. P. 7.1 extend to entities appearing *amici curiae*.

(b) Financial Interest to be Disclosed. In addition to the disclosures required under Fed. R. Civ. P. 7.1, nongovernmental corporate parties and parties appearing *amici curiae* shall disclose the identity of <u>any publicly held corporations or their affiliates that are not parties to the case or appearing amici curiae that have substantial financial interests in the outcome of the litigation by reason of insurance, a franchise agreement, or an indemnity agreement. The nature of that substantial financial interest shall also be disclosed.</u>

(c) Form and Time of Disclosure

. . .

(2) Although counsel and parties have an obligation to the Court to investigate and make accurate disclosures under this Rule, these requirements are solely for administrative purposes, and matters disclosed have no legal effect in the action.

(3) Parties required to file disclosure statements shall do so with their first appearance, pleading, petition, motion, response, or other filing with the Court. If the disclosure statement is required to be filed before all relevant facts have been fully investigated, it shall be specifically noted as potentially incomplete, and counsel shall thereafter complete the investigation and file a supplemental disclosure statement. Counsel shall also promptly file a supplemental statement upon any change in the information that the disclosure statement requires.

(d) Judicial Disqualification. In addition to addressing the corporate affiliations/financial interests, all counsel shall consider at the earliest opportunity whether there may be any reason for a Judge of this Court to disqualify himself or herself, pursuant to 28 U.S.C. § 144 or § 455, and shall advise the Court in writing as early as possible of any such concerns.

34. Northern District of Oklahoma

LCvR7.1-1. Disclosure Statement.

(a) Nongovernmental Entities—All Cases. Any nongovernmental corporation or other nongovernmental entity that is a party or that seeks to intervene shall file a Disclosure Statement, on the court approved form, available from the Court Clerk's office or the Court's website, making the disclosures listed in Fed. R. Civ. P. 7.1(a)(1), and also identifying the names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to the party or intervenor as a parent, subsidiary, or otherwise, or have a direct financial interest in the outcome of the litigation. The provisions of Fed. R. Civ. P. 7.1(b) shall apply to nongovernmental entities in all cases.

. . .

35. Western District of Oklahoma

LCvR7.1.1 Disclosure Statement.

A party formed as a limited liability company ("LLC") or partnership shall, concurrently with its first filing in the case, file a separate "Disclosure Statement Identifying Constituents of LLC or Partnership," identifying the LLC's members or the partnership's partners, as applicable. If any party has invoked federal jurisdiction on the basis of diversity of citizenship with the LLC or partnership, the disclosure statement shall also affirmatively state whether any of the members or partners are citizens of the adversary's alleged state of citizenship. The LLC or partnership must promptly file a supplemental statement if any required information changes. The court may relieve a party of some or all of the requirements of this rule for good cause.

36. Western District of Pennsylvania

LCvR 7.1. Disclosure Statement and RICO Case Statement.

A. Disclosure Statement.

1. Disclosure Statement Required. A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding shall file a Disclosure Statement, at the time of the filing of the initial pleading, or other Court paper on behalf of that party or as otherwise ordered by the Court, identifying all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public. In emergency or any other situations where it is impossible or impracticable to file the Disclosure Statement with the initial pleading, or other Court paper, it shall be filed within seven days of the date of the original filing. For the purposes of this rule, "affiliate" shall be a person or entity that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity; "parent" shall be an affiliate controlling such entity directly, or indirectly through intermediaries; and "subsidiary" shall be an affiliate controlled by such entity directly or indirectly through one or more intermediaries.

2. Purpose of Disclosure Statement. The purpose of this Disclosure Statement is to enable the Judges of this Court to determine the need for recusal pursuant to 28 U.S.C. § 455 or otherwise. Counsel shall have the continuing obligation to amend the Disclosure Statement to reflect relevant changes.

3. Disclosure Statement Contents. The Disclosure Statement shall identify the represented entity's general nature and purpose and if the entity is unincorporated. The statement shall include the names of any members of the entity that have issued shares or debt securities to the public. No such listing need be made, however, of the names of members of a trade association or professional association. For purposes of this rule, a "trade association" is a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership. . . . .

. . .

37. District of Puerto Rico

Local Civil Rule 7.1. Disclosure Statement.

Any non-governmental corporate party shall file a statement identifying all parent companies, subsidiaries and affiliates that have issued shares to the public. The statement shall be filed with a party's first appearance.

38. District of South Carolina

Local Civil Rule 26.01. Interrogatories to Be Answered by Each Party.

Answers to the interrogatories set out below are used for purposes of assigning cases and shall be filed with the court and served on all parties at the time a party first appears. In removed cases, the removing defendant shall file these responses with the removal papers. All other parties shall file responses no later than fourteen (14) days after service of the notice of removal. If a party fails to file the required responses on time, the clerk of court shall draw the requirement to the attention of the party (or counsel) and allow fourteen (14) days to file responses. The clerk of court shall have the authority to extend the time for responding. Absent order to the contrary, categories of actions listed in Fed. R. Civ. P. 26(a)(1)(B) are exempt from the requirements of this rule. Compliance with this rule satisfies the requirements of Fed. R. Civ. P. 7.1. The following information is required:

(A) State the full name, address, and telephone number of all persons or legal entities who may have a subrogation interest in each claim and state the basis and extent of that interest.

. . .

(C) State whether the party submitting these responses is a publicly owned company and separately identify (1) any parent corporation and any publicly held corporation owning ten percent (10%) or more of the party's stock; (2) each publicly owned company of which it is a parent; and (3) each publicly owned company in which the party owns ten percent (10%) or more of the outstanding shares.

. . .

39. District of South Dakota

Civil LR 7.1.1. Disclosure Statement.

Every non-government organizational party or intervenor in a civil case must file either a Corporate Disclosure Statement (disclosure statement) or a Certificate that Fed. R. Civ. P 7.1 is not applicable (certificate of non-applicability). Information provided under this local rule may be used by the judge assigned to a case to determine whether recusal is necessary or appropriate and to confirm jurisdiction is proper. The disclosure statement or certificate of non-applicability must be filed within fourteen (14) days of the party's first pleading or entry of appearance.

40. Middle District of Tennessee

LR7.02. Business Entity Disclosure Statement.

Any non-governmental business entity party must file a Business Entity Disclosure Statement, using the form located on the Court's website. A party must file the Business Entity Disclosure Statement as a separate document with its initial pleading, or other initial court filing, and must supplement the Business Entity Disclosure Statement within a reasonable time of any change in the information.

Business Entity Disclosure Form.

. . .

❒ This party has parent corporations.

If yes, identify on attached page(s) all parent corporations, including grandparent and great-grandparent corporations.

❒ Ten percent or more of the stock of this party is owned by a publicly held corporation or other publicly held entity.

If yes, identify on attached page(s) all such owners.

❒ This party is a limited liability company or limited liability partnership.

If yes, identify on attached page(s) each member of the entity and the member's state of citizenship. If any member is other than an individual person, the required information identifying ownership interests and citizenship for each sub-member must be provided as well. *See Delay v. Rosenthal Collins, Grp., LLC*, 585 F.3d 1003 (6th Cir. 2009).

❒ This party is an unincorporated association or entity.

If yes, identify on attached page(s) the nature of the entity, the members of the entity and the member's state of citizenship. If any member is other than an individual person, the required information identifying ownership interests and citizenship for each sub-member must be provided as well.

❒ This party is [a] trust.

If yes, identify on attached page(s) each trustee and each trustee's state of citizenship. If any trustee is other than an individual person, the required information identifying ownership of the non-individual the trustee and state of citizenship of each sub-trustee must be provided as well.

❒ Another publicly held corporation or another publicly held entity has a direct financial interest in the outcome of the litigation.

If yes, identify on attached page(s) all corporations or entities and the nature of their interest.

41. Northern District of Texas

LR 3.1. Filing Complaint by Electronic Means.

A plaintiff may file a complaint by electronic means by following the procedures set forth in the ECF Administrative Procedures Manual. The complaint must be accompanied by:

. . .

(c) a separately signed certificate of interested persons—in a form approved by the clerk—that contains—in addition to the information required by Fed. R. Civ. P. 7.1(a)—a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are financially interested in the outcome of the case. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary.

LR 3.2. Filing Complaint on Paper.

To file a complaint on paper, a plaintiff must provide the clerk:

. . .

(e) a separately signed certificate of interested persons—in a form approved by the clerk—that contains—in addition to the information required by Fed. R. Civ. P. 7.1(a)—a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are financially interested in the outcome of the case. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary.

LR 7.4. Certificate of Interested Persons.

The initial responsive pleading or motion filed in lieu of a responsive pleading that a defendant files in a civil action must be accompanied by a separately signed certificate of interested persons that complies with LR 3.1(c) or 3.2(e). If the defendant concurs in the accuracy of another party's previously filed certificate, the defendant may adopt that certificate.

LR 81.1. Required Form of Documents to be Filed upon Removal.

(a) The party or parties that remove a civil action from state court must provide the following to the clerk for filing:

. . .

(4) a notice of removal with a copy of each of the following attached to both the original and the judge's copy—

. . .

(D) a separately signed certificate of interested persons that complies with LR 3.1(c) or 3.2(e).

. . .

LR 81.2. Certificate of Interested Persons.

Within 21 days after the notice of removal is filed, the plaintiff shall file a separately signed certificate of interested persons that complies with LR 3.1(c) or 3.2(e). If the plaintiff concurs in the accuracy of another party's previously filed certificate, the plaintiff may adopt that certificate.

42. District of Utah

DUCivR 7-6. Amicus Curiae Participation.

(a) Participation. An attorney or person, entity, or the government through an attorney may seek leave of the court to file an amicus curiae brief in a case. Those seeking leave must file a motion consistent with section 7-6(b).

. . .

(d) Memorandum Contents.

(1) The memorandum must include the following sections:

(A) if the amicus curiae is a nongovernmental corporate party, the disclosure statement required by Fed. R. Civ. P. 7.1(a);

. . .

. . .

. . .

43. District of Vermont

Local Civil Rule 7.1. Corporate Disclosure; Purpose.

(a) Corporate Disclosure. In addition to the disclosures required by Fed. R. Civ. P. 7.1, a nongovernmental corporate party or a non-governmental party that seeks to intervene must file a statement identifying:

(1) any subsidiary (except wholly-owned subsidiaries); and

(2) any affiliate that has issued shares of ownership to the public.

(b) Purpose. This requirement is intended to assist the court in determining whether conflicts-of-interest might disqualify the judge from the case. Counsel may obtain information regarding a judge's financial interests by a written request to the clerk.

44. Eastern District of Virginia

Local Civil Rule 7.1. Disclosure Statement.

(A) Nongovernmental Corporations. A nongovernmental corporation, partnership, trust, or other similar entity that is a party to, or that appears in, an action or proceeding in this Court shall:

(1) file a statement that:

a. identifies all its parent, subsidiary, or affiliate entities (corporate or otherwise) that have issued stock or debt securities to the public and also identifies any publicly held entity (corporate or otherwise) that owns 10% or more of its stock, and

b. identifies all parties in the partnerships, general or limited, or owners or members of non-publicly traded entities such as LLCs or other closely held entities, or

c. states that there is nothing to report under Local Civil Rule 7.1(A)(1)(a) and (b); and

(2) file a supplemental statement containing such additional information as may be from time to time required by the Judicial Conference of the United States or this Court.

. . .

(C) Time for Filing. A statement or form required by Local Civil Rule 7.1(A) shall be filed upon the party's first appearance, pleading, petition, motion, response, or other request addressed to the Court. A supplemental statement or form shall be filed promptly upon any change in the circumstances that Local Civil Rule 7.1(A) requires the party to identify.

45. Western District of Washington

LCR 7.1. Corporate Disclosure Statement.

(a) Who Must File; Contents. Any nongovernmental party, or any nongovernmental corporation that seeks to intervene, other than an individual or sole proprietorship, must file a corporate disclosure statement. The corporate disclosure statement must do one of the following:

(1) Identify any parent corporation and any publicly held corporation owning more than 10% of its stock; any member or owner in a joint venture or limited liability corporation (LLC); all partners in a partnership or limited liability partnership (LLP); and any corporate member, if the party is any other unincorporated association; or

(2) State that there "is no parent, shareholder, member, or partner to identify as required by LCR 7.1(a)(1)."

. . .

46. Northern District of West Virginia

LR Civ P 7.10. Disclosure Statement.

In order for a presiding judicial officer to be aware of any potential issues regarding judicial disqualification on the basis of financial information unknown to the Court, a non-governmental corporate party to any civil or criminal proceeding, and the government in a criminal proceeding, must provide the Court with sufficient information to allow the judge to make an informed decision about any potential conflict of interest pursuant to the applicable Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and Rules Governing Judicial Conduct.

(a) Form Provided by the Clerk of Court: The Clerk of Court shall provide a form on the Court Internet Site (www.wvnd.uscourts.gov) that parties may use to provide any statement required by this Rule or, in lieu thereof, a party may prepare and file a similar statement containing the same information required by this Rule.

. . .

Local Disclosure Form.

1. I[s] the party or intervenor a non-governmental corporate party?

❒ Yes ❒ No

2. If the answer to Number 1 is "yes," list below any parent corporation or state that there is no such corporation:

3. If the answer to Number 1 is "yes," list below any public[ly]-held corporation that owns 10% or more of the party or intervenor's stock or state that there is no such corporation:

. . .

47. Eastern District of Wisconsin

Civil L. R. 7.1. Disclosure Statement.

(a) Required information. To enable the Court to determine whether recusal is necessary or appropriate, an attorney for a nongovernmental party, an intervenor, or an amicus curiae must file a Disclosure Statement that:

(1) states the full name of every party, intervenor, or amicus the attorney represents in the action; and

(2) if such party, intervenor, or amicus is a corporation:

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

(B) states there is no such corporation; and

(3) states the names of all law firms whose attorneys will appear, or are expected to appear, for the party in this Court.

(b) Filing and Serving. A party, intervenor, or amicus curiae must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, notice of removal or other request addressed to the Court, or when a case has been removed to this Court, the non-removing party must file within 14 days of the filing of a notice of removal; and

(2) promptly file a supplemental statement if any required information changes.

. . .

Appendix: Links to Local Civil Rules

1. Middle District of Alabama: https://www.almd.uscourts.gov/sites/default/files/forms/ALMD%20Local%20Rules.pdf
2. Northern District of Alabama: https://www.alnd.uscourts.gov/sites/alnd/files/ALND%20Local%20Rules%20Revised%2012-04-2019.pdf
3. Southern District of Alabama: https://www.alsd.uscourts.gov/sites/alsd/files/local-rules.pdf
4. District of Alaska: https://www.akd.uscourts.gov/sites/akd/files/local_rules/Local%20Civil%20Rules.January%202023.FINAL%20.pdf
5. Eastern District of Arkansas: https://www.are.uscourts.gov/sites/are/files/local_rules/All_LR.pdf
6. Western District of Arkansas: https://www.arwd.uscourts.gov/sites/arwd/files/ARWD%20Local%20Rules.pdf
7. District of Arizona: https://www.azd.uscourts.gov/sites/default/files/local-rules/Local%20Rules%20Master%20File%202021.pdf
8. Central District of California: https://www.cacd.uscourts.gov/sites/default/files/documents/2023%20June%20LRs%20Chap%201.pdf
9. Eastern District of California: https://www.caed.uscourts.gov/caednew/assets/File/EDCA%20Local%20Rules%20Effective%208-7-23.pdf
10. Northern District of California: https://www.cand.uscourts.gov/wp-content/uploads/local-rules/civil-local-rules/CAND_Civil_Local_Rules_2-2-2023.pdf
11. Southern District of California: https://www.casd.uscourts.gov/_assets/pdf/rules/2023.08.18%20Local%20Rules.pdf
12. District of Colorado: http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/LocalRules/CivilLocalRules.aspx[5]
13. District of Columbia: https://www.dcd.uscourts.gov/sites/dcd/files/local_rules/Local%20Rules%20April_2023%282%29.pdf
14. District of Connecticut: https://www.ctd.uscourts.gov/sites/default/files/Revised-Local-Rules-8.14.23.pdf
15. District of Delaware: https://www.ded.uscourts.gov/sites/ded/files/local-rules/District%20of%20Delaware%20LOCAL%20RULES%202016.pdf
16. Middle District of Florida: https://www.flmd.uscourts.gov/sites/flmd/files/local_rules/flmd-united-states-district-court-middle-district-of-florida-local-rules.pdf

[5] Using "https" instead of "http" may not work.

17. Northern District of Florida: https://www.flnd.uscourts.gov/sites/flnd/files/local_rules/local_rules_0.pdf

18. Southern District of Florida: https://www.flsd.uscourts.gov/sites/flsd/files/22-11-15%202022%20Local%20Rules%20effective%20120122%20-%20FINAL.pdf

19. Middle District of Georgia: https://www.gamd.uscourts.gov/sites/gamd/files/Local_Rules-12_1_2022.pdf

20. Northern District of Georgia: https://www.gand.uscourts.gov/sites/gand/files/local_rules/NDGARulesCV_0.pdf

21. Southern District of Georgia: https://www.gasd.uscourts.gov/sites/gasd/files/LocalRules-printable.pdf

22. District Court of Guam: https://www.gud.uscourts.gov/sites/gud/files/civil_rules_effective_20190722_0.pdf

23. District of Hawaii: https://www.hid.uscourts.gov/files/order532/2019_08_26_administrative_Order%20Amending%20the%20Local%20Rules%20eff%202019_09_01(1).pdf

24. District of Idaho: https://www.id.uscourts.gov/content_fetcher/print_pdf_packet.cfml?Court_Unit=District&Content_Type=Rule&Content_Sub_Type=Civil

25. Central District of Illinois: https://www.ilcd.uscourts.gov/sites/ilcd/files/August%2011%202023%20Local%20Rules.pdf

26. Northern District of Illinois: https://www.ilnd.uscourts.gov/_assets/_documents/_rules/LRRULES.pdf

27. Southern District of Illinois: https://www.ilsd.uscourts.gov/Forms/2021LocalRules.pdf

28. Northern District of Indiana: https://www.innd.uscourts.gov/sites/innd/files/CurrentLocalRules.pdf

29. Southern District of Indiana: https://www.insd.uscourts.gov/sites/insd/files/Local%20Rules%207-1-23.pdf

30. Northern District of Iowa: https://www.iand.uscourts.gov/sites/iand/files/Local%20Rules%20-%20Final%20Website%20Version.pdf

31. Southern District of Iowa: https://www.iasd.uscourts.gov/sites/default/files/forms/Local%20Rules%20-%20Final%2012142020.pdf

32. District of Kansas: https://ksd.uscourts.gov/sites/ksd/files/MASTER%20COPY%20updated%2008-23-23.pdf

33. Eastern District of Kentucky: https://www.kyed.uscourts.gov/sites/kyed/files/KY%20Amended%20Civil%20Rules_07-12-2023.pdf

34. Western District of Kentucky: https://www.kywd.uscourts.gov/sites/kywd/files/local_rules/KY%20Amended%20Civil%20Rules_07-7-2023_draft.pdf

35. Eastern District of Louisiana: https://www.laed.uscourts.gov/sites/default/files/local_rules/2022%20CIVIL%20RULES%20LAED%20w%20Amendments%203.1.22.pdf

36. Middle District of Louisiana: https://www.lamd.uscourts.gov/sites/default/files/pdf/2022%20Local%20Rules%20Revisions%208-18-2022.pdf

37. Western District of Louisiana: https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/localrules.WDLA.2022July12.pdf

38. District of Maine: https://www.med.uscourts.gov/sites/med/files/LocalRules.pdf

39. District of Maryland: https://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf

40. District of Massachusetts: https://www.mad.uscourts.gov/general/pdf/local-rules/Combined%20Local%20Rules.pdf

41. Eastern District of Michigan: https://www.mied.uscourts.gov/PDFFIles/localRulesPackage.pdf

42. Western District of Michigan: https://www.miwd.uscourts.gov/court-info/local-rules-and-orders/local-civil-rules

43. District of Minnesota: https://www.mnd.uscourts.gov/sites/mnd/files/Local-Rules-Master.pdf

44. Northern District of Mississippi: https://www.msnd.uscourts.gov/sites/msnd/files/forms/2021-%20MASTER%20COPY%20-%20CIVIL%20FINAL.pdf

45. Southern District of Mississippi: https://www.mssd.uscourts.gov/sites/mssd/files/2021_MASTER_COPY_CIVIL_FINAL.pdf

46. Eastern District of Missouri: https://www.moed.uscourts.gov/sites/moed/files/CMECF_localrule.pdf

47. Western District of Missouri: https://www.mow.uscourts.gov/sites/mow/files/DC-Local_Rules.pdf

48. District of Montana: https://www.mtd.uscourts.gov/sites/mtd/files/LocalRules_12012022.pdf

49. District of Nebraska: https://www.ned.uscourts.gov/internetDocs/localrules/NECivR.2022.pdf

50. District of Nevada: https://www.nvd.uscourts.gov/wp-content/uploads/2020/04/Local-Rules-of-Practice-Amended-2020.pdf

51. District of New Hampshire: https://www.nhd.uscourts.gov/pdf/Combined%20LR%20Dec%202022.pdf

52. District of New Jersey: https://www.njd.uscourts.gov/sites/njd/files/CompleteLocalRules.pdf

53. District of New Mexico: https://www.nmd.uscourts.gov/sites/nmd/files/local_rules/Local%20Rules%20of%20Civil%20Procedure%20Adopted%20October%201%2C%202020_0.pdf

54. Eastern District of New York: https://img.nyed.uscourts.gov/files/local_rules/localrules_8.pdf

55. Northern District of New York: https://www.nynd.uscourts.gov/sites/nynd/files/local_rules/Local%20Rules%202023_Errata_030923.pdf

56. Southern District of New York: https://nysd.uscourts.gov/sites/default/files/local_rules/2021-10-15%20Joint%20Local%20Rules.pdf

57. Western District of New York: https://www.nywd.uscourts.gov/sites/nywd/files/2023%20Local%20Rules%20of%20Civil%20Procedure%20FINAL%20-%20signed.pdf

58. Eastern District of North Carolina: https://www.nced.uscourts.gov/pdfs/Local%20Civil%20Rules%202023.pdf

59. Middle District of North Carolina: https://www.ncmd.uscourts.gov/sites/ncmd/files/2022_June_01_CIVRulesEffective.pdf

60. Western District of North Carolina: https://www.ncwd.uscourts.gov/sites/default/files/local_rules/Revised%20Local%20Rules%20120122.pdf

61. District of North Dakota: https://www.ndd.uscourts.gov/lci/Local_Rules.pdf

62. District Court of the Northern Mariana Islands: https://www.nmid.uscourts.gov/documents/localrules/LR20171101.pdf

63. Northern District of Ohio: https://www.ohnd.uscourts.gov/sites/ohnd/files/Civil%20Rules%204-3-2023.pdf

64. Southern District of Ohio: https://www.ohsd.uscourts.gov/sites/ohsd/files//Local%20Rules%20Effective%202022-07-25.pdf

65. Eastern District of Oklahoma: https://www.oked.uscourts.gov/sites/oked/files/Local_Civil_Rules.pdf

66. Northern District of Oklahoma: https://www.oknd.uscourts.gov/sites/default/files/madcap/Local%20Rules%20PDF.pdf

67. Western District of Oklahoma: https://www.okwd.uscourts.gov/Documents/Local_Rules_05-2021_With_Revised_Appendix_IV.pdf

68. District of Oregon: https://www.ord.uscourts.gov/index.php?option=com_content&view=category&id=1177&Itemid=441

69. Eastern District of Pennsylvania: https://www.paed.uscourts.gov/documents/locrules/civil/cvrules.pdf

70. Middle District of Pennsylvania: https://www.pamd.uscourts.gov/sites/pamd/files/LR120114.pdf

71. Western District of Pennsylvania: https://www.pawd.uscourts.gov/sites/pawd/files/lrmanual20181101.pdf

72. District of Puerto Rico: https://www.prd.uscourts.gov/sites/default/files/local_rules/20230714-USDCPR-Local-Rules_0.pdf

73. District of Rhode Island: https://www.rid.uscourts.gov/sites/rid/files/documents/localrulesreviewcommittee/LocalRules120119_0.pdf

74. District of South Carolina: https://www.scd.uscourts.gov/Rules/Civil%20Rules%20-%20Current.pdf

75. District of South Dakota: https://www.sdd.uscourts.gov/sites/sdd/files/Civil%20Local%20Rule%20Changes%20%28Complete%20Set%29.pdf

76. Eastern District of Tennessee: https://www.tned.uscourts.gov/sites/tned/files/localrules.pdf

77. Middle District of Tennessee: https://www.tnmd.uscourts.gov/court-info/local-rules-and-orders/local-rules; *see also* https://www.tnmd.uscourts.gov/sites/tnmd/files/forms/Business%20Entity%20disclosure%20form.pdf

78. Western District of Tennessee: https://www.tnwd.uscourts.gov/pdf/content/LocalRules.pdf

79. Eastern District of Texas: https://www.txed.uscourts.gov/sites/default/files/HR_Docs/TXED%20Local%20Rules%202022.pdf

80. Northern District of Texas: https://www.txnd.uscourts.gov/sites/default/files/documents/CIVRULES.pdf

81. Southern District of Texas: https://www.txs.uscourts.gov/sites/txs/files/LR_August_2023.pdf

82. Western District of Texas: https://www.txwd.uscourts.gov/wp-content/uploads/2023/07/TXWD-Local-Rules-Full-Copy-042623.pdf

83. District of Utah: https://www.utd.uscourts.gov/sites/utd/files/UTD%20Civil%20Rules%20Final%202022.pdf

84. District of Vermont: https://www.vtd.uscourts.gov/sites/vtd/files/LocalRules-2022.DecRevision..pdf[6]

85. District Court of the Virgin Islands: https://www.vid.uscourts.gov/sites/vid/files/local_rules/LocalRulesofCivilProcedure2021.pdf

[6] The double-period before "pdf" is intended.

86. Eastern District of Virginia: https://www.vaed.uscourts.gov/sites/vaed/files/Local%20Rules%20EDVA%20Jan%2018%202023.pdf

87. Western District of Virginia: http://www.vawd.uscourts.gov/sites/Public/assets/File/court/local_rules.pdf[7]

88. Eastern District of Washington: https://www.waed.uscourts.gov/sites/default/files/localrules/LocalCivilRules.pdf

89. Western District of Washington: https://www.wawd.uscourts.gov/sites/wawd/files/020123%20WAWD%20Local%20Civil%20Rules%20CLEAN.pdf

90. Northern District of West Virginia: https://www.wvnd.uscourts.gov/sites/wvnd/files/NDWV%20Local%20Rules%202018%20MASTER.pdf; *see also* https://www.wvnd.uscourts.gov/sites/wvnd/files/Civil%20Corporate%20Disclosure%20NDWV%20Dec%202022.pdf

91. Southern District of West Virginia: https://www.wvsd.uscourts.gov/sites/wvsd/files/LocalRulesofProcedure-June2017.pdf

92. Eastern District of Wisconsin: https://www.wied.uscourts.gov/sites/wied/files/documents/Local%20Rules%202010-0201-Amended%202023-0601.pdf

93. Western District of Wisconsin: https://www.wiwd.uscourts.gov/sites/default/files/Local_Rules.pdf

94. District of Wyoming: https://www.wyd.uscourts.gov/sites/wyd/files/local_rules/2022%20Civil%20Local%20Rules%20-%20FINAL.pdf

[7] Using "https" instead of "http" may not work.

From: Ralph Erickson <[redacted]>
Sent: Thursday, June 30, 2022 11:43 AM
To: Robert Dow <[redacted]>; Jennifer Elrod <[redacted]>
Cc: Roslynn R Mauskopf <[redacted]>
Subject: Problems Associated with Berkshire Hathaway holdings by judges

Good Morning,

I just wanted to pass on a couple of recurring issues that I'm being contacted about by judges around our circuit—and from a couple from outside the Eighth Circuit.

A number of judges have contacted me indicated that they have holdings in Berkshire Hathaway and that they have accumulated substantial capital gains that would be problematic if they moved the investment into ETFs or Mutual funds. Each of them called me because he or she had recently discovered that Berkshire Hathaway was either a parent or the parent of a parent company. The parent companies are usually disclosed on the Rule 7.1 disclosure and are caught before a judge acts or is even assigned. The problem arises when Berkshire Hathaway is the parent company of a parent company and the disclosure does not appear to be required under Rule 7.1 of the FRCivP. As an example, Orange Julius of America is wholly owned by International Dairy Queen. In compliance with Rule 7.1 Orange Julius would disclose that International Dairy Queen is its parent company—but it would not disclose that IDQ is wholly owned by Berkshire Hathaway. In some cases judges have presided only to find out later about the relationship. People who own CitiGroup have similar problems as CitiGroup has a controlling interest in some 300 companies. Given the breadth of Canon 3C(1) and the broad definition of "financial interest" in 3C(3)(C) of the Code of Conduct for United States Judges, as well as the guidance in Advisory Opinion 57 the conflict is a thorny one for judges to maneuver in the field.

This brings to mind a couple of issues, one for the Codes Committee and one for the Civil Rules Advisory Committee. First, should we amend the Certificate of Divestiture process so as to allow judges a window to preemptively divest themselves of these sorts of holdings and move into qualified investments and get a Certificate of Divestiture? As I said, the large capital gains tax is the main reason that judges still hold these investments even though they know they create a conflict nightmare.

Second, should we amend Rule 7.1 to require the disclosure of companies that hold the parent corporations of corporations in a parent relationship to a party to the action? It seems to me that more information rather than less is prudent in today's environment.

Thanks for your consideration. Have a great Independence Day holiday!

Ralph R. Erickson
U.S. Court of Appeals for the 8th Circuit
Fargo, ND
[redacted]

From: Patty Barksdale
To: RulesCommittee Secretary
Subject: Suggestion for Fed. R. Civ. P. 7.1 (Disclosure Statement)
Date: Wednesday, June 08, 2022 10:20:32 AM

To address issues with financial conflicts of interest, please consider amending Rule 7.1 to require a nongovernmental corporate party, when filing a disclosure statement, to certify the party has checked the assigned judges' publicly available financial disclosures and, if a conflict or possible conflict exists, will file a motion to recuse or a notice of a possible conflict of interest.

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS. A nongovernmental corporate party must file ~~2 copies of~~ a disclosure statement that:

(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock~~;~~ or states that there is no such corporation;

~~(2) states that there is no such corporation~~and

(3) certifies that the party has checked the assigned judge or judges' publicly available financial disclosures and, if a conflict or possible conflict exists, will file a motion to recuse or a notice of a possible conflict within 14 days of filing the disclosure.~~.~~

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

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement with a supplemental certificate, ~~if~~ any required information changes.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202
(904) 549-1950

TAB 9

MEMORANDUM

DATE: September 18, 2023

TO: Advisory Committees on Appellate, Civil, and Criminal Rules[1]

FROM: Catherine T. Struve

RE: Project on self-represented litigants' filing and service

As you know, a working group that was convened to consider filing methods open to self-represented litigants has been studying two broad topics: (1) increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and (2) service (of papers subsequent to the complaint) by self-represented litigants on litigants who will receive a notice of electronic filing (NEF) through CM/ECF or a court-based electronic-noticing program.

In spring 2023, Tim Reagan and I conducted additional interviews of court personnel on these topics, and I enclose a report that summarizes findings from those interviews. This memo provides a very brief update concerning the working group's summer 2023 discussions on both the filing and the service topics.

The service topic concerns whether to repeal the current rules' apparent requirement that non-CM/ECF users serve CM/ECF users separately from the NEF generated after a filing is scanned and uploaded into CM/ECF. The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their post-case-initiation filings[2] on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even those that are CM/ECF users. In the advisory committees' discussions of this topic during the past year, participants were receptive to the possibility of amending the service rules to eliminate the requirement of paper service on those receiving

1 The Bankruptcy Rules Committee, of course, is also a part of the project discussed in this memo, but as of this writing that Committee has already met. It received an oral report along the same lines expressed in this memo.

2 The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). As noted, the discussion here focuses on filings subsequent to the initiation of a case.

NEFs. At the working group's most recent (September 2023) meeting, participants expressed support for that idea, but also suggested a number of possible drafting changes to the then-extant sketch of a possible amendment. That redrafting is yet to be done, so I am not including here a sketch of a possible amendment. We intend to develop that proposal in the coming months.

On the filing topic, last year's round of advisory-committee discussions disclosed both some support for adopting a rule that would broaden self-represented litigants' access to CM/ECF and also a fair amount of opposition to adopting a rule that would require broad access for self-represented litigants to CM/ECF. In the light of those discussions, at its September 2023 meeting the working group considered the possibility of proposing a rule that would merely disallow districts from adopting blanket bans entirely denying all CM/ECF access to all self-represented litigants. Such a rule might say that even if a district generally disallows CM/ECF access for self-represented litigants it must make reasonable exceptions to that policy. That idea, like the service idea, has not yet taken shape in draft form. At the fall advisory committee meetings, I welcome the opportunity to gather input on whether such a rule could be drafted in such a way as to address the concerns expressed by participants in the process who are most wary of a broad right of CM/ECF access.

Encl.

MEMORANDUM

DATE: September 18, 2023

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Update concerning spring 2023 district-court interviews

During March 2023, Tim Reagan and I interviewed 17 district-court employees[1] who hale from nine districts.[2] This memo summarizes some of the themes that emerge from the interviews.

We are indebted to the 17 interviewees, who took time from their extremely busy schedules to share their courts' experiences with us. And I am also indebted to Tim, who guided my research and provided me with the entrée that enabled us to talk with the court staff with whom we spoke – many of whom he or his colleagues had interviewed in the course of last year's research. His and his colleagues' study provided the foundation for this further research, and Tim's expert presence on our video meetings and phone calls was invaluable. Tim also generously allowed me to choose the focus of this round of follow-up interviews.

I chose to focus this round specifically on personnel in districts where – we believed – the district has adopted the approach of exempting litigants from separate service on CM/ECF participants. But once we had the opportunity to talk with court personnel from a given district, of course we took the opportunity to ask them about the other two topics (CM/ECF access, and alternative modes of electronic access) as well. And in some instances, we also had the opportunity to inquire about special programs that the district had adopted concerning incarcerated litigants.[3] To make the inquiry manageable, I restricted our scope to district courts

1 In some instances, more than one person joined the interview: we spoke with two people in the District of Arizona, two in the District of Columbia, five in the District of Kansas, two in the Western District of Pennsylvania, and two in the District of South Carolina.

2 The districts in question were: D. Ariz.; D.D.C.; N.D. Ill.; D. Kan.; W.D. Mo.; S.D.N.Y.; W.D.Pa.; D.S.C.; and D. Utah.

We also interviewed a Pro Se Law Clerk from another district, but that interview turned out to be brief because she explained that her district does not actually engage in any of the service or filing practices on which we wanted to focus.

3 Those inquiries are omitted from this memo, in part because we did not have time to pursue them in all interviews.

(not bankruptcy or appellate courts) and focused our questions on the practice in civil cases (not criminal cases). This memo first sketches some findings concerning the service issue, and then turns to CM/ECF and alternative electronic access.

I. Exempting litigants from separate service on CM/ECF participants

We confirmed through our interviews that the following districts have exempted paper filers from traditionally serving papers[4] on litigants who are on CM/ECF:

- The District of Arizona
- The Northern District of Illinois
- The Western District of Missouri
- The Southern District of New York
- The Western District of Pennsylvania
- The District of South Carolina
- The District of Utah

For short, I'll refer to these districts as the "service-exemption" districts. Notably, these districts vary in how explicitly their published materials tell self-represented litigants about the exemption; only one of these districts is very explicit and consistent on this point.[5]

Once we confirmed that a district was indeed a service-exemption district, we asked the personnel from that district the questions noted in Part I.B of my March 3, 2023 memo.

Those personnel reported no problems with the implementation of the service-exemption policy. We specifically asked about burdens on the clerk's office, and no one could think of any.[6] One interviewee stated that the lawyers representing other parties in the case don't want paper copies of filings anyway.[7]

As to the question, how do the self-represented litigants know who is in CM/ECF (and need not be separately served) and who is not in CM/ECF (such that separate service is still

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4 As discussed previously, we are focusing here on Civil Rule 5 service (that is, for papers subsequent to the complaint), not on Civil Rule 4 service.

5 The Southern District of New York is explicit: "Where the Clerk scans and electronically files pleadings and documents on behalf of a pro se party, the associated NEF constitutes service." S.D.N.Y. ECF Rules & Instructions 9.2; see also id. Rules 9.1, 19.1, & 19.2; Role of the Pro Se Intake Unit, https://www.nysd.uscourts.gov/prose/role-of-the-prose-intake-unit.

6 Interviewees who responded to the burdens question and said no included: D. Ariz.; N.D. Ill. (no effect on the clerk's office because "We don't monitor how service is done."); W.D. Mo. (might even save clerk's office "a little smidge" of work because they need not deal with later filing of a certificate of service); W.D. Pa.; S.D.N.Y.; D.S.C.

7 D. Ariz.

required), responses varied. It was noted that this particular question would only arise in a case where multiple parties are not on CM/ECF – which some of our interviewees noted would be unusual.[8] Also, even in such a case, the question would arise only if the person making the paper filing was not enrolled in an electronic-noticing program (because such a program would generate a NEF when the paper filing was entered in CM/ECF, and the NEF would state if any other party to the case required traditional service).[9] One interviewee said they thought that this information might be included in a notice that the court sends to self-represented parties early in the case.[10] A number of interviewees observed that a useful way to discern who needs traditional service is to look at the docket; if it shows no email address for a self-represented litigant, that is a tip-off that the person is not receiving electronic noticing.[11] Interviewees from another district stated that the issue might be addressed in a court order early in the case.[12] Interviewees from two districts said that the issue simply had not arisen.[13]

In at least three of the relevant five or six districts,[14] the service exemption encompassed both service on CM/ECF participants and service on participants in a court-run electronic-noticing program,[15] but one interviewee surmised that the program in their district encompassed only service on CM/ECF participants and not service on participants in the court-run electronic-noticing program[16] and, upon reviewing my notes, I am not sure that I posed this question to the interviewee from one other district.[17]

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8 N.D. Ill. (interviewee stated this would be very rare, but might arise in a lawsuit involving spouses, or a lawsuit in which two individuals are jointly suing the police); W.D. Mo. (interviewee could not think of a case involving more than one self-represented party); D.S.C. (interviewee stated that "theoretically that could happen, but as a practical matter it hasn't been a concern").

9 S.D.N.Y.

10 D. Ariz.

11 D. Ariz.

12 W.D. Mo.; D.S.C.

13 W.D. Pa. (clerk's office assumes that litigants comply with their service requirements); D. Utah.

14 If my memory serves, the District of South Carolina does not offer electronic noticing.

In the W.D. Pa., there is no formal electronic-noticing program separate from CM/ECF, but self-represented litigants may register for CM/ECF but continue filing by paper if they wish. If a self-represented litigant signs up to use CM/ECF but is making paper filings, that litigant need not be traditionally served.

15 D. Ariz.; S.D.N.Y. ECF Rules & Instructions 9.1 (the service exemption encompasses service on "all Filing and Receiving Users who are listed as recipients of notice by electronic mail"); id. 2.2(b) ("A pro se party who is not incarcerated may consent to be a Receiving User (one who receives notices of court filings by e-mail instead of by regular mail, but who cannot file electronically)."); D. Utah.

16 N.D. Ill.

17 W.D. Mo.

Our interviewees confirmed that when a litigant makes a filing in paper, that filing will always be scanned by the clerk's office and placed into CM/ECF.[18] (Interviewees noted a few exceptions, such as documents submitted by a person who is under a filing restriction,[19] documents submitted by a litigant whose case had been closed for several years,[20] documents submitted for in camera review, documents that have no discernible connection to any litigation,[21] correspondence to the judge that should not be filed in the case.[22]) A number of interviewees reported that their office sets a goal for the maximum time interval between the court's receipt of a paper filing and the time when that filing has been scanned and is entered into CM/ECF;[23] the goals ranged from 12 business hours[24] to one business day[25] or two business days.[26]

In some districts, a filing that is made under seal would need to be traditionally served on the other participants in the case, because in those districts that filing would not be available to the parties in the case via CM/ECF.[27] But that's true of filings made under seal by attorneys via CM/ECF, just as it would be true of paper filings made under seal by a self-represented litigants; in either event, the filer would be directed to serve the filing on the other parties by traditional

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18 D. Ariz. (implicit in answer to related question); D.S.C.; D. Utah.

19 D.S.C.

20 D. Utah (interviewee stated that depending on the filing, they would check with chambers before docketing such a submission).

21 S.D.N.Y. (the stated example was a document "talking about [the litigant's] meatloaf recipe"; the clerk's office would consult the judge before docketing such an item).

22 W.D. Pa. (judge might determine that certain correspondence should not be filed, e.g., a letter from a criminal defendant discussing their lawyer's performance in ways that implicate attorney-client privilege); S.D.N.Y. (letter threatening the judge).

23 I did not note a specific goal stated by the interviewees from the W.D. Pa., but they stated that the usual turnaround time from opening to scanning to docketing is generally from 4 to 6 business hours.

24 N.D. Ill. (this is the goal, but it is hard to meet on the Tuesday after a Monday holiday).

25 W.D. Mo. (interviewee stated that the informal deadline is 24 hours not counting weekends, but "99.5 percent" of paper filings are docketed the day that the court receives them); D.S.C.; D. Utah (goal is to enter paper documents within 24 hours, excluding holidays and weekends).

See also D.D.C. (for filings in an existing case; listed here as a "see also" because D.D.C. apparently does not exempt paper filers from serving those who get NEFs).

26 D. Ariz. (goal is same day or next day; in context I think "business day" was implicit); S.D.N.Y. (48 hours – not counting weekends – from stamping the document received to docketing on CM/ECF).

27 E.g., D. Ariz.; N.D. Ill. (local provision points out that the NEF for a sealed filing does not count as service); W.D. Mo. CM/ECF Admin. Manual at 8; W.D. Pa.; D. Utah ECF Admin. Procedural Manual 21, 28-29.

means.[28] In other districts, it is possible to set the restrictions for the CM/ECF filing so that the document is viewable both by the court and the other parties.[29]

It appeared that some but not all of the districts had thought about how to treat the calculation of time periods measured from service when the service is effected through CM/ECF but the filing was filed other than through CM/ECF. An interviewee in one district reported that this issue does not come up, but thought that a sensible way to approach this question is to count the date of entry in the CM/ECF docket (i.e., the date of the NEF) as the date of service.[30] An interviewee in another district stated that the issue has not arisen in their experience, perhaps because the clerk's office tends to get paper filings up onto CM/ECF pretty quickly.[31] An interviewee in a third district also reported that the issue has not come up, probably because briefing schedules are typically set by the judge.[32] An interviewee in another district treats the date of entry into CM/ECF (that is, the date of the NEF) as the relevant starting point for response periods that run from service.[33] Two districts apparently treat the date the court receives the filing (not the date of entry into CM/ECF) as the relevant starting point for response periods that run from service, and do not accord the responding party three extra days for the response.[34]

II. Access to CM/ECF for self-represented litigants

When interviewing personnel from districts that provide CM/ECF access to non-incarcerated self-represented litigants (either across the board or by permission), we asked a number of questions about how that is working. Since this suite of questions concerned experience with CM/ECF access for self-represented litigants, we posed these questions only to those from districts that provide that access to some degree.[35] Among the districts encompassed

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28 D. Ariz. ("attorneys are often worse" than self-represented litigants about separately serving sealed documents on the other parties); N.D. Ill ("attorneys get into trouble on this"); W.D. Mo. (noting that the other party would know of the filing's existence based on the NEF, so they would know to follow up with the filer if the document were not separately served on them as required by the local provision).

29 S.D.N.Y. ECF Rules & Instructions 6.9 ("The filing party has the ability to designate which case participants will have access by selecting the appropriate Viewing Level for the document from the list below."); D.S.C.

30 N.D. Ill.; see also S.D.N.Y. (interviewee stated that the date of entry stated on the NEF would be considered to be the date of service).

31 W.D. Mo.; see also supra note 25 regarding typical time interval in W.D. Mo. between receipt of paper filing and entry in CM/ECF.

32 W.D. Pa.

33 D.S.C.

34 D. Ariz.; D. Utah.

35 The D.S.C. does not permit any self-represented litigants to use CM/ECF. An interviewee

in our interviews, the districts that provide access to all self-represented litigants (at the litigant's option) without the need for special permission are:

- District of Kansas (where an interviewee reports that "one or two percent of our [CM/ECF] filers are pro se users").

- Western District of Missouri (where an interviewee estimates that there are about 20 to 25 self-represented litigants currently using CM/ECF).[36]

- Western District of Pennsylvania (where an interviewee estimates that there are "maybe a couple of dozen" self-represented litigants using CM/ECF at any given time).[37]

The districts that provide access to self-represented litigants with court permission are:

- District of Arizona[38] (where an interviewee reports that CM/ECF participation by self-represented litigants is "not rare").

- District of the District of Columbia (where an interviewee reports "a lot of pro se filers on CM/ECF").

- Northern District of Illinois.

- Southern District of New York (where the interviewee reports that it is unusual for a self-represented litigant to use CM/ECF; those who do are usually pro se attorneys).

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from that district volunteered that she would oppose any rule amendment that required a district to allow such litigants to access CM/ECF. I responded that the proposals currently under consideration would, at most, foreclose a district from having a blanket ban on CM/ECF access [see Suggestion No. 20-CV-EE (John Hawkinson)]. The interviewee stated that a blanket ban is necessary in her district because the court wishes to treat all pro se litigants uniformly.

36 The district initially provided access based on permission from the judge (starting in about 2009), but five years ago it changed its approach and the clerk's office grants access "on a routine basis."

37 See W.D. Pa. ECF Policies & Procedures at 2-3: "A person who is a party to an action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. If during the course of the action the person retains an attorney who appears on the person's behalf, the attorney must advise the clerk to terminate the person's filing privileges as a Filing User upon the attorney's appearance.
When registering, an individual must certify that ECF training has been completed, and then requests a CM/ECF account for the Western District of Pennsylvania through PACER. Once the request is processed by the clerk, the Filing User will receive notification that the request was approved."

38 See D. Ariz. Pro Se Handbook at 15-16.

Uniformly, the interviewees reported that there was no difficulty in keeping track of self-represented litigants on CM/ECF.[39] You will recall that this question arose in committee discussions because self-represented litigants, unlike lawyers, do not have attorney ID numbers. Interviewees in two districts stated that their court wouldn't keep track of attorneys on CM/ECF via their attorney ID numbers.[40] Several interviewees noted that each CM/ECF registrant (whether or not they are a lawyer) has a "PRID" number[41] – which is a unique personal identifier – though one of those interviewees observed that their court hardly ever uses the PRID, because they can usually just look up a self-represented litigant using their name.[42] One interviewee noted that the CM/ECF system will have an email address on file for the litigant.[43]

Interviewees from a number of districts reported that their staff do quality control on all CM/ECF filings, whether made by self-represented litigants or by attorneys.[44] Two interviewees mentioned that the filings made on behalf of attorneys are often made – in actuality – by paralegals;[45] one of these interviewees reported that mistakes occur about equally frequently by attorneys and by self-represented litigants,[46] and the other reported that their office finds far more errors by lawyers, especially by attorneys who usually practice in state court.[47] One interviewee reported that, in the course of their quality control, they will correct a wrong event choice (or the like) whether made by an attorney or by a self-represented litigant.[48] Interviewees from three districts reported that they might need to do more review for quality control and make corrections more frequently for self-represented litigants.[49] An interviewee from another district

39 D. Ariz.; D.D.C.; W.D. Mo.; W.D. Pa.; S.D.N.Y.
40 D.D.C. (attorney bar numbers are not listed in the docket); N.D. Ill. (interviewee noted that staff are not going to call up a state bar to verify attorney's bar ID number).
41 D.D.C.; W.D.Mo.; S.D.N.Y.; see also D. Kan. (interviewee stated that pro se litigants have personal ID numbers that will show in the system).
42 D.D.C.; see also D. Kan. (interviewee noted that NextGen suggests matches for a person's name, which helps with "matching" a person if they have filed more than one case in the district; "at any given moment, we have ten to 15 electronic filers that we are relatively familiar with, and they tend to be repeat litigants").
43 D. Ariz.
44 D.D.C.; N.D. Ill.; D. Kan.; S.D.N.Y.
45 N.D. Ill. (estimating that nine out of ten attorneys have a paralegal do the filing).
46 D.D.C.
47 N.D. Ill.
48 D.D.C. Compare S.D.N.Y. (court flags the error for the litigant to correct, and the litigant can call the help desk for further explanation).
49 D. Ariz. (but this interviewee also noted that a lot of self-represented litigants "actually do a pretty good job," and that "attorneys are terrible at [choosing the right events when filing], too"); D. Kan. (interviewee noted that some self-represented litigants "are better than some paralegals, because we are in better communication with them," while other self-represented litigants are

reported that problems with the format of PDFs are more frequent in attorney filings than self-represented litigants' filings,[50] and an interviewee from a third district reported that attorneys use the wrong event more often than self-represented litigants do.[51] An interviewee from another district reported that their office does quality control by checking for legibility and use of the right event, and does correct errors, but stated that "if anything" the only "appreciable burden" is the time spent on the phone with the self-represented litigants who are getting used to the system.[52]

Among the seven relevant districts, one requires training for both attorneys and self-represented users of CM/ECF,[53] while (probably) two require training only for the self-represented users[54] and three do not require training for either group.[55] One district requires that the self-represented litigant certify completion of the training as part of their application for permission to use CM/ECF.[56] Training and/or information varied among the districts that provide it, with written training materials being the most common but with some districts providing video training modules[57] and one district providing a particularly helpful step-by-step

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much less functional; "overall we spend a little more time on quality control with the pro se's, but not a lot more"); W.D. Pa. (there might be additional quality control that needs to be done and quality-control messages that need to go out a little more frequently – for example, if the litigant selects the wrong event or fails to separate documents – but some of the self-represented litigants are just as good as the attorney filers).

50 D.D.C. (attorneys sometimes file fillable PDF forms without first "printing" them to PDF; self-represented litigants are less likely to do this because they are more likely to file PDFs created by scanning).

51 N.D. Ill.

52 W.D. Mo.

53 N.D. Ill.

54 S.D.N.Y. is in this category. See S.D.N.Y. Motion for Permission for Electronic Case Filing. D.D.C. appears to also fall in this category, see D.D.C. Local Civil Rules 5.4(b)(1) (no mention of training requirement for lawyers) & (2) (self-represented applicant to use CM/ECF must certify "that he or she either has successfully completed the entire Clerk's Office on-line tutorial or has been permitted to file electronically in other federal courts").

55 D. Ariz.; D. Kan. (training is "offered and encouraged" but not required; self-represented litigants must have a conversation with an Administrative Specialist at the court before they receive CM/ECF credentials); W.D. Mo.

In the Western District of Pennsylvania, the ECF Policies & Procedures state that when registering for CM/ECF one "must certify that ECF training has been completed," but our interviewees stated that training resources were offered but not required.

56 D.D.C. (see D.D.C. Local Civil Rule 5.4(b)(2)).

57 D. Kan. (one civil-case video module accessible at https://www.ksd.uscourts.gov/cmecf); S.D.N.Y. (selected videos at https://nysd.uscourts.gov/programs/ecf-training).

I do not count the Western District of Missouri's video on case-opening procedures because self-represented litigants are not permitted to open cases via CM/ECF.

interactive automated training.[58]

Interviewees reported favorably on their court's experience with CM/ECF access for self-represented litigants.[59] The most commonly noted benefit (to the court)[60] of CM/ECF access for self-represented litigants was the decrease in the volume of paper filings.[61] A number of our interviewees pointed to a huge savings in court time – that is, opening mail, sorting it, scanning it, and uploading the electronic version to the docket.[62] Some also like not having to handle tangible papers that might be hard to scan, fragmentary, or odorous.[63] Because CM/ECF access also includes electronic noticing via the NEF, interviewees also strongly praised the saving in court time spent on sending notice of court orders – printing, mailing, and re-sending the mailings that are returned by the Post Office – and also the savings on mailing costs.[64] A number of interviewees also praised the benefits of the electronic record, which averts disputes with the litigant concerning what the litigant filed and when[65] and what orders the court sent out and when.

The interviewees had a range of views about the burdens on the clerk's office occasioned by self-represented litigants' access to CM/ECF.[66] One interviewee noted that sometimes a self-represented litigant might complain that they had a problem with their "one free look" at a filing via the NEF.[67] An interviewee from another district reported no extra burdens occasioned

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58 This is the D.D.C. See https://media.dcd.uscourts.gov/ecf2d/ . They acquired these training modules from another court. The District of Kansas website describes a similar training system, but when I clicked the link to access it, https://ecf-test.ksd.uscourts.gov/, I received an error message. Similarly, I could not get the Western District of Pennsylvania's training module, available via https://www.pawd.uscourts.gov/cm-ecf-training , to work for me.
59 N.D. Ill. ("The benefits outweigh the risks").
60 It is notable that a number of our interviewees also expressed the importance of striving for equality of court access for self-represented litigants. See D.D.C. (noting convenience to litigants of ability to file after hours).
61 N.D. Ill.; W.D. Pa.
62 D. Ariz. (not having to scan the paper documents); D.D.C. (same); W.D. Mo. (same; interviewee noted that due to the combined effect of CM/ECF access and EDSS access, court staff time on processing and scanning paper filings was about 30 minutes per day, down from a couple of hours per day).
63 D. Ariz.
64 D. Ariz. (printing court orders, time and cost of mailing them); S.D.N.Y. (mailing costs).
65 D.D.C. (clerk's office need not worry whether it correctly scanned all the pages of a filing); N.D. Ill. (electronic filing avoids the risk that an unethical filer might say that a paper filing scanned by the court differed from the original document).
66 See above for discussions of whether there was an increased need for quality control for self-represented CM/ECF users' filings.
67 D. Ariz.

by self-represented litigants' CM/ECF access.[68] Interviewees from another district noted that they will check whether a litigant is subject to a filing restriction, and that occasionally the court has removed the CM/ECF privileges of a problem filer (with the problematic filings in such cases typically being problematic because of their volume, that is, too many filings); but these interviewees reported (respectively) no "undue stress on the system" and that "overall [the access] is probably helpful".[69]

On the question of inappropriate filings, the overall view was that these could present problems whether filed in paper or electronically, and that either way the burden on the court was manageable.[70] One interviewee observed that self-represented litigant CM/ECF privileges did open the possibility that an inappropriate filing would be viewable on CM/ECF until court staff had a chance to review it; on the other hand, this interviewee observed that the staff in their district – when scanning in a paper filing – check only the caption, case number, and signature, but not every page of the document.[71] This interviewee could only think of one self-represented litigant, in the course of a decade, who filed an inappropriate item in CM/ECF; staff spotted the filing (a document containing inappropriate images) while auditing and immediately restricted access to it, and revoked the petitioner's CM/ECF privileges.[72] In another district, the interviewees could not think of an instance of inappropriate language or images filed via CM/ECF, though they could think of one involving a paper filer.[73] And in a third district, the interviewee noted that court personnel will simply restrict access to a problematic filing when necessary, and that even those filings tend to be made in good faith (e.g., pictures relating to a surgery or an injury);[74] this interviewee could think of only one self-represented litigant who made "scandalous" filings, and observed that the court promptly handled that situation by order.[75] In another district, the interviewee did note that services such as Lexis and Westlaw

68 N.D. Ill.
69 D. Kan.
70 D. Ariz. ("The vast majority of litigants are trying to get their case heard and are not filing a bunch of inflammatory stuff and clerk's offices are good at reacting quickly if something should be sealed and it hasn't been a burden to do that."); W.D. Mo ("litigants aren't attaching deliberately scandalous material, just sensitive information about themselves"); W.D. Pa. (generally the pro se filer who is technically savvy enough to use CM/ECF is not among the pro se litigants who are submitting problematic materials); S.D.N.Y. ("I would rather have frivolous electronic filings than frivolous paper filings.").
71 N.D. Ill.
72 N.D. Ill. The interviewee also noted an instance where a self-represented litigant's filing in a state (not federal) court contained the home addresses of judicial personnel.
73 D. Kan. (noting a litigant who brought the court "boxes full of porn").
74 W.D. Mo. (interviewee noted options of restricting access to parties only or court only).
75 W.D. Mo. ("that was a bit of an ordeal when it was happening, but the judge acted quickly, and there was no public interest in the documents"; the court set up immediate notifications to chambers when this litigant made a filing, so that the court could quickly review them and decide whether to restrict electronic access).

scan the court's electronic dockets constantly and will download new filings right away.[76] Multiple interviewees observed that rescinding CM/ECF privileges is always an option.[77]

None of the districts in question uses a "gating" system (that is, holding self-represented litigants' court filings for clerk's office review after a document is filed in CM/ECF and before it is made viewable by people other than court personnel). A number of our interviewees noted that it would be possible to configure CM/ECF so that it worked this way (for example, by creating a separate user group for self-represented litigants and then only giving that user group access to events that would be restricted to court viewing only).[78] But two interviewees observed that their district hadn't felt the need to adopt such a practice.[79] One interviewee observed that it would take valuable clerk's office time to engage in such a review.[80] And another interviewee suggested that the relevant court of appeals would look askance at the constitutionality of restricting (even temporarily) who could view a litigant's filings.[81]

We asked about inappropriate sharing of CM/ECF credentials, and among our interviewees, only one cited an example involving a self-represented litigant – specifically, a case in which a mother was the listed plaintiff in a case but her son would use her PACER account to file documents.[82] But the interviewee who provided that example also stated that they "had not seen a huge problem," and that the "majority of mistakes concerning sharing of credentials come from law firms."[83] A number of interviewees observed that, because access to NextGen CM/ECF entails linking the person's PACER account with the particular case, sharing credentials would mean sharing the PACER login – and there is a built-in disincentive to share the PACER login because that would enable the other person to run up PACER bills on the person's PACER account.[84] Also, a number of these districts restrict a self-represented litigant's CM/ECF access to only those cases in which the self-represented litigant is a party,[85]

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76 S.D.N.Y.

77 D. Ariz.; D.D.C. (interviewee noted that in a few instances the court had rescinded access); N.D. Ill. (interviewee noted that the court had revoked an attorney's CM/ECF privileges too); D. Kan.; W.D. Pa.

78 D.D.C.; D.Kan.; S.D.N.Y.

79 D. Ariz. (interviewee noted that court could simply rescind CM/ECF access if necessary); D. Kan. (same).

80 D. Kan.

81 N.D. Ill.

82 D. Kan.

83 D. Kan. See also S.D.N.Y. (interviewee noted that a lot of lawyers share their credentials, and asked why credential sharing would be a bigger deal when done by a pro se litigant).

84 D.D.C.; W.D. Mo.

85 D. Ariz.; D.D.C. (access is granted on a per-case basis); D. Kan. (interviewee stated that "you have to be associated with the case, and there is a mechanism within the profile for that case, where we have to turn on their e filing privileges"); W.D. Mo.; W.D. Pa.; S.D.N.Y.

which by definition limits the incentive to share the credentials with some other person for reasons unrelated to the litigant's case.

All but one of these districts require the self-represented litigant to initiate their case by other means; so CM/ECF access for self-represented litigants in these districts occurs only once the case has gotten started.[86] (By contrast, in some of these districts lawyers can initiate a case via CM/ECF, while in others even lawyers cannot do so.) In one district, new cases can be initiated electronically in a "shell case," and then the clerk's office moves the case over in a real case docket; and this process is available to self-represented litigants who are registered in CM/ECF; but only a handful of self-represented litigants have used this method.[87]

We also asked these interviewees what resources a court would find necessary or useful if it were to permit or expand CM/ECF access for self-represented litigants. Here are their suggestions:

- Learn from your peers in other courts.[88]
- Use a pilot program, take things one step at a time, and see how a new program goes.[89]
- Involve your pro se law clerks in drafting your CM/ECF rules and procedures.[90]
- Plan how you will rescind CM/ECF access if necessary.[91]

By contrast, our interviewee from the Northern District of Illinois asserted that it is not technically possible to limit access to just one case. I now think that what he may have meant is that if you grant a litigant access to CM/ECF for one of their cases, and they have multiple cases in the district, the grant of access operates across all of their cases. We certainly did hear from other districts that it was possible to limit access such that the self-represented litigant could not file in cases to which they are not a party.

86 D. Ariz. (interviewee noted that, for IFP cases, this effectively means no CM/ECF filing access until after the case has survived the initial IFP case review); D.D.C. (interviewee noted that "case initiating filings are the most likely to be problematic"); N.D. Ill. (interviewee noted that this helps the court to know who a litigant is); D. Kan. (see https://www.ksd.uscourts.gov/filing-without-attorney/faq); W.D. Mo. CM/ECF Admin. Manual at 17; S.D.N.Y. ECF Rules & Instructions 14.2.

87 See W.D. Pa. CM/ECF Version 6.2 Attorney User Guide at 19.

88 D.D.C. (interviewee advocated use of listserves that have been set up by someone in EDNY – such as a listserve for ECF coordinators – and observed that these listserves have searchable archives); N.D. Ill. (suggestions included convening a seminar at which courts that don't yet allow self-represented litigants to use CM/ECF can learn peer-to-peer (chief judge to chief judge, clerk to clerk) how it works in the districts that have been doing it for a while); W.D. Mo. (interviewee suggested consulting personnel in districts that are similar in size or within the same circuit).

89 D.D.C.

90 S.D.N.Y.

91 N.D. Ill.

- Build a very simple menu in CM/ECF for the pro se filers, with only a few simple events, so as to limit the options that they will see when they use the system.[92]
- Put together a training on CM/ECF (which the court should already have done for their attorney filers).[93]
- Have good instructional documentation online. [94]
- Make sure that your help-desk staff can explain how the system works, especially how to select the right event when filing.[95]
- Make clear to the would-be self-represented CM/ECF filer that the court will not provide remedial technical support such as teaching them how to make PDFs or how to troubleshoot their wi-fi connectivity.[96]
- In one district, the interviewees were equivocal as to whether staffing would be a consideration.[97] In another district,[98] interviewees emphasized the need for proper staffing – both having someone on staff who knows how to configure the system for use by self-represented litigants and having adequate personnel to do quality control.

III. Alternative (non-CM/ECF) modes of electronic access

A number of these districts provide alternative methods of access for self-represented litigants – both for filing their own papers and for receiving others' filings in the case. As to those districts, we had a set of questions for the interviewees. The districts (in our interview set) that provide alternative electronic filing access[99] are:

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92 S.D.N.Y.
93 N.D. Ill.
94 D. Kan.
95 D. Kan.
96 S.D.N.Y.
97 D. Kan. (one interviewee first advised, "make sure you have the manpower to handle what might be a huge influx," but then stated that self-represented access to CM/ECF "does not seem like that big of a deal"; a second interviewee noted that their district had not seen a flood of self-represented litigants on CM/ECF and predicted that a court won't necessarily have to increase its staffing but instead should just make sure its existing staff are trained and prepared).
98 W.D. Pa.
99 I am omitting the D.D.C. from this list, because although the court accepted email filings in civil cases during COVID, it no longer does so (though it is still accepting email filings in criminal cases).

For similar reasons, I am omitting the District of South Carolina. The D.S.C. permitted pro se email submissions during COVID, but ended that program in June 2021. The interviewee from the D.S.C. explained that few litigants were using it, and those who were using it made some frivolous filings, so this mode of access was being used "improperly or not much."

I am also omitting the Western District of Pennsylvania, which allows certain sealed filings to be submitted by email, but does not otherwise allow alternative means of electronic submission.

- Northern District of Illinois (upload via Box.com; court previously had a temporary email address for pro se filings)
- District of Kansas (email)
- Western District of Missouri (upload) (interviewee estimates that around 50 self-represented litigants are using the EDSS system, up from half that number the previous year)[100]
- Southern District of New York (email, including to start a new case)
- District of Utah (email; interviewee stated that probably 70 percent of non-incarcerated self-represented litigants are filing by email)

The districts (in the interview set) that provide an electronic noticing program[101] are:

- District of Arizona
- District of the District of Columbia
- Northern District of Illinois
- District of Kansas (an interviewee reported that this is "more popular than electronic filing")
- Western District of Missouri (only if the litigant signs up for EDSS)
- Southern District of New York
- District of Utah

The interviewees from districts that permit email or portal submissions did not report any significant difficulties with virus scanning,[102] file size,[103] or other technical problems.

As noted above in the section concerning CM/ECF access, the key benefit of electronic

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100 https://www.mow.uscourts.gov/content/electronic-document-submission-system .

101 In the W.D. Pa., there is no formal electronic-noticing program separate from CM/ECF, but self-represented litigants may register for CM/ECF but continue filing by paper if they wish.

102 A D.D.C. interviewee expressed confidence in the fact that the court's IT department keeps their virus protections up to date.

A District of Kansas interviewee noted that court personnel will send any questionable-looking file to their IT department for review, but also noted that they knew of no malicious submissions; "the biggest problem is that they'll scan in something you can barely read."

A Western District of Missouri interviewee reported that the court's IT department set up the court's security system, which the interviewee presumes addresses any virus issues.

The Southern District of New York interviewee stated that, nationwide, the AO has provided all districts with a version of Outlook that blocks attachments that appear malicious.

The District of Utah interviewee stated that viruses have not been a concern.

103 D. Kan. (people will usually file multiple attachments rather than trying to consolidate all of them into one big file); W.D. Mo.

submission methods, from the clerk's office perspective,[104] is the avoidance of the need to handle paper filings.[105] Some interviewees also noted the benefit of an electronic trail concerning what was filed and when.[106] And one interviewee noted that unlike paper filings scanned by the court, some electronic submissions are native PDF files that are text searchable.[107]

Our interviewees did not note many difficulties or burdens associated with their programs. An interviewee in one district reported that occasionally a litigant will email the court a complaint without including contact info besides their email.[108] In another district, the interviewee noted one problematic litigant with seven cases before the court who was abusive in interactions with court staff, but that situation was handled by the judge and was "a rarity" because most EDSS users "file on time and properly and do well."[109] The interviewee in another district stated that there is "a love/hate relationship" with the court's email filing program: on one hand, some email submissions are crazy and abusive, but on the other hand, abuse can be submitted via paper as well, and with email submissions, the court avoids the need to deal with paper filings.[110] In another district the interviewee noted that the main challenges were making sure that a litigant submitted the required form to register for email filing[111] and that litigants sometimes make improperly formatted or too-frequent submissions; but this interviewee reported that most self-represented email filers do well, and that it is faster to deal with electronic submissions than paper submissions.

In districts that provide an alternative electronic submission method (email or portal), we asked whether such filings qualified for the same time-computation treatment as CM/ECF filings – that is, would a filing submitted at 11:30 pm on Tuesday be counted as filed on Tuesday? The

104 As with CM/ECF, so too here, some personnel also noted benefits to the litigant. E.g., W.D. Mo. (interviewee stated that access to the EDSS system gives litigant greater control over their case).
105 N.D. Ill. (avoidance of need to scan paper filing, audit scanned e-copy, retain paper copy for a period of time); D. Kan. (avoidance of need to scan paper filing); W.D. Mo. (same).
106 N.D. Ill. (contrasting this with the disputes that can arise with respect to what a litigant filed via a physical drop box).
107 S.D.N.Y.
108 D. Kan. (interviewee added, "but that's a handful of noncompliant people," and overall the email filing program saves the court a "tremendous" amount of effort).
109 W.D. Mo.
110 S.D.N.Y. This interviewee stated uncertainty as to whether the court would continue its email submission program.
111 D. Utah. Some litigants submit by email without first filling out the form, which sets out the ground rules for the program, see D. Utah Email Filing & Electronic Notification Form for Unrepresented Parties.

answer in all five districts is yes.[112]

In the districts that provide an electronic noticing program, the electronic noticing programs all work the same basic way: The system is set to generate an email notice of electronic filing (NEF) to those litigants who are enrolled in the electronic noticing program just as it generates a NEF to those litigants who are on CM/ECF. So the electronic noticing works similarly for its enrollees as for CM/ECF participants: the email notice includes a link to the underlying filing (whether it be a litigant's filing or a court order)[113] and the person gets "one free look" by which to view and download the document (after that one free look, any applicable PACER fees would be incurred by subsequent "looks").

Our interviewees noted a few minor issues with their court's electronic noticing system: the need to alert litigants to its limitations,[114] the occasional user who messes up their "one free look,"[115] the occasional typo in an email address or change in email address.[116] They tended to stress the benefit to the court of avoiding the need to mail court orders[117] as well as having an electronic record of what the litigant received.[118] A number of interviewees observed that their court encourages self-represented litigants to sign up for electronic noticing.[119]

In at least one instance, we also obtained details on how electronic noticing works for

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112 N.D. Ill.; D. Kan.; W.D. Mo. (answer provided by W.D. Mo. EDSS Admin Procedure III.B); S.D.N.Y.; D. Utah Local Civil Rule 5-1(b)(1)(A)(iv).

113 N.D. Ill.; D. Kan.; W.D. Mo.; S.D.N.Y.; D. Utah.

An interviewee from D.D.C. pointed out an exception to this: the documents cannot be accessed electronically in Social Security or immigration cases. (This may be specific to the way in which the email noticing program is set up. Compare Civil Rule 5.2(c)(1) (presumptively allowing "remote electronic access to any part of the case file" for "the parties and their attorneys" in Social Security and immigration cases).

114 A D.D.C. interviewee stressed the need to make sure that litigants understand the lack of electronic access to documents in Social Security and immigration cases.

115 D.D.C. (interviewee noted that the court will generate a new NEF for the person so long as it's not always the same person having this difficulty). Compare D. Kan. (interviewee noted that this issue arises much more frequently with attorneys than with self-represented litigants).

116 N.D. Ill. (interviewee noted that this problem arises "more frequently with attorneys" than with self-represented litigants); D. Utah (interviewee noted the need to keep the email addresses up to date and monitor for bouncebacks).

117 D. Kan. (interviewee noted that for many self-represented litigants, their email address may be more stable over time than their physical address); S.D.N.Y. (between CM/ECF access and electronic noticing program, court is avoiding the need to mail out about 3,000 orders per week); D. Utah (savings on printing and postage and trips to the mail drop).

118 D. Utah.

119 D. Ariz.; D.D.C. (courtroom deputies boosted awareness of the program by sending flyers to self-represented litigants); N.D. Ill.; D. Kan.

incarcerated litigants.[120] In the interests of brevity, I am omitting from this memo that and other details specific to incarcerated litigants, but that will be useful information for future work on that topic.

120 D. Ariz.

TAB 10

MEMORANDUM

DATE: August 24, 2023

TO: Judge John D. Bates
Standing Committee on Rules of Practice and Procedure
Reporters and Advisory Committee Chairs

CC: H. Thomas Byron III

FROM: Judge Jay S. Bybee
Catherine T. Struve

RE: E-Filing Deadlines Joint Subcommittee

We write on behalf of the E-Filing Deadlines Joint Subcommittee to summarize the Subcommittee's recommendations concerning Suggestion Nos. 19-AP-E, 19-BK-H, 19-CR-C, and 19-CV-U. Those docket numbers refer to a 2019 proposal by now-Chief Judge Michael Chagares that the national time-counting rules[1] be amended to set a presumptive electronic-filing deadline earlier than midnight.[2]

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1 Civil Rule 6(a)(4) is representative of the operative portions of the national time-counting rules. It provides in relevant part:

> (a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time….
>
> > (4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:
> >
> > > (A) for electronic filing, at midnight in the court's time zone; and
> > >
> > > (B) for filing by other means, when the clerk's office is scheduled to close.

Bankruptcy Rule 9006(a)(4) and Criminal Rule 45(a)(4) are materially similar. Appellate Rule 26(a)(4) is slightly more complicated (in part because it addresses electronic filings in both the district court and the court of appeals) but, like the other three rules, it sets a presumptive deadline of midnight for electronic filings.

2 Chief Judge Chagares summarized his proposal thus:

The subcommittee requested information from the Federal Judicial Center ("FJC") about actual filing patterns by time of day. The FJC released two studies in 2022 – one concerning e-filing in federal court,[3] and another concerning e-filing in state courts.[4] The study of federal-court filings included a survey component, but that survey was truncated due to challenges arising from the pandemic.[5] The study also included a quantitative analysis of more than 47 million docket entries made in 2018 in the federal bankruptcy courts, district courts, and courts of appeals. That analysis enabled the researchers to reach this estimate: "About four out of five attorney filings in all three types of courts were made between 8:00 a.m. and 5:00 p.m. About one in fifty was made before 8:00, about one in six was made after 5:00, and about one in ten was made after 6:00."[6]

This year, the Third Circuit adopted (effective July 1, 2023) a new local rule that moves the presumptive deadline for most electronic filings in that court of appeals from midnight to 5:00 p.m.[7] The Standing Committee asked the subcommittee to update its consideration of the

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> I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

The full proposal is enclosed.

3 See Tim Reagan et al., Electronic Filing Times in Federal Courts (FJC 2022), available at https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingDeadlineStudy.pdf .

4 See Marie Leary & Jana Laks, Electronic Filing Deadlines in State Courts (FJC 2022), available at https://www.fjc.gov/sites/default/files/materials/59/ElectronicFilingStateCourts.pdf .

5 See Reagan et al., supra note 3, at 1 ("We planned to ask a random sample of judges and attorneys about their practices and preferences, but we brought the survey to a close during its pilot phase because of the still-present COVID-19 pandemic.").

6 See id. at 4.

7 Third Circuit Local Appellate Rule 26.1 provides:

> 26.1 Deadline for Filing
>
> (a) Unless a different time is set by a statute, local rule, or court order:
>
> (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
>
> (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and

2019 proposal in the light of that development.

The subcommittee met by Zoom on August 21, 2023. All members participated, as did the Rules Committee Secretary and reporters from all four of the relevant advisory committees. Subcommittee members gave consideration to the Third Circuit's stated reasons for its new local rule, and also to reported comments concerning that local rule. It was noted that the local rule proposal had evoked strong negative reactions from the bar. An internal DOJ survey of attorneys concerning the idea of moving the presumptive e-filing deadline earlier than midnight had also elicited negative comments about that idea. A subcommittee member reported a similar reaction from members of a law firm.

After careful discussion, the subcommittee voted unanimously to recommend that no action be taken on Suggestion Nos. 19-AP-E, 19-BK-H, 19-CR-C, and 19-CV-U, and that the subcommittee be disbanded.[8]

Encls.

> (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.
>
> (b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.
>
> (c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:
>
> > (1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or
> >
> > (2) a party is providing paper copies of previously filed electronic briefs and appendices.
>
> (d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

The Third Circuit's Public Notice dated May 2, 2023 is enclosed.

8 It was noted that the Appellate Rules Committee currently has before it a suggestion from Howard Bashman, Esq., proposing various possible responses by the Appellate Rules Committee to the Third Circuit's local rule. See Suggestion 23-AP-F. The Appellate Rules Committee, however, has not yet discussed that proposal, which remains for future consideration by that advisory committee.

19-AP-E
19-BK-H
19-CR-C
19-CV-U

MEMORANDUM

TO: Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules

DATE: June 3, 2019

RE: Proposal – Study Regarding Rolling Back the Electronic Filing Deadline from Midnight

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk's office closes in the respective court's time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

Background

Electronic filing has many advantages, including flexibility, convenience, and cost savings. The advent of electronic filing led to the Appellate, Bankruptcy, Civil, and Criminal rules to be amended to include the following definition affecting the filing deadline:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:
>
> (A) for electronic filing, at midnight in the court's time zone; and
>
> (B) for filing by other means, when the clerk's office is scheduled to close.

Fed. R. Bankr. P. 9006(a)(4); Fed. R. Civ. P. 6(a)(4); Fed. R. Crim. P. 45(a)(4). See Fed. R. App. P. 26(a)(4) (incorporating the identical language). As a result, the rules provide for two distinct filing deadlines that depend upon whether the filing is accomplished electronically or not.

Reasons Driving the Proposal for a Study

Under the current rules, the virtual courthouse is generally open each day until midnight. As a consequence, attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents. This is in stark contrast to the former practice and procedure, where hard copies of filings had to arrive at the clerk's office before the door closed, which was (and is) in the late afternoon.

It may be that the midnight deadline has negatively impacted the quality of life of many, taking these people away from their families and friends as well as from valuable non-legal pursuits. Working until midnight to finalize and file papers may result in greater profits for some, and just extra working hours for others. The same may be said of the opposition, who may be waiting for those papers to appear on the docket. But can or should the rules of procedure encourage a better quality of life for people involved in representing others (or themselves)? These are vexing questions worthy of consideration in my view.

As you know, I have been considering this proposal for some time. Only this past weekend I learned that the United States District Court for the District of Delaware in 2014 and the Supreme Court of Delaware in July 2018 rolled their electronic deadlines back — the District Court until 6:00 p.m. and the Supreme Court until 5:00 p.m. Notably, the Supreme Court of Delaware adopted the recommendations of a Delaware Bar report titled *Shaping Delaware's Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware* (the "Delaware Bar Report") and found at: https://courts.delaware.gov/forms/download.aspx?id=105958. The Delaware Bar Report memorialized a careful study of members of the Delaware bar and may be instructive in considering my proposal. It focused largely on attorney and staff quality of life, observing for instance that "[w]hen it is simply the result of the human tendency to delay until any deadline, especially on the part of those who do not bear the worst consequences of delay [that is, people who are not "more junior lawyers and support staff"], what can result is a dispiriting and unnecessary requirement for litigators and support staff to routinely be in the office late at night to file papers that could have been filed during the business day." Delaware Bar Report 26-27. Accordingly, studying the effects of an earlier filing deadline on attorney (especially younger attorney) and staff quality of life would seem to be a worthwhile endeavor.

Another reason for a study is that it may shed light on the impact of late-night filings on the courts and the possible benefits of an earlier electronic filing deadline to judges. For instance, many District Judges and Magistrate Judges receive an email after midnight each night that provide them notice of docket activities (NDAs) or notice of electronic filings (NEFs) in their cases from the preceding day. NDAs or NEFs received after midnight may not do judges a lot of good. It may be that an earlier filing deadline would allow judges the opportunity to scan the electronic filings to determine whether any matters require immediate action.

Still another reason for the study involves fairness. This raises a couple of concerns. Maintaining a level playing field for advocates and parties is one concern. For example, pro se litigants are not permitted in some jurisdictions (or may be unable to use) the electronic filing system. Electronic filers may then be afforded the advantage of many more hours than their pro se counterparts to prepare and file papers. Another example involves large law firms that have night staffs versus small law firms and solo practitioners that might be forced to bear the expense of overtime or find new personnel to assist on a late-night filing. A second concern involves the possibility of adversaries "sandbagging" each other with unnecessary late-night filings to deprive each other from hours (perhaps until the morning) that could be used to formulate a response to such filings. Indeed, the Delaware Bar Report noted "[s]everal lawyers admitted to us that when

counsel . . . had filed briefs against them at midnight that they had responded by 'holding' briefs for filing until midnight themselves as a response, even when their brief was done." Delaware Bar Report 33-34.[1]

A study should also thoroughly consider the potential problems that might be associated with an earlier electronic filing deadline. These problems may include how attorneys who are occupied in court or at a deposition during the day and attorneys working with counsel in other time zones are supposed to draft and file their papers timely if they do not have until midnight. Further, a criticism addressed by the Delaware Bar was that an earlier deadline "will not change the practice of law, which is a 24-hour job, and it will result in more work on the previous day." Delaware Bar Report 25.

Like other potential changes to the status quo, the notion of rolling back the time in which an advocate may electronically file will certainly be opposed by many in the bar. Indeed, the Delaware Bar Report recounts that the large majority of attorneys polled did not support changing the time to file electronically. Groups that did support the change (at least informally), however, were the Delaware Women Chancery Lawyers and the Delaware State Bar Association's Women and the Law Section. Delaware Bar Report 17, 18. In addition, the United States District Court for the District of Delaware — a pilot district of sorts — has four and one-half years of experience with its earlier deadline for electronic filing. I spoke with Chief Judge Leonard Stark, who confirmed that the attorneys in that district appear to be satisfied with the earlier electronic filing deadline, and that the judges in that district have received no complaints about the deadline. See Delaware Bar Report 10 (quoting the statement of the Delaware Chapter of the Federal Bar Association president that the District Court order rolling back the electronic filing deadline "has provided a healthier work-life balance" and that the order "has been well received and we have heard positive feedback from clients, Delaware counsel, and counsel from across the country."). A study may well consider the Delaware experience.

Sketches of a Rule Change

If the deadline for electronic filing is rolled back, what time would be appropriate? I do not propose a specific time, but I do suggest this would be an area to study if the committees are inclined to consider changes. The Delaware Bar Report, relying upon local daycare closing times, recommended a 5:00 p.m. deadline, and that deadline was adopted by the Delaware Supreme Court. Delaware Bar Report 32. If a time-specific approach was embraced in the federal rules, then the current <(A) for electronic filing, at midnight in the court's time zone> could be changed to <(A) for electronic filing, at ___ p.m. in the court's time zone>. Another

[1] The Delaware Bar Report also concluded that an earlier deadline would improve the quality of electronic court filings. Delaware Bar Report 32-33, 39-40. Reasons proffered for this conclusion include that late evening electronic filing "does not promote the submission of carefully considered and edited filings," id. at 32, and that quality "is improved when lawyers can bring to their professional duties the freshness of body, mind, and spirit that a fulfilling personal and family life enable," id. at 39-40.

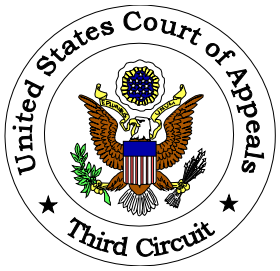
approach that has the benefit of simplicity is setting a uniform time for all filings. So, under that approach, the rules could be changed to something such as:

> **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends, for either electronic filing or for filing by other means, when the clerk's office is scheduled to close.

This sketch incorporates most of the language of the current rules. Note that both sketches retain the important language that leaves open the possibility that an alternate deadline may be set by statute, local rule, or court order. Of course, the above sketches are merely for possible discussion and there are certainly other options. Committee notes, if a change is made, might include the acknowledgment that the amendment would not affect the deadlines to file initial pleadings or notices of appeal.

* * * * *

Thank you for considering this proposal. As always, I will be pleased to assist the rules committees in any way.



Public Notice – May 2, 2023

The United States Court of Appeals for the Third Circuit has adopted amendments to its Local Appellate Rules (L.A.R.), creating a new L.A.R. 26.1 and modifying L.A.R. Misc. 113.3(c). The amended rules create a uniform 5:00 p.m. E.T. deadline for filings (electronic and otherwise) and will become effective on July 1, 2023. The Clerk's Office will apply the 5:00 p.m. E.T. deadline to deadlines set on or after July 1, 2023, and also observe a grace period until December 31, 2023, for papers mistakenly filed after 5:00 p.m. E.T. The amendments are below.

By way of background, Federal Rules of Appellate Procedure 25(a) and 26(a) create two general presumptive filing deadlines, with electronically filed documents due at midnight and documents filed otherwise (such as paper filings) due when the Clerk's Office closes. The hours of the Clerk's Office in the Court of Appeals for the Third Circuit are 8:30 a.m. to 5:00 p.m. E.T.

Rule 26(a)(4) also authorizes courts to establish their own deadlines by court order or local rule. The Court consulted its Lawyers Advisory Committee, which studied and approved the proposed rule changes. The Court then determined that it would solicit comments from the public about the proposed new local rule and conforming amendment. A Public Notice encouraging comments was issued on January 17, 2023. The period for public comment closed on March 3, 2023.

The Court received wide variety of comments from a diverse group of entities and people, including senior attorneys, junior attorneys, pro se litigants, professors, paralegals, and legal assistants. "The Court is grateful for all of the comments received and they were quite helpful in our decision-making. As a matter of fact, several modifications to the proposed rules were made because of suggestions made in the comments, such as excepting filings initiating cases in the Court, like petitions for review," stated Chief Judge Michael A. Chagares. Further, the Court took notice of the successes of the United States District Court for the District of Delaware and state courts of Delaware, which relied principally on work/life balance and quality of life concerns in similarly modifying their filing deadlines years ago. Other courts have also rolled back their deadlines.

Reasons supporting the Court's adoption of the amendments include, in no particular order:

- permitting the Court's Helpdesk personnel to assist electronic filers with technical and other issues when needed during regular business hours and permitting other Clerk's Office personnel to extend current deadlines (the average non-extended filing period is thirty days) in response to a party's motion or for up to fourteen days by telephone, during regular business hours. In addition, the amendments permit judges to read and consider filings at an earlier hour.

- insofar as over half of the Court's litigants are pro se, many of whom cannot or will not use the Court's CM/ECF system (and attorneys must use the system), the rule largely equalizes the filing deadlines for pro se litigants and attorneys.

- consistent with the collegiality and fairness the Court encourages, the rule ends the practice by some of unnecessary late-night filings intended to deprive opponents from hours that could be used to consider and formulate responses to such filings. Further, the rule obviates the need by opposing counsel to check whether opposing papers were filed throughout the night. About one-quarter of the Court's filings are currently received after business hours.

- alleviating confusion by equalizing the filing deadlines for electronically filed and non-electronically filed documents in most cases.

While the new rule sets a 5:00 p.m. E.T. deadline for filing, parties reserve the autonomy to prepare their papers whenever they choose, and as Chief Judge Chagares notes, "the virtual courthouse remains open twenty-four hours a day for electronic filing."

The Clerk's Office will proactively advise and remind parties of the new deadline in, for instance, scheduling orders.

L.A.R. 26.0 COMPUTING AND EXTENDING TIME

26.1 Deadline for Filing

(a) Unless a different time is set by a statute, local rule, or court order:
  (1) documents received by the Clerk by 5:00 p.m. Eastern Time on the last day for filing will be considered timely filed;
  (2) documents received after 5:00 p.m. Eastern Time on the last day for filing will be considered untimely filed; and
  (3) for documents filed electronically, the filer must complete the transaction by 5:00 p.m. Eastern Time on the last day for filing for the filing to be considered timely.

(b) L.A.R. 26.1 applies to documents filed after the initiation of a proceeding in the court of appeals. It does not apply to documents that initiate an appeal or other proceeding in the court of appeals.

(c) Pursuant to L.A.R. 31.1(b)(1) and L.A.R. Misc. 113, registered ECF filers must file briefs and appendices electronically and the deadline established in L.A.R. 26.1(a) applies. The deadline established in L.A.R. 26.1(a) does not apply to the submission of briefs and appendices, if:

(1) a party is not a registered ECF filer and is permitted to file non-electronic briefs and appendices in accordance with Fed. R. App. P. 25(a)(2)(A)(ii); or

(2) a party is providing paper copies of previously filed electronic briefs and appendices.

(d) The deadline established in L.A.R. 26.1(a) does not apply to documents filed by inmates in accordance with Fed. R. App. P. 25(a)(2)(A)(iii).

Source: None

Cross-References: Fed. R. App. P. 26(a); L.A.R. 25; L.A.R. Misc. 113

Comments: Fed. R. App. P. 26(a)(4) defines the end of the last day of filing in the court of appeals as "midnight in the time zone of the circuit clerk's principal office" for electronic filing and "when the Clerk's office is scheduled to close" for other means of transmission of documents to the clerk's office. This rule applies "[u]nless a different time is set by statute, local rule, or court order." L.A.R. 26.1 relies upon this authority.

Miscellaneous – 3d Circuit Local Appellate Rules

113.3 Consequences of Electronic Filing

….

(c) Except as stated in L.A.R. 26.1, ~~F~~filing must be completed by ~~midnight on the last day Eastern Time~~ 5:00 p.m. Eastern Time on the last day to be considered timely ~~filed that day~~.

….

Comments: Rules on electronic filing were added in 2008. ~~Time changed to midnight in 2010 to conform to amendments to FRAP.~~ The rule was amended to conform to the 2023 amendment to L.A.R. 26.1.

TAB 11

Item 11 will be an oral report.

TAB 12

Item 12 will be an oral report.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTY RULES

FROM: TECHNOLOGY AND PRIVACY SUBCOMMITTEE

SUBJECT: 23-BK-C– RULES 9014 AND 9017 AND PROPOSED RULE 7043 ON REMOTE HEARINGS

DATE: AUG. 16, 2023

The National Bankruptcy Conference (NBC) has submitted proposals to amend Bankruptcy Rules 9014 and 9017 and introduce a new Rule 7043 to facilitate video conference hearings for contested matters in bankruptcy cases.

Currently, Rule 9017 makes applicable to bankruptcy cases the Federal Rules of Evidence[1] and Fed. R. Civ. P. 43 (Taking Testimony), 44 (Proving an Official Record) and 44.1 (Determining Foreign Law). Fed. R. Civ. P. 43(a) provides as follows:

> (a) IN OPEN COURT. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from the different location.

Fed. R. Bank. P. 5001(b) requires, in part, that "[a]ll trials and hearings shall be conducted in open court[2] and so far as convenient in a regular court room." The Rule was adapted from Fed. R. Civ. P. 77(b), which states, in part, that "[e]very trial on the merits must be conducted in open court, and, so far as convenient, in a regular courtroom." The proposal by the NBC would not modify the requirements of Rule 5001(b).

The NBC proposes to eliminate the incorporation of Fed. R. Civ. P. 43 by reference in Fed. R. Bankr. P. 9017, so that it would no longer be applicable "in a bankruptcy case."[3] With the deletion of the reference to Civil Rule 43, Rule 9017 would read as follows:

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[1] Fed. R. Evid. 611(a), one of the Federal Rules of Evidence made applicable to bankruptcy cases under Bankruptcy Rule 9017, states that "[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." The NBC views the broad discretion conferred by Fed. R. Evid. 611(a) as setting out a standard that is "inconsistent" with Fed. R. Civ. P. 43(a). In fact, Rule 611 does not directly address remote testimony, while Civil Rule 43(a) does so.

[2] The concept of an "open court" requires a presiding judge, a formal record, and public access. *See, e.g.*, Gould Electronics, Inc. v. Livingston County Road Comm'n, 470 F. Supp. 3d 735, 739 (E.D. Mich. 2020).

[3] This is the language in the restyled version of Bankruptcy Rule 9017.

Rule 9017. Evidence[4]

The Federal Rules of Evidence and Fed. R. Civ. P. ~~43,~~ 44, and 44.1 apply in a bankruptcy case.

Advisory Committee Note

The Rule is amended to delete the reference to Fed. R. Civ. P. 43. Under new Rule 7043, Fed. R. Civ. P. 43 is applicable to advisory proceedings but not to contested matters. Testimony in contested matters is governed by Rule 9014(d).

Instead, the NBC suggests a new Fed. R. Bankr. P. 7043 which would read as follows[5]:

Rule 7043. Taking Testimony

Fed. R. Civ. P. 43 applies in adversary proceedings.

Advisory Committee Note

Rule 7043 is new and continues to make Fed. R. Civ. P. 43 applicable to adversary proceedings —as was previously true under Rule 9017—but not to contested matters.

For contested matters, the NBC proposes to amend Fed. R. Bankr. P. 9014(d). That Rule currently reads as follows:[6]

Rule 9014. Contested Matters

***

(d) Taking Testimony on a Disputed Factual Issue. A witness's testimony on a disputed material factual issue must be taken in the same manner as testimony in an adversary proceeding.

The NBC proposes that the Rule should be amended as follows:

Rule 9014. Contested Matters

***

(d) Taking Testimony on a Disputed Factual Issue; Evidence; Interpreters. Rule 43(d) F.R.Civ. P. applies in contested matters. A witness's testimony on a disputed material factual issue must be taken ~~in the same manner~~

[4] This is the restyled version of Rule 9017.
[5] The suggested language of the NBC has been modified to be consistent with the restyled version of the Part VII rules.
[6] This is the restyled version of Rule 9014(d).

~~as testimony in an adversary proceeding.~~ in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. When a contested matter relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

The language of the proposed insertion is identical to Civil Rule 43 with the exception that the "compelling circumstances" standard is removed. To be consistent with the restyling project,[7] the amended rule should read as follows:

Rule 9014. Contested Matters

***

(d) Taking Testimony on a Disputed Factual Issue; Evidence; Interpreter.

(1) ***Taking Testimony***. A witness's testimony on a disputed material factual issue must be taken ~~in the same manner as testimony in an adversary proceeding.~~in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For cause and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(2) ***Evidence on a Motion***. When a motion in a contested matter relies on facts outside the record, the court may hear the motion on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(3) ***Providing an Interpreter***. Fed. R. Civ. P. 43(d) applies in a contested matter.

* * * * *

Advisory Committee Note

Rule 9014(d) is amended to include language from Fed. R. Civ. P. 43. That rule is no longer generally applicable in a bankruptcy case and the reference to that rule has been removed from Rule 9017. Instead, Rule 9014(d) incorporates most of the language of Fed. R. Civ. P. 43 for contested matters, but eliminates the "compelling circumstances" standard in Fed. R. Civ. P. 43(a) for permitting remote testimony. Under new Rule 7043, all of Fed. R. Civ. P. 43—

[7] Note that the restyled Bankruptcy Rules never use the term "good cause" so the second sentence in (d)(1) uses the term "cause" despite the inconsistency with Civil Rule 43(a).

including the "compelling circumstances" standard—continues to apply to adversary proceedings.

Remote hearings have become commonplace in bankruptcy practice since the COVID-19 pandemic, and were justified during that period by "compelling circumstances." But bankruptcy courts have recognized that there are many advantages to remote hearings, including to the debtors. As the NBC suggestion notes, "[r]emote transmission of court hearings removes a barrier to access for individual debtors who are unable to travel to the federal courthouse because the travel expense, parking expense, childcare needs, lack of job leave, and no public transportation make live attendance not possible." Remote hearings also, as the NBC points out, "allow creditors who are often spread out across the country to participate in hearings when live attendance would be cost prohibitive."

Unlike adversary proceedings, which are comparable to civil actions governed by Fed. R. Civ. P. 43, contested matters are often of very short duration and do not typically turn on the credibility of witnesses. Therefore, the concerns about the inability to confront witnesses in person are much less pressing for bankruptcy contested matters. The proposed amendments and new rule would retain the general rule that testimony in a contested matter will be in person, but give the court more discretion to permit remote testimony by setting a less stringent standard for allowing exceptions to the rule.

***

The Subcommittee recommends that that Advisory Committee approve the proposed rule amendments and new Rule 7043 and submit them to the Standing Committee for publication.

TAB 13

13. Random Case Assignment – 23-CV-U

Submission 23-CV-U, from the Brennan Center for Justice of New York University School of Law, urges the adoption of a Civil Rule to "establish a minimum floor for the randomization of judicial assignment within districts for certain civil cases."

This topic is included in the agenda for discussion by the Committee of whether or how such an objective could be achieved by rule amendment. There is no question that the topic is important. The Chief Justice stressed the importance of random assignment of cases in his 2021 Year-End Report on the Federal Judiciary. On July 10, 2023, 19 Senators wrote Judge Rosenberg about "judge shopping" that appeared to occur in some judicial districts in which "plaintiffs can effectively choose the judge who will hear their cases due to local court rules governing how matters are assigned." In other districts, the letter observed, "local rules require cases to be assigned randomly among all of the judges serving in the district." A copy of that letter is included in this agenda book.

In August 2023, the American Bar Association adopted its Resolution 521 (also included in this agenda book) as follows:

> RESOLVED, That the American Bar Association urges federal courts to eliminate case assignment mechanisms that predictably assign cases to a single United States District Judge without random assignment when such cases seek to enjoin or mandate the enforcement of a state or federal law or regulation and where any party, including intervenor(s), in such a case objects to the initial, non-random assignment within a reasonable time; and
>
> FURTHER RESOLVED, That the American Bar Association urges that, in such situations, case assignments are made randomly and on a district-wide rather than a division-wide basis.

To a notable extent, this set of concerns relate to another issue that has appropriately received considerable attention recently – "nationwide injunctions" issued by a single district judge affecting governmental activities across the entire nation. See, e.g., Amanda Frost & Samuel Bray, Are Nationwide Injunctions Legal?, 102 Judicature 70 (2018); Alan Morrison, It's Time to Enact a 3-Judge Court Law for National Injunctions, Bloomberg Law News, Feb. 6, 2023. Both the House and Senate Judiciary Committees have held hearings on this set of issues.

A starting point is 28 U.S.C. § 137(a), which provides:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

An initial reaction might be that this statute does not prescribe any role for the Civil Rules regarding the assignment of cases. Instead, the statute contemplates that the matter is governed by the district court, subject to action by the circuit judicial counsel if there is an impasse among the judges in a district.

Somewhat similarly, statutory provisions contain considerable detail about the divisions of district courts. See 28 U.S.C. §§ 81-131. For example, § 81(a) provides that the Northern District of Alabama comprises seven divisions, which the statute defines by county.

It appears that the local rules of a number of districts employ local "venue" provisions that allocate cases among divisions, and that some divisions may have only one or two active district judges. Before 1988, the relevant federal statute evidently required that cases be filed in the division where the defendant resided, but that was repealed in 1988. See ABA Resolution 521 at 5-6 ("In 1988, Congress repealed that statutory provision, abolishing divisional venue at the federal level.").

This statutory overlay need not entirely foreclose the Committee's ability to change existing practices by rule. The Enabling Act, 28 U.S.C. § 2072(b) provides that, although rules "shall not abridge, enlarge or modify any substantive right," "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." This provision was originally included in the Enabling Act in 1934 because procedural provisions were sprinkled throughout the federal codes, and there were concerns that some of them might be overlooked and advanced as nullifying the new set of Civil Rules. That purpose has little current force, and the supersession power should be employed, if at all, with great caution. (And it might be worth noting, as Professor Burbank has emphasized, that when the Enabling Act was adopted in 1934 the "substantive rights" limitation probably did not apply to state law provisions, since the *Erie* case was not decided until 1938.)

Accordingly, though this submission presents an important set of issues, it is not clear that a rulemaking response would be a desirable way to proceed to address them.

For purposes of discussion, however, it seems useful to identify some concerns. No doubt Committee discussion will identify more:

Importance of local district-court flexibility: Until now (subject to review by circuit judicial councils) the district courts have been in charge of their own case assignment practices. The submission itself says that districts have adopted "a wide variety of methods to allocate cases among judges." It seems they vary from district to district, and that even a "minimum floor for the randomization of judicial assignment," as proposed, could intrude in significant, and perhaps unfortunate, ways. For example, in geographically large districts having cases assigned to judges in a given division may serve valuable purposes. Insisting that jurors, lawyers, and judges travel long distances to attend court proceedings may be undesirable.

It is also worth noting that the question of case assignment has evolved over time. Until the 1960s, many districts employed a "master calendar" system rather than individual assignment of cases for all purposes. Now individual assignment of cases is the norm, and perhaps universal. But individual assignment could be seen as a source of the problem complained of. See Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 378 (1982) (reporting on a major change in the judicial role – "Today, federal district judges are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion.").

As the submission also notes, the Northern District of California uses random assignment for patent, trademark, and copyright cases and securities class actions. One prompt there might be that judges in the San Jose Division (next to Silicon Valley) might bear a very disproportionate portion of the district's workload were all cases by or against Silicon Valley companies assigned to that division. That might be an example of circumstances in a district that call for a particular approach to case assignment. Section 137 leaves it to districts to attend to such needs, and perhaps a nationally uniform provision could unduly hamstring local latitude.

Defining the affected cases: The submission does not seek to supersede local district court assignment practices in all cases, but only in a few. It offers the following possible description of those cases:

> In cases where a plaintiff seeks injunctive or declaratory relief that may extend beyond the district in which the case is filed, districts shall use a random or blind assignment procedure to assign the case among judges in that district.

As an alternative, it also offers the following narrower definition:

> Cases where 1) the plaintiff is seeking injunctive relief that would extend outside the district; and 2) at least one of the plaintiffs is a governmental entity or official, resides outside the division, or is a member organization that includes members residing outside the division.

The submission also conveyed the ABA definition of the cases that present this problem – "when a plaintiff seeks to enjoin a federal or state law or agency action."

It should be clear that these definitions would include a lot of cases. For any multi-district state, any action seeking injunctive or declaratory relief against the state would extend beyond the district. For example, a class action in California on behalf of a class of prisoners in state prisons would potentially apply state-wide in a state with four districts. In the same vein, a labor union is a "member organization," and many unions include members outside the district. Similarly, some employment discrimination class actions would seem to be covered by the definition. Class certification in *Wal-Mart v. Dukes* was overturned by the Supreme Court, but the case would seem to fit the first definition above.

Applying the definition of affected cases: Presumably case assignment (by random means) is handled efficiently by clerks' offices and does not require judicial input. If some cases must be assigned in a special way rather than in the manner used for most cases, somebody will have to decide whether given filings should be subject to a different assignment procedure. Is that decision to be made by the court clerk? Alternatively, is the chief judge to make the determination? With

electronic filing, that might not be logistically difficult, but it could be an additional complication. Perhaps the civil cover sheet should include a question that would identify a case as falling within the category of concern. But if we are dealing with plaintiff forum shopping it may be that some plaintiffs will be reluctant to identify their cases in this manner.

Rule-based "venue" provision?: The submission objects that cases seeking nationwide relief may be filed in divisions "that bear little connection" to the facts or issues of the case. Of course, the general venue statute controls where cases may be filed; is this case-assignment approach an additional "venue" directive? As the ABA materials show, in 1988 Congress abolished "divisional venue." Is this a step back in that direction? Should a rule require that cases be filed only in districts with a "substantial" connection to the facts or issues in the case?

Have measures short of rule amendments been effective?: The submission notes the issue raised with the Committee by Senators Tillis and Leahy regarding assignment of patent infringement cases (22-CV-Q). As it notes, the district whose practices were drawn into question by the senators revised its case assignment practices for patent cases to deal with the problem. Perhaps the problem in the patent infringement cases was of a different dimension, but the comparison does raise this question.

Of concern only to the Civil Rules?: This submission is only about assignment of civil cases. But it is worth asking whether case assignment in other federal courts might be considered. For example, some bankruptcy proceedings have broad implications. Consider, for example, the Purdue Pharma matter now pending before the Supreme Court. The automatic stay in bankruptcy may often, as in the opioids instance, have broad effect across many districts (and in state courts as well). Perhaps assignment of such "blockbuster" bankruptcy matters should be done on a random basis in districts with multiple bankruptcy judges.

Applicable to magistrate judge assignments under § 636(c)?: Of course, assignment to a magistrate judge of full authority to decide a case under § 636(c) depends on party consent. But on occasion that consent may be conditioned on the identity of the magistrate judge. Whether or not such a conditional consent should be honored, the possibility does suggest another potential implication of this submission.

* * * * *

A new Rule 83(a)(3) might prescribe case assignment requirements with regard to certain cases. Perhaps one might say this is not a transsubstantive rule because it's only about one category of cases. Though defining that category may be difficult, the transsubstantivity concern might not loom large. It's worth noting, for example, that Rule 5.1 already prescribes special treatment for cases making a constitutional challenge to a statute, and that Rule 24(b)(2) has provisions about intervention by a government officer or agency in litigation involving statutes or orders emanating from that officer or agency. It may be that the sort of cases that prompt this submission raise similar concerns, though with regard to case assignment rather than notice to a governmental body or intervention by that governmental body.

Surely many other issues will be raised, but the foregoing at least suggests some.

BRENNAN CENTER FOR JUSTICE

23-CV-U

September 1, 2023

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Submission of a Proposal to Adopt a Rule to
Increase the Randomness of Civil Case Assignments

Dear Secretary Byron:

Please find enclosed a Proposal requesting that the Committee on Rules of Practice and Procedure adopt a rule that would establish a minimum floor for the randomization of judicial assignment within districts in certain civil cases. The Proposal details one potential approach for the Committee's consideration: if a plaintiff seeks injunctive relief that would extend beyond a judicial district, the case would be randomly assigned to any judge within the district, regardless of the division in which the case was filed. The Committee might also consider additional potential criteria for requiring randomization, as discussed in the Proposal.

Random case assignment protects the impartiality and public legitimacy of the judiciary. This is especially important where parties seek broad injunctive relief that will affect numerous others not before the court. Currently, there are a number of divisions in the country where, pursuant to local rules, all cases filed in the counties of a division are assigned to a small handful of judges, and often a single judge. Litigants in a range of high-profile cases have filed in such divisions with the aim of securing a judge they believe will favor their claims.

This judge-shopping has damaged public confidence in the fairness of the judicial system, at a time when the judiciary is already under intense scrutiny. A new Federal Rule of Civil Procedure is needed to ensure uniform minimum standards for random case assignment. Adopting such a change through rulemaking would permit thoughtful consideration of the different values and institutional needs implicated by judicial case assignment procedures. An effective response from the judiciary itself to the problem of judge-shopping would promote public confidence in judicial impartiality.

Professor Amanda Shanor and the Brennan Center for Justice are the Proponents and respectfully request that they be notified when the Committee considers this matter in open session. For the convenience of the Committee, all communications can be directed to the undersigned at shanor@wharton.upenn.edu.

Respectfully Submitted,

Amanda Shanor
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BEFORE THE COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE
PROPOSAL TO REQUIRE RANDOM JUDICIAL ASSIGNMENT FOR CERTAIN CASES

Professor Amanda Shanor and the Brennan Center for Justice (the Proponents) respectfully request that the Committee on Rules of Practice and Procedure consider and then adopt a Rule under which certain cases would be randomly assigned to any judge of the district in which the case was filed.

Introduction & Rationale for the Proposal

Currently, the judges in each federal judicial district have discretion to devise a system for case assignment within their district. Pursuant to 28 U.S.C. § 137, titled *Division of business among district judges*, "[t]he business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court." Rule 83 on Local Rules then sets the procedures under which case assignment systems can be adopted. For instance, it provides that "[a]fter giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice" and that "[c]opies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public." Fed. R. Civ. P. 83.

Districts have adopted a wide variety of methods to allocate cases among judges.[1] In some places, districts assign all cases filed within a division with a relatively low volume of cases to only one or two judges. Geographically-tied assignment rules are a valuable tool for preserving access to justice in less populous areas and for ensuring that "litigants are served by federal judges tied to their communities."[2] However, they were not meant to enable plaintiffs to hand-pick their judges, let alone in cases with significant nationwide implications.

However, they have led to just that result. In recent years, plaintiffs have exploited case assignment procedures to seek nationwide relief from one or two judges in divisions that bear little connection to the facts of their case, in what has widely been perceived to be an effort to choose a judge who favors their

[1] For a policy that mostly relies on random selection, but within limits so that certain districts are not overburdened, *see* General Order No. 21-01 at 9-15 (C.D. Cal. 2021), https://www.cacd.uscourts.gov/sites/default/files/general-orders/GO%2021-01.pdf. For an example of a policy of random assignment in the context of one courthouse, *see* D.D.C. LCvR. 40.3, https://www.dcd.uscourts.gov/sites/dcd/files/local_rules/Local%20Rules%20April_2023.pdf. For a geographically large district split into many divisions that assigns all of its judges to all of its divisions and randomly divides all cases between all of them, regardless of where filed, *see* General Order No. 12 (N.D.N.Y. 2020), https://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO12.pdf ("Civil cases shall be assigned blindly and at random by the Clerk"). The Western District of Missouri uses a similar approach W.D. Mo. L.R. 83.9, https://www.mow.uscourts.gov/sites/mow/files/Local_Rules.pdf ("Unless otherwise provided in a statute, federal rule, or order of the Court en banc, the Clerk must assign newly filed matters among the qualified judges by blind draw.").

[2] John G. Roberts, Jr., C.J., *2021 Year-End Report on the Federal Judiciary*, Supreme Court of the United States, 5 (Dec. 31, 2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

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viewpoint.[3] This includes cases where the issues being litigated, and even the parties, have no particular connection to that division.[4] In recent years, parties have filed a remarkable volume of cases seeking, and obtaining, nationwide relief in single-judge divisions. Indeed, a small number of judges in single-judge divisions have issued nationwide injunctions against a range of federal policies related to immigration,[5] abortion,[6] contraception,[7] gun regulation,[8] employment law,[9] and educational policy.[10]

This situation has damaged public confidence in the fairness of the judicial system and prompted widespread demands for change. The American Bar Association, for example, recently adopted a resolution urging the federal courts to "eliminate case assignment mechanisms that predictably assign cases to a single United States District Judge" in cases seeking injunctions against federal or state law where any party objects to the initial assignment within a reasonable time period.[11] Those cases, the ABA

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[3] *See e.g.*, Motion for Leave to File Amicus Curiae Brief and Brief of Stephen I. Vladeck as Amicus Curiae in Support of Applicants, United States v. Texas, No. 22-40367 (July 13, 2022), https://www.supremecourt.gov/DocketPDF/22/22-58/230032/20220713161446965_22A17%20tsac%20Stephen%20I.%20Vladeck.pdf (describing Texas's practice of filing dozens of challenges in divisions outside the state capital and far from the relevant facts, staffed by one or two judges appointed by administrations of the same party, and of consolidating cases away from multi-judge divisions); Perry Stein, *The Justice Department's Fight against Judge Shopping in Texas*, Wash. Post (May 9, 2023), https://www.washingtonpost.com/national-security/2023/03/19/judge-shopping-justice-protests-texas/.

[4] Abbie Vansickle, *Schumer Asks Judicial Policymakers to End Single-Judge Divisions in Texas*, N.Y. Times (July 11, 2023), https://www.nytimes.com/2023/07/11/us/politics/schumer-judge-selection-texas.html (describing how an advocacy group incorporated in Amarillo, Texas shortly after *Roe v. Wade* was overturned, and then filed suit in that district, where all cases go to a judge who had publicly criticized *Roe* and who then granted the group's motion to reverse 20 years of unchallenged Food and Drug Administration approval for medication abortion).

[5] Sabrina Rodriguez, *Federal Judge Deals Biden Another Blow on 100-Day Deportation Ban*, Politico (Feb. 24, 2021), https://www.politico.com/news/2021/02/24/texas-judge-biden-deportation-ban-471315.

[6] Brendan Pierson, *Explainer: Kacsmaryk Suspends Approval of Abortion Pill. What's Next?*, Reuters (April 10, 2023), https://www.reuters.com/world/us/texas-judge-suspends-approval-abortion-pill-what-happens-next-2023-04-08/.

[7] DeOtte v. Azar, 393 F. Supp. 3d 490 (N.D. Tex. 2019), https://affordablecareactlitigation.files.wordpress.com/2019/06/deotte-summary-judgment-order.pdf.

[8] Melissa Quinn, *Alito Extends Order Reinstating ATF Rules Restricting 'Ghost Guns' for Now*, CBS News (Aug. 4, 2023), https://www.cbsnews.com/news/justice-samuel-alito-atf-rules-ghost-guns-supreme-court/; Perry Stein, *Veterans Sue Biden Justice Dept. over Pistol Brace Restrictions*, Wash. Post (Feb. 2, 2023), https://www.washingtonpost.com/national-security/2023/02/01/wisconsin-pistol-brace-lawsuit/ (describing Wisconsin firm filing in Amarillo Division of Northern District of Texas to block federal policy).

[9] Texas v. United States, 95 F. Supp. 3d 965 (N.D. Tex. 2015) (ruling by Judge Reed O'Connor blocking the federal Department of Labor from including same-sex spouses in a statutory definition of the word "spouse").

[10] Camila Domonoske, *U.S. Judge Grants Nationwide Injunction Blocking White House Transgender Policy*, NPR, (Aug. 22, 2016), https://www.npr.org/sections/thetwo-way/2016/08/22/490915833/u-s-judge-grants-nationwide-injunction-blocking-white-house-transgender-policy. Additionally, a motion is pending to block a federal policy permitting retirement funds to consider ethical guidelines in making investment decisions. Jon McGowan, *Biden Administration and Republicans Trade Motions in ESG Rule Lawsuit*, Forbes (June 6, 2023), https://www.forbes.com/sites/jonmcgowan/2023/06/06/biden-administration-and-republicans-trade-motions-in-esg-rule-lawsuit/?sh=33afe1dc141f.

[11] American Bar Association (ABA), Resolution No. 521 (Aug. 2023), https://www.americanbar.org/content/dam/aba/administrative/news/2023/am-res/521.pdf.

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proposes, would then be randomly assigned among all of the district judges.[12] Nineteen Senators recently called on the Judicial Conference to recommend rules to all district courts that would ameliorate judges shopping.[13] And Senate Majority Leader, Chuck Schumer, has called on the U.S. District Court for the Northern District of Texas, which has assignment rules[14] that have been frequently exploited, to adopt random case assignment.[15] In short, as the Congressional Research Service has noted, "[i]n recent years, some observers have expressed concerns that litigants challenging government actions were filing suit in those divisions [where only one or two active federal judges are assigned] in an attempt to judge shop."[16] These concerns have correctly identified a fundamental problem; a new Rule is needed to establish uniform minimum standards for random case assignment.

The process for adopting new Federal Rules provided in the Rules Enabling Act, 28 U.S.C. § 2072, and elaborated through the Judicial Conference, is a preferable method for dealing with this issue for several reasons. This process would allow both a systematic approach to and public comment on the administrative practicalities and multiple values implicated by case assignment procedures. As the Supreme Court has recognized, rulemaking "draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions."[17] It is also flexible: the rules committees are "left wholly free to approach the question of amendment of . . . the rules in the light of whatever considerations seem relevant to them,"[18] and are not constrained by the "time pressures and piecemeal character of case-by-case adjudication"[19] or other similar limitations. For this reason, this Committee can more comprehensively study and weigh the issues raised by judge shopping and case assignment processes.

A Rule would also establish not only a uniform but also, critically, a clear policy. All litigants then could both be assured that their case had been assigned in accordance with a minimum floor of randomness and have a clear Rule to cite if there was any question as to the processes of their case assignment. Adopting a Rule that ensures minimum standards for the random assignment of cases would thus promote both the legitimacy and impartiality of the judiciary–fostering public confidence.

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[12] *Id*.

[13] Letter from Sen. Charles Schumer et al. to Hon. Robin L. Rosenberg (July 10, 2023), https://www.democracydocket.com/wp-content/uploads/2023/07/Letter-on-judge-shopping.pdf.

[14] Special Order 3: Order Regarding Judgeships and Case Assignments (N.D. Tex.), https://www.txnd.uscourts.gov/special-order-3/.

[15] Letter from Sen. Charles Schumer to Hon. David C. Godbey (April 27, 2023), https://www.democrats.senate.gov/imo/media/doc/following_devastating_decisions_on_abortion_lgbt_protections_and_immigration_majority_leader_schumer_pushes_to_end_contemptible_practice_of_texas_forum_shopping.pdf. Bills have also been proposed in both the House and Senate to address the situation by providing the District of Columbia, which uses full random assignment, jurisdiction over all cases involving declaratory or injunctive relief against the federal laws. *See* Stop Judge Shopping Act, S. 1265, 118th Congress (2023), https://www.congress.gov/bill/118th-congress/senate-bill/1265/text; Stop Judge Shopping Act, H.R. 3163, 118th Congress (2023), https://www.congress.gov/bill/118th-congress/house-bill/3163/text.

[16] Joanna R. Lampe, *Where a Suit Can Proceed: Court Selection and Forum Shopping*, Cong. Research Serv. No. LSB10856, 3 (Nov. 8, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10856.

[17] Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 114 (2009).

[18] Miner v. Atlass, 363 U.S. 641, 651 (1960).

[19] Harris v. Nelson, 394 U.S. 286, 306 (1969) (Harlan, J., dissenting).

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Proposal

The Judicial Conference is empowered under 28 U.S.C. § 2072 "to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." Pursuant to this authority, similar to Rule 83, the Conference should adopt a rule that creates a minimum procedural floor for the impartiality of case assignment. Districts would continue to have the flexibility, beyond that minimum, to adopt local rules to best divide business among district judges based on local conditions.

There are multiple ways to ensure cases are randomly assigned in circumstances when the risks of judge-shopping exceed the importance of having a case resolved locally by a judge with local community ties. Proponents offer one, relatively simple approach for the Committee's consideration. Specifically, Proponents ask that this Committee promulgate the following rule or its equivalent:

- In cases where a plaintiff seeks injunctive or declaratory relief that may extend beyond the district in which the case is filed, districts shall use a random or blind assignment procedure to assign the case among the judges in that district.

If the Committee determines that requiring random assignment for a narrower category of cases would strike a better balance between preventing judge-shopping and preserving the benefits of single-judge divisions, it could require random assignment only for cases where 1) the plaintiff is seeking injunctive relief that would extend outside the district; AND 2) at least one of the plaintiffs is a governmental entity or official, resides outside the division, or is a member organization that includes members residing outside the division. Alternatively, it could require random assignment when a plaintiff seeks to enjoin a federal or state law or agency action, as the ABA recently recommended.[20]

This Proposal, like other similar proposals for randomization, accords with the Conference's longstanding support for random case assignment, recently reaffirmed by Chief Justice Roberts, who observed that "the Judicial Conference has long supported the random assignment of cases and fostered the role of district judges as generalists capable of handling the full range of legal issues."[21] The proposal also responds to widespread and bipartisan concerns about judge-shopping.[22] It does so in a balanced way that preserves single-judge judicial assignments in cases where they better serve the interests of access to justice or where a judge's community ties might be germane to the issues at stake.

Similar limits on single-judge assignment have already proved workable in other contexts. Most recently, in response to judge-shopping concerns in patent cases filed in Waco, Texas, and after Chief Justice Roberts had referred the issue to the Conference for study,[23] the Western District of Texas revised its

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[20] ABA, *supra* note 11.
[21] Roberts, C.J., *supra* note 2 at 5.
[22] *Id*. (in context of case assignment for patent cases, noting concerns from Senators "from both sides of the aisle); ABA, *supra* note 11; Lampe, *supra* note 16 at 3.
[23] Roberts, C.J., *supra* note 2 at 5 (naming addressing assignment of patent cases as one of the three agenda topics highlighted that year).

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rules to require the random assignment of patent cases among the twelve judges in the district regardless of where the case is filed.[24] Other districts have put similar measures in place.[25] The Northern District of California uses random assignment for patent, trademark, and copyright cases, securities class actions, prisoner petitions, and capital habeas corpus cases.[26] The District of Nebraska does so when the United States is the plaintiff or the State of Nebraska, its agencies, or employees are the defendants, as well as for prisoner and pro se plaintiffs and social security cases.[27] The District of Montana largely does so for election-related cases.[28] The District of Maine does so where the state is a plaintiff or defendant.[29] And both the Northern District of New York and the Western District of Missouri–both large districts divided into many divisions–assign all of their judges to all of their divisions and randomly divide all cases between all of them, regardless of where filed.[30]

While these individual district rules vary, they all reflect and seek to reinforce the widely-shared values of fairness and impartiality. These values merit uniform protection throughout the federal judiciary. This Proposal would take a critical step in that direction by preventing the exploitation of case assignment rules by plaintiffs seeking geographically broad injunctive relief.

Thank you for your consideration,

Amanda Shanor
Assistant Professor

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[24] Order Assigning the Business of the Court as it Relates to Patent Cases (W.D. Tex. July 25, 2022), https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Order%20Assigning%20the%20Business%20of%20the%20Court%20as%20it%20Relates%20to%20Patent%20Cases%20072522.pdf ("[A]ll civil cases involving patents (Nature of Suit Codes 830 and 835), filed in the Waco Division on or after July 25, 2022, shall be randomly assigned to the following [twelve named] district judges of this Court until further order of the Court.").

[25] *See generally* Alex Botoman, *Divisional Judge-Shopping*, 49 Colum. Hum. Rts. L. Rev. 297 (2018), https://hrlr.law.columbia.edu/files/2018/07/AlexBotomanDivisionalJudg.pdf.

[26] General Order No. 44(D)(3) (N.D. Cal. Jan. 1, 2018), https://www.cand.uscourts.gov/filelibrary/132/GO-44_01.01.18.pdf.

[27] General Rule 1.4(a)(5)(A) (D. Neb. Dec. 1, 2016), https://www.ned.uscourts.gov/internetDocs/localrules/NEGenR.2016.pdf.

[28] Standing Order No. BMM-25 (D. Mont. July 19, 2023), https://www.mtd.uscourts.gov/sites/mtd/files/SO_BMM-25.pdf (changing standing order from one requiring random assignment for such cases to random assignment with the exclusion of one senior judge).

[29] D. Me. L.R. 3(b) (Dec. 1, 2017), https://www.med.uscourts.gov/sites/med/files/LocalRules.pdf.

[30] General Order No. 12 (N.D.N.Y. 2020), https://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO12.pdf ("Civil cases shall be assigned blindly and at random by the Clerk"). The Western District of Missouri uses a similar approach W.D. Mo. L.R. 83.9, https://www.mow.uscourts.gov/sites/mow/files/Local_Rules.pdf ("Unless otherwise provided in a statute, federal rule, or order of the Court en banc, the Clerk must assign newly filed matters among the qualified judges by blind draw.").

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United States Senate
WASHINGTON, DC 20510-3203

July 10, 2023

The Honorable Robin L. Rosenberg
Chair, Advisory Committee on Civil Rules
Judicial Conference
One Columbus Circle, NE
Washington, D.C. 20544

Dear Chair Rosenberg:

We write to you today about the issue of judge shopping. Specifically, in some federal judicial districts, plaintiffs can effectively choose the judge who will hear their cases due to local court rules governing how matters are assigned. In other districts, local rules require cases to be assigned randomly among all of the judges serving in the district. As a result, based on geography, some plaintiffs are able to guarantee that their claims will be heard before a specific judge whereas others are left to chance, and this inconsistency undermines Americans' faith in our judicial system. Congress requires the Judicial Conference to submit "recommendations to the various courts to promote uniformity of management procedures…of court business."[1] We urge you to provide applicable recommendations to every district court in order to address this problem and restore fairness to our federal judiciary.

One notable example of this issue occurs in the Northern District of Texas. Even though the Northern District has twelve active judges and another four senior judges who still hear cases, the relevant special order[2] provides that civil cases filed in many divisions are always assigned to a single judge, or to one of just a few: cases filed in the Amarillo Division are always assigned to Judge Kacsmaryk; cases filed in the Wichita Falls Division are always assigned to Judge O'Connor; cases filed in the Abilene, Lubbock, and San Angelo Divisions are split between just two judges; and cases filed in the Fort Worth Division are split between three. Consequently, plaintiffs can effectively choose the exact judge (or set of a few judges) who will hear their cases by choosing the courthouse in which they sue. The State of Texas itself has sued the Biden Administration at least 31 times in Texas federal district courts, but it has not filed even *one* of those cases in Austin, where the Texas Attorney General's office is located. Instead, Texas has always sued in divisions where case-assignment procedures ensure that a particular preferred judge or one of a handful of preferred judges will hear the case. That includes the Northern District's Amarillo Division, where Texas has filed seven of its cases against the federal government. Many other litigants have done the same, including the Alliance Defending Freedom in its case challenging the FDA's approval of mifepristone.

[1] 28 U.S.C. 331.

[2] Special Order 3: Order Regarding Judgeships and Case Assignments, https://www.txnd.uscourts.gov/special-order-3/.

Nothing requires any district to let plaintiffs choose their judges like this. Federal law splits many districts into two or more divisions, but these are geographical only. We acknowledge that there may be good-faith reasons for districts to assign judges to specific divisions. Such splits may reduce travel times for judges, jurors, criminal defendants, and other litigants by allowing cases to be tried locally. On the other hand, any logistical inconveniences must be balanced against unfairness in judicial process. Furthermore, with electronic filing, divisions need not affect judicial assignments at all. Some district courts with many divisions divide civil cases randomly between all their judges, regardless of where the case is filed. The Northern District of New York is—like the Northern District of Texas—a geographically large district split into many divisions. But the Northern District of New York assigns all of its judges to all of its divisions and randomly divides all cases between all of them, regardless of where the cases are filed.[3]

The Judicial Conference recently highlighted issues related to "judicial assignment and venue for patent cases in federal trial court," and Chief Justice John Roberts affirmed the Conference's support for "random assignment of cases."[4] Shortly thereafter, the Western District of Texas changed its case-assignment rules for patent cases filed in Waco so that such cases are now randomly assigned between all eleven active judges in the district and one senior judge.[5] While this was a positive development, it is unclear why this principle should not apply to every district court for every area of the law.

Congress currently allows each district court to decide for itself how to assign cases.[6] This gives courts the flexibility to address individual circumstances in their districts and among their judges. But that flexibility is permitting litigants to hand-pick their preferred judges and effectively guarantee their preferred outcomes. Accordingly, the Judicial Conference should recommend rules to all district courts that would promote uniformity in the federal courts.

Additionally, as Congress considers whether new legislation is necessary to address this issue, we request responses to the following questions by Monday, July 24, 2023:

1. Which divisions across the nation have local rules that guarantee one district judge will hear all (or nearly all) cases filed in those divisions?
    a. What considerations may justify such local rules?
2. What options are available to guarantee variability in the assignment of cases to district judges?
    a. Through what mechanisms could such options be implemented?
3. How often does the Judicial Conference "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business," as required by statute?
4. What other options should Congress consider to reduce judge shopping, both at the district-court level and circuit-court level?

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[3] N.D.N.Y. General Order No. 12 (Oct. 8, 2020), https://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO12.pdf.
[4] 2021 Year-End Report on the Federal Judiciary, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.
[5] Order Assigning the Business of the Court as it Relates to Patent Cases (July 25, 2022), https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Order%20Assigning%20the%20Business%20of%20the%20Court%20as%20it%20Relates%20to%20Patent%20Cases%20072522.pdf.
[6] 28 U.S.C. § 137(a).

5. Is there any requirement that district courts publicize their division-of-business orders?
    a. If not, will the Judicial Conference consider adopting such a requirement?

Sincerely,

Charles E. Schumer
United States Senator

Elizabeth Warren
United States Senator

Alex Padilla
United States Senator

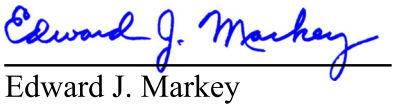
Mazie K. Hirono
United States Senator

Ron Wyden
United States Senator

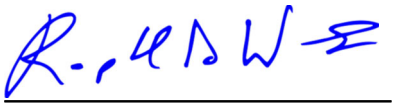
Richard Blumenthal
United States Senator

Benjamin L. Cardin
United States Senator

Tammy Baldwin
United States Senator

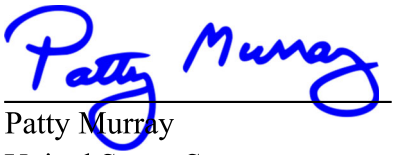


Edward J. Markey
United States Senator

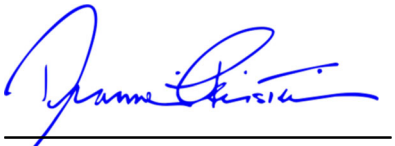


Raphael Warnock
United States Senator

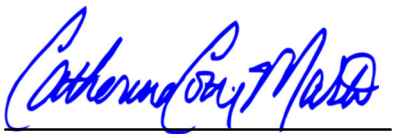
Kirsten Gillibrand
United States Senator



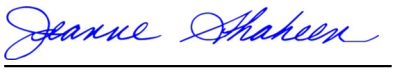
Patty Murray
United States Senator



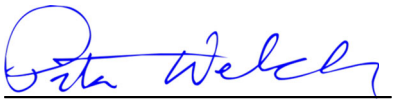
Dianne Feinstein
United States Senator



Catherine Cortez Masto
United States Senator



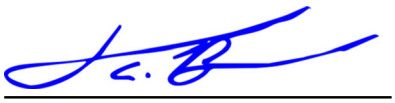
Jeanne Shaheen
United States Senator



Peter Welch
United States Senator

Martin Heinrich
United States Senator

Robert Menendez
United States Senator



Cory A. Booker
United States Senator

ADOPTED

AMERICAN BAR ASSOCIATION

LITIGATION SECTION
TORT, TRIAL AND INSURANCE PRACTICE SECTION
CIVIL RIGHTS AND SOCIAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges federal courts to eliminate case assignment mechanisms that predictably assign cases to a single United States District Judge without random assignment when such cases seek to enjoin or mandate the enforcement of a state or federal law or regulation and where any party, including intervenor(s), in such a case objects to the initial, non-random assignment within a reasonable time; and

FURTHER RESOLVED, That the American Bar Association urges that, in such situations, case assignments are made randomly and on a district-wide rather than division-wide basis.

REPORT

Introduction

Our federal courts are generally designed to assign district judges randomly to cases as they are filed, barring, e.g., a relationship to pending matters within the same district or relationship to a prior, concluded case. Chief Justice Roberts noted in the 2021 Year-End Report on the Federal Judiciary that "the Judicial Conference has long supported the random assignment of cases . . . ."[1] Random assignment serves important functions in preserving and promoting public confidence in the judiciary. It avoids the appearance that some litigants can literally "pick their judge" by, in some instances, filing within a particular division within a federal district; in some circumstances, the courthouse in which a case is filed leads to the sole judge who sits there routinely receiving assignments from filings made "at" that courthouse.[2]

This tactical version of "judge-shopping" by place-of-filing was highlighted by the practice of patent owners filing cases with nationwide impact in a single division (Waco) in the Western District of Texas, resulting in nearly 25% of patent cases nationally being assigned to the single judge in that division.[3] In 2021, Chief Justice Roberts addressed criticism of this practice, noting that "Senators from both sides of the aisle have expressed concern that case assignment procedures allowing the party filing a case to select a division of district court might, in effect, enable the plaintiff to select a particular judge to hear a case."[4] Chief Justice Roberts was sufficiently concerned that he "asked the Director of the Administrative Office, who serves as Secretary of the Judicial Conference, to put the issue before the Conference," noting further that the "Committee on Court Administration and Case Management is reviewing this matter and will report back to the full Conference."[5] The Chief Judge for the Western District of Texas then issued case-assignment orders expressly directed at patent filings to prevent filings in Waco from leading to assignment to a particular judge.[6] In effect,

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[1] John G. Roberts, Jr., C.J., U.S. Sup. Ct., 2021 Year-End Report on the Federal Judiciary at 5, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf ("2021 Year-End Report") (specifically addressing assignment of patent cases as one of the three agenda topics the Chief Justice chose to highlight that year).

[2] The word "at" is singled out because in this day and age e-filing is available throughout the federal system, although it is not the only method for filing.

[3] Michael Shapiro, *West Texas Patent Case Assignment Order Stays in Place, for Now*, Bloomberg Law (December 22, 2022), https://news.bloomberglaw.com/ip-law/west-texas-patent-case-assignment-order-stays-in-place-for-now. The number of patent case filed in federal court in Waco, Texas, soared from a total of five in 2016-2017 to nearly 1,000 in 2019-2020. J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 Duke L.J. 419, 421 (2021).

[4] 2021 Year-End Report, *supra* note 1, at 5.

[5] *Id*. As of the first quarter of 2023, no "report back to the full Conference" has been released, perhaps due to the issuance of case assignment Orders in the Western District of Texas addressing the practice.

[6] Order Assigning the Business of the Court as It Relates to Patent Cases (W.D. Tex. July 25, 2022) ("[A]ll civil cases involving patents (Nature of Suit Codes 830 and 835), filed in the Waco Division on or after July 25, 2022, shall be randomly assigned to the following [twelve named] district judges of this Court until further order of the Court."), as continued in Amended Order Assigning the Business of the Court, Item IX(c) (W.D. Tex. May 1, 2023), ("Patent cases will be assigned as ordered on July 25, 2022, in the

these orders confirmed Chief Justice Roberts's stated belief "that self-governing bodies of judges from the front lines are in the best position to study and solve—and to work in partnership with Congress in the event change in the law is necessary."[7]

Yet patent cases are not the only kind of case in which strategic, geographic filings have apparently been made to select a particular judge. As the Congressional Research Service noted in late 2022, "[i]n recent years, some observers have expressed concerns that litigants challenging government actions were filing suit in those divisions [where only one or two active federal judges are assigned] in an attempt to judge shop."[8] For example, an amicus brief in the recent application in *United States v. Texas and Louisiana* examined nineteen instances in which the State of Texas had filed challenges to federal law in federal courts from in 2021 and 2022, and noted that eighteen of the nineteen cases had been assigned to a district judge appointed by a President of the opposite political party from the Administration promoting the federal law or policy being challenged. Of the eighteen cases, seven were filed in single-judge divisions, while another eight were filed in two-judge divisions.[9]

Of course, concern with "judge shopping" is nothing new and is not restricted to any particular political viewpoint or party or kind of case. This Report shows that concerns about "judge shopping" arise in many contexts or kinds of cases,[10] with the recent decision on the medication-abortion drug mifepristone in the single-judge Amarillo Division of the Northern District of Texas as a case in point.[11] While that case brought this issue once again to the forefront, the perception that a party can choose a

(continued…)

Court's Order Assigning the Business of the Court as it Relates to Patent Cases . . . .") (collectively referred to as "Orders").

[7] 2021 Year-End Report, *supra* note 1, at 5.

[8] Joanna R. Lampe, Cong. Rsch. Serv., LSB1085, Where a Suit Can Proceed: Court Selection and Forum Shopping 3 (2022).

[9] Amicus Curiae Brief of Stephen I. Vladeck in Support of Applicants at 3-4 & n.5, *United States v. State of Texas & State of Louisiana*, No. 22A17 (U.S. July 13, 2022) ("Vladeck Amicus Brief"). To the brief Vladeck attached and discussed a chart of nineteen instances in which the State of Texas has challenged federal policy in Texas federal courts, with eighteen of the nineteen cases being filed resulting in assignment to judges appointed by the President of one national political party. *Id.*, app. A.

[10] In addition to concerns about this practice in patent cases raised by the Chief Justice and cases like the mifepristone case brought in the Northern District of Texas, these concerns have arisen in bankruptcy cases, ERISA cases, among others. *See, e.g.*, Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. Ill. L. Rev. 351, 354 (2023) ("In recent years, judge shopping has become standard practice in large chapter 11 bankruptcy cases."); U.S. Government Defendants' Motion to Transfer Venue, *State of Utah v. Walsh,* No. 2:23-cv-00016-Z (N.D. Tex. Feb. 7, 2023) (seeking to transfer under 28 U.S.C. § 1404, arguing that there was not proper venue because "there is no connection between the Complaint and this District or Division," in a case challenging regulations promulgated under the Employee Retirement Income Security Act of 1974 ("ERISA")).

[11] *All. for Hippocratic Med. v. U.S. Food & Drug Admin.,* No. 2:22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023), *granting motions to stay in part sub. nom. All. for Hippocratic Med. v. Food & Drug Admin.*, No. 23-10362, 2023 WL 2913725 (5th Cir. Apr. 12, 2023) (per curiam) (Unpublished Order), *stay granted sub nom. Danco Lab'ys., LLC v. All. for Hippocratic Medicine*, No. 22A901, 2023 WL 3033177 (U.S. Apr. 21, 2023).

preferred judge is problematic whether the practice is used to advance a conservative ideology or a liberal one, or whether it is used to gain advantage in patent cases or any other type of litigation. The organization of the courts and case-assignment should be fair, and should be seen as fair by all, and should not be used as a vehicle for advancing any kind of political agenda or financial or other result.

Blind, random selection of judges has long been thought to be critical to "prevent[] judge shopping by any party, thereby enhancing public confidence in the assignment process."[12] If a party "attempted somehow to choose the judge whom she believed would be most favorable to her case, our judicial system would condemn this action because it impairs the integrity of the judicial system and judicial process."[13]

Against this background, it is important that district courts protect what Chief Justice Roberts described as the "important" value of "the random assignment of cases."[14] by assigning certain cases via district-wide, normal random case-assignment provisions (which may very well include the judge in the division in which the case was filed, but will not automatically result in assignment to that judge). The proposal is limited to cases seeking to enjoin national or state law or agency action (or mandate its enforcement in a particular way) such that the ruling would apply outside the division in which a case is filed—if not nationwide. When such a case is filed in a division in which it would be predictably assigned to a single district judge, including single-judge divisions that use the division in which a case is filed to make the case assignment, such predictable assignment would be circumvented if a party or intervenor promptly objects. Because this proposal is limited to cases challenging federal or state law or agency action beyond the division's geographic limits, the interest in having "litigants . . . served by federal judges tied to their communities"[15] is not at issue. Because the process requires an objection, cases that fit the description but are otherwise viewed by all parties as appropriate for resolution before the one judge in that division (whether due to their familiarity with the local community or otherwise) would not be affected by this proposal. The proposal does not seek, as some commentators have suggested, to dismantle current single-judge divisions. It is important to note, also, that not all districts

[12] *United States v. Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992).
[13] Kimberly Jade Norwood, *Shopping for a Venue: The Needs for More Limits on Choice*, 50 U. Miami L. Rev. 267, 268-69 (1996); *see also* A. Kohn, *Southern District Panel Studies Ways to End Judge-Shopping*, N.Y.L.J., Mar. 23, 1987 (referring to practice whereby criminal defendant could pick which judge would sentence him based on reputation of judge for severe or light sentences); A. Kohn, *U.S. Court Revises Format to Curtail Judge-Shopping,* N.Y.L.J., May 1, 1987 (reporting on vote by S.D.N.Y. judges to make choice of sentencing judge subject to random assignment); D. Wise, *Panel Seeks Reform of Case Assignment Rule: City Bar Committee Urges Change in Related-Case Process to Curb Vestiges of: Judge-Shopping,* N.Y.L.J., Mar. 15, 1989; T. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. Pa. L. Rev. 302 (1980); S. Brill, *When the Government Goes Judge Shopping*, Am. Lawyer, Nov. 1988 (decrying "judge shopping" by government in civil RICO case against Teamsters using the "related case" process to have case assigned to judge perceived as pro-government).
[14] 2021 Year-End Report, *supra* note 1, at 5 (addressing patent cases specifically).
[15] *Id.* This was the sole "competing value[]" identified by Chief Justice Roberts as potentially weighing against random assignment. *Id*.

with divisions served by a single judge make case assignments based upon the division in which the case is filed.[16]

Background Regarding Districts and Divisions

Of the ninety-four judicial districts within the federal system as of the first quarter of 2023, only two districts have only a single authorized judge—the District of Guam and the District of the Northern Mariana Islands.[17] Thus, in theory and barring recusals, no case filed in any other district court should automatically go to a particular judge due to a division being served by a single district judge.[18]

As of 2018, fifty-five of the ninety-four federal district courts have been divided into divisions by geography.[19] And as of 2018, at least thirty-five of those fifty-five divisions appear to have either a single district judge or two district judges assigned to each.[20]

Federal statutes leave case-assignment mechanisms to each district, with the judicial council of the appropriate circuit authorized to set procedures should the district court fail to do so.[21] Common factors applied within districts in setting their case-assignment mechanisms include: (i) preferences for maintaining a balance of case numbers before each active district judge, (ii) some distinction between civil and criminal matters, (iii) some distinctions based upon type of case as revealed by

[16] Alex Botoman, *Divisional Judge-Shopping*, 49 Colum. Hum. Rts. L. Rev. 297, 317 (2018).
[17] In addition, there is one district judge authorized for the Eastern District of Oklahoma plus (as of March 11, 1994) an additional authorized district judge who "roves" equally between the Northern and Eastern Districts of Oklahoma. A breakdown is available through the United States Courts website at https://www.uscourts.gov/judges-judgeships/authorized-judgeships,
[18] Botoman, *supra* note 16, at 317.
[19] *Id*. at 299 & app. A.
[20] The United States Courts website does not publish information regarding one- or two-judge divisions. Botoman reported and tabulated the results of research indicating that identified thirty-five judicial divisions within which a single district judge hears greater than 50% of the cases, providing a logical proxy for one to two judge divisions. *Id.*, app. A. While information was not available for all districts and divisions, the article's Appendix A identified the following districts with one or more such divisions in U.S. District Courts for the following districts: District of Montana (with five such divisions), Western District of North Carolina (with four such divisions), Western District of Pennsylvania (with two such divisions), Eastern District of Texas (with five such divisions), Northern District of Texas (with two such divisions), Southern District of Texas (with two such divisions), Western District of Texas (with two such divisions), Western District of Virginia (with six such divisions), Northern District of West Virginia (with four such divisions), Southern District of West Virginia (with two such divisions), and Eastern District of Wisconsin (with one such division), for a total of thirty-five divisions spread across seven states within which one judge is assigned more than half the cases filed.
[21] 28 U.S.C. § 137(a) ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. . . . If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.").

information contained on the Civil Cover Sheet[22] or similar documentation, and (iv) use of divisions in making assignments.[23]

Over the past several years the public perception has grown that high-profile cases with national impact are filed by repeat litigants in particular districts and divisions in order to be assigned to particular judges. As Chief Justice Roberts noted in his 2021 Year-End Report on the Federal Judiciary when addressing specifically the assignment of patent cases filed in a single-judge division:

> **Senators from both sides of the aisle have expressed concern that case assignment procedures allowing the party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear a case**. Two important and sometimes competing values are at issue. First, the Judicial Conference has long supported the random assignment of cases and fostered the role of district judges as generalists capable of handling the full range of legal issues. But the Conference is also mindful that Congress has intentionally shaped the lower courts into districts and divisions codified by law so that litigants are served by federal judges tied to their communities. Reconciling these values is important to public confidence in the courts . . . .[24]

While the patent-case assignment situation was addressed by the district in which 25% of patent cases nationwide had been filed in a single-judge division[25] moving to a system where patent cases were to be assigned randomly throughout the district,[26] the ability to appear to "choose" a particular judge is (i) not limited to patent law, and (ii) not addressed in the internal Western District of Texas Assignment Order that sought to end the rush to select a single judge by filing in the Waco Division.[27]

Abolition of "Divisional Venue"

Prior to 1988, the presence of judicial divisions did not lead to the possibility of judge-shopping because, under the relevant federal statute, a party was generally

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[22] Form JS-44, last revised Apr. 2021, with Civil Nature of Suit Code Description, last revised Dec. 2022, both available from the United States Courts website at https://www.uscourts.gov/forms/civil-forms/civil-cover-sheet.

[23] One author notes that thirty-six of the ninety-four district courts do not use "divisions" when making assignments. Botoman, *supra* note 16, at 317.

[24] 2021 Year-End Report, *supra* note 1, at 5 (emphasis added). The perception that the system was being manipulated in patent cases was of sufficient importance that it was one of only "three topics" expressly "highlighted" in the Report. *Id.* at 3 ("I would like to highlight three topics that have been flagged by Congress and the press over the past year."); *see also id.* at 5.

[25] "At one point, nearly 25% of all patent litigation nationwide was pending before [District Judge Alan] Albright, prompting criticism from Congress and US Supreme Court Chief Justice John Roberts." Shapiro, *supra* note 3.

[26] *See* Orders, *supra* note 6..

[27] *See id.*

required to file within the division where the defendant resided.[28] In 1988, Congress repealed that statutory provision, abolishing divisional venue at the federal level.[29] Now, following that repeal, divisional case-assignment rules run the gamut. Some districts make venue available only in one division. Other districts have established divisional rules largely tracking the rules for district-level venue, i.e., focusing upon where a defendant resides or where a substantial part of the events occurred that allegedly give rise to the claim; to still other courts that have elected not to establish any division-level rules, allowing any plaintiff to choose any division within the district.[30] Even those courts that allow filing in any division do not necessarily tie the case assignment of judges to the division in which a case was filed.[31] In short, a variety of approaches exist, with one approach—assignment to single-judge divisions—resulting in the perception that the value of "random assignment" is being overrun without any corresponding benefit resulting from a perceived tie to the specific judges' assigned communities.[32]

The Impact of Single-Judge Divisions Can and Should Be Lessened or Eliminated

A. Case-Assignment Methods in Some Single-Judge Divisions Create an Appearance That Some Repeat Litigants Can Effectively Choose a Specific Judge, Unlike the Vast Majority of Litigants in Federal Court.

The experience of district courts throughout the system evidences a preference for initial random assignment to one or more judges. Chief Justice Roberts recognized this interest in his 2021 Year-End Report, stating that "the Judicial Conference has long supported the random assignment of cases and fostered the role of district judges as generalists capable of handling the full range of legal issues."[33] Yet, as the patent-case assignment experience demonstrated, and as the pattern of filing cases with nationwide impact in particular one- and two-judge divisions has also shown,[34] the "random assignment of cases" can be circumvented, or seen to be avoided particularly in certain kinds of cases. This apparent avoidance, as the Chief Justice noted in 2021, has led to questioning and criticism from Congress and the public and press.[35] However, as

[28] 28 U.S.C. § 1393 (repealed) (providing that in judicial districts with divisions actions must be brought where one or more defendants resided).
[29] Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1001, 102 Stat. 4642, 4664 (1988) ("REPEAL.—Section 1393, relating to divisional venue in civil cases, and the item relating to section 1393 in the table of sections at the beginning of chapter 87, are repealed.").
[30] These approaches are summarized and exemplars provided in Botoman's article. Botoman, *supra* note 16, at 316 & nn. 102-104.
[31] *Id*. at 315-20.
[32] 2021 Year-End Report, *supra* note 1, at 5.
[33] *Id*.
[34] For example, the Vladeck Amicus Brief, *supra* note 9, discusses 19 instances in which the State of Texas has challenged federal policy in Texas federal courts, with 18 of the 19 cases resulting in assignment to judges appointed by the President of the same national political party. Seven of the cases were filed in single-judge divisions, while another eight were filed in two-judge divisions. *Id*., app. A.
[35] *See, e.g.*, 2021 Year-End Report, *supra* note 1, at 5 (referencing "Senators from both sides of the aisle hav[ing] expressed concern that case assignment procedures allowing the party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear the case"); Perry Stein, *The Justice Department's Fight Against Judge Shopping In Texas*, The Washington Post,

discussed below, both the Courts themselves and the Congress each have toolkits that can be used to mitigate the perception of judge-shopping in these instances.

B. Multiple Alternative Approaches, if Taken by Courts, Can Avoid the Impact of Single-Judge Divisions.

The ABA Resolution does not call for the dismantling of any divisions or even of any divisions served by one judge. No new judges need to be added to any division, no court and chambers spaces need to be added in existing courthouses, and no new courthouses built. The Resolution seeks to avoid only the impact that non-random assignment brings.

District judges have the authority provided by 28 U.S.C. § 137(a) to craft and apply assignment systems within their districts, with judicial councils authorized to create assignment systems if the district judges do not agree. As with the patent-cases situation in the Waco Division of the Western District of Texas, "[t]his issue of judicial administration provides another good example of a matter that self-governing bodies of judges from the front lines are in the best position to study and solve—and to work in partnership with Congress in the event change in the law is necessary."[36] In that instance, the chief judge of the district announced new case-assignment practices that returned cases to the wheel for random assignment across the district. Some other districts may take that same approach. Others may choose to eschew consideration of the division in which a qualifying case is filed for all assignment purposes. Other courts will find additional approaches to both allow the continuation of relatively small docket divisions that are geographically dispersed, so long as random assignment occurs for cases seeking to enjoin federal or state law or regulation.

Districts with single-judge divisions can address the issues through a variety of means, including assigning relevant cases in the first instance throughout the district to judges irrespective of the division in which the case is filed, or allowing a party or intervenor within a designated time after service to call for random assignment within the district.

(continued…)

Mar. 19, 2023, https://www.washingtonpost.com/national-security/2023/03/19/judge-shopping-justice-protests-texas/; Steve Vladeck, *Texas Judge's Covid Mandate Ruling Exposes Federal Judge-Shopping Problem*, MSNBC Jan. 11, 2022, https://www.msnbc.com/opinion/texas-judge-s-covid-mandate-ruling-exposes-federal-judge-shopping-n1287324.

[36] 2021 Year-End Report, *supra* note 1, at 5.

C. Multiple Alternative Approaches by Congress Remain Available Should Courts Not Act to Restrict or Remove the Impact of Single-Judge Division Assignments.

This Resolution does not call for Congressional action. Yet commentators have noted several legislative approaches that could be taken, as the Chief Justice put it, "in the event change in the law is necessary."[37]

For years, federal statutes required that such cases be resolved by three-judge courts. One legislative approach would address cases that have extra-divisional impact, or perhaps extra-district impact, and return to three-judge courts, when the validity of constitutionality of administrative rules or statutes are involved.[38]

A second legislative approach has suggested that the U.S. District Court for the District of Columbia have exclusive jurisdiction over suits seeking an injunction against the enforcement of any federal law (including regulations and Executive orders).[39]

A third alternative legislative approach would simply prohibit single-judge divisions from being used for assignment purposes if any party objected within a designated number of days after service. In the event of objection, the case would randomly be assigned to a judge at the district level without regard to the division in which the case was filed. In effect, this would legislate what the proposal proposes courts consider.

This Resolution and Report does not endorse any of these proposals. However, the availability of Congressional action may, as the Chief Justice suggested, encourage action by the Judiciary.

Conclusion

Confidence in our judicial system is the bedrock of the rule of law. The system's fairness, and perception of its fairness, is even more critical when addressing issues of legislative or executive power. This Resolution addresses efforts to pick not just a forum, but to pick a specific judge. Avoiding perceptions that parties can choose a judge to decide matters will help support the legitimacy of our federal courts and the public's confidence in them.

Respectfully submitted,

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[37] *Id*.

[38] Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 Notre Dame L. Rev., no. 5, 2023, at 131.

[39] Stop Judge Shopping Act, S. 1265, 118th Cong. (2023).

Daniel W. Van Horn Chair
Litigation Section

August 2023

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GENERAL INFORMATION FORM

Submitting Entity: Litigation Section

Submitted by: Daniel Van Horn, Chair

1. Summary of Resolution(s).

   The Resolution urges federal courts to use their existing statutory authority to avoid case assignment mechanisms in which cases are predictably assigned to a single United States District Judge without random assignment (e.g., due to the use of geographic divisions in assignment where a single judge is associated with a single division or for any other reason) in all such cases (i) seeking to enjoin or mandate the enforcement of a state or federal law or regulation, and (ii) where any party, including intervenor(s), objects to the initial, non-random assignment within a reasonable time; and, instead, in such cases make case assignments on a district-wide, rather than division-wide, random assignment basis.

   The Resolution further urges that, in such situations, case assignments are made randomly be made on a district-wide rather than division-wide random assignment basis.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

   The Resolution seeks to advance Goal 4- Advance the Rule of Law by helping to ensure that federal judges are assigned to cases randomly and to ensure public confidence in the United States courts by avoiding the appearance that parties can choose the judges who decide their cases.

3. Approval by Submitting Entity.

   Approved by Litigation Section Council on May 1, 2023.

4. Has this or a similar resolution been submitted to the House or Board previously?

   No.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   None.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

   N/A

7. Status of Legislation. (If applicable)

   Legislation has not been introduced.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   Publicize ABA policy once adopted and support judicial actions by the federal courts, including their judicial councils, as outlined in the resolution.

9. Cost to the Association. (Both direct and indirect costs)
   None.

10. Disclosure of Interest. (If applicable)

    None.

11. Referrals.

    Administrative Law and Regulatory Practice
    Antitrust Law Section
    Business Law
    Civil Rights & Social Justice
    Criminal Justice
    Dispute Resolution
    Environmental, Energy, & Resources
    Family Law Section
    Government & Public Sector Lawyers
    Health Law
    Infastructure & Regulated Industries
    Intellectual Property Law
    International Law Section
    Judicial Division
    Labor & Employment Law
    Law Practice
    Public Contract Law
    Real Property, Trust & Estate Law
    Science & Technology Law
    Senior Lawyers
    Solo, Small Firm, and General Practice

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State and Local Government Law
Tort Trial and Insurance Practice Section
Young Lawyers Division

12. Contact Name and Address Information. (Prior to the meeting. Please include name, telephone number and e-mail address. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Don Bivens
602-708-1450
don@donbivens.com

13, Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Don Bivens
602-708-1450
don@donbivens.com

EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges federal courts to use their existing statutory authority to avoid case assignment mechanisms in which cases are predictably assigned to a single United States District Judge without random assignment (e.g., due to the use of geographic divisions in assignment where a single judge is associated with a single division or for any other reason) in all such cases (i) seeking to enjoin or mandate the enforcement of a state or federal law or regulation, and (ii) where any party, including intervenor(s), objects to the initial, non-random assignment within a reasonable time; and, instead, in such cases make case assignments on a district-wide, rather than division-wide, random assignment basis.

The Resolution further urges that, in such situations, case assignments are made randomly on a district-wide rather than division-wide basis.

2. Summary of the Issue that the Resolution Addresses

Cases in which plaintiffs seem to be able to pick a particular judge, as opposed to a particular forum, do disservice to the public perception of the judiciary and the litigation process. This can arise particularly when a judicial district has a division in which all cases are predictably assigned to a single judge and the district uses the division in which the case was filed as the basis for case assignment. Courts are not required to do so, and this Resolution urges federal to use their authority to avoid non-random assignment in single-judge divisions or otherwise in cases having clear extra-divisional impact.

3. Please Explain How the Proposed Policy Position will address the issue

The policy calls for federal courts to use their case assignment authority to assign based on the entire district, rather than only a division, in these instances.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

The proposal to limit single judge, non-random assignments itself does not appear to be controversial per se. Some stakeholders may prefer to let the courts simply continue to deal with the issues on a district-by-district basis without any additional suggestions or guidance. Some stakeholders may prefer to provide guidance that more broadly limits single judge assignments in all cases and regardless of objection by the parties. The Resolution takes a middle ground, focusing on those cases that involve extra-divisional effects on enforcement of state or federal statutes or regulations where a party or intervenor objects.

On the other hand, some proponents of providing guidance would prefer to skip the "urge the courts" step reflected in the Resolution, and instead go straight to requesting legislative action. Consistent with Chief Justice Roberts's statements when a similar issue surfaced in patent cases in a particular district, this Resolution calls on self-governing bodies of judges from the front lines to find appropriate, nuanced approaches to avoid the non-random assignments. Should non-random assignments continue, the situation may call for legislative action.

TAB 14

14. Rule 60(b)(1) – 23-CV-D

This matter comes to the Committee by way of the January 2023 meeting of the Standing Committee:

> At the January 2023 Standing Committee meeting, Judge Pratter suggested that the Civil Rules Committee consider whether there is a need to address the recent Supreme Court decision *Kemp v. United States* (2022). In that opinion, the Court held that a "mistake" under Civil Rules 60(b)(1) includes a judge's error of law.

Kemp v. United States, 142 S.Ct. 1856 (2022), involved a Rule 60(b) motion to reopen Kemp's motion under § 2255 to vacate his 2011 sentence of 420 months after conviction for a variety of crimes. Kemp appealed his conviction, as did his co-defendants, and the Eleventh Circuit consolidated the appeals and affirmed the convictions in November 2013. Ordinarily such a judgment would become final when the 90 days to seek certiorari or rehearing expired, in February 2014. Though Kemp did not seek rehearing of this affirmance or certiorari, two of his co-defendants did seek rehearing, which the Eleventh Circuit denied in May 2014.

In April 2015, Kemp filed the § 2255 motion. The Government moved to dismiss on the ground that the motion was too late because the statute requires that the motion must be filed within one year from "the date on which the judgment becomes final." The district court granted the Government's motion, concluding that the judgment on Kemp's appeal became final in February 2014, 90 days after the panel ruling. Though his § 2255 motion was filed within one year of the Eleventh Circuit denial of his co-defendants' motion for a rehearing, Kemp did not appeal the dismissal.

Two years after the dismissal of the § 2255 motion, Kemp sought to reopen that action, relying on Rule 60(b)(6). He argued that even though he did not move for rehearing from the original affirmance of his conviction some of his co-defendants did, meaning that the final judgment was entered only when the rehearing petitions of those co-defendants were denied in May 2014, so that his April 2015 motion actually was timely. Kemp relied on the Supreme Court's Rule 13.3, which prescribes that the 90-day clock to seek certiorari does not begin to run until *all* parties' petitions for rehearing are denied.

The district court rejected Kemp's argument on the timeliness of his original § 2255 motion, but also held that in any event his Rule 60(b) motion was untimely under the one-year limit in 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."

Kemp argued before the Eleventh Circuit that his motion was actually under Rule 60(b)(6) – "any other reason that justifies relief" – because it was premised about the district court's legal error in determining whether his original § 2255 motion was timely. The Eleventh Circuit agreed that Kemp's original § 2255 motion appeared to have been timely due to the petitions for rehearing filed by his co-defendants, but held that he was nevertheless barred by the one-year limit in Rule 60(c)(1) since his motion was based on a "mistake."

Noting that there was a division among the circuits about whether Rule 60(b)(1) was available for relief due to an argument that the court erred as a matter of law, the Supreme Court

granted cert. See 142 S.Ct. at 1861 n.1, saying that the Eighth and First Circuits had ruled that Rule 60(b)(1) does not apply in such circumstances, while the Seventh, Second, Sixth and Eleventh had ruled that it includes the court's errors of law.

By an 8-1 vote, the Court held that, in light of the "text, structure, and history of Rule 60(b)," a judge's errors of law are "mistakes" within the rule. It rejected Kemp's reliance on Rule 60(b)(6) because that is available only when Rules 60(b)(1) through 60(b)(5) are inapplicable, and 60(b)(1) was applicable.

Justice Sotomayor concurred in the Court's opinion, but stressed her understanding that Rule 60(b)(6) might be available in "extraordinary circumstances, including a change in controlling law." The Court recognized that "we do not decide whether a judicial decision rendered erroneous by subsequent legal or factual changes also qualifies as a 'mistake' under Rule 60(b)(1)." *See id.* at 1862 n.2.

Justice Gorsuch dissented on the ground that the Court should not have taken the case, and that the issue should instead have been addressed through the rules process because it "presents a policy question about the proper balance between finality and error correction." He also stressed that the rule interpretation "matters only under rare circumstances": "By petitioner's own (uncontested) count, his is the first petition *ever* to present today's question for this Court's review." *Id.* at 1865.

The majority did not accept Justice Gorsuch's urging that the matter be addressed by rulemaking, so the question going forward is whether this decision provides a ground for considering a change to Rule 60(b). As matters now stand, it seems that the Court has held that the interpretation of Rule 60(b)(1) previously employed by the Eighth and First Circuits was wrong, and that the interpretation of four other circuits was right.

The main impact of the Court's interpretation of Rule 60(b)(1) is to subject motions seeking relief from an order or judgment to the one-year time limitation in Rule 60(c)(1), which would not apply to a motion under Rule 60(b)(6). One concern might be that including legal errors among those within "mistake" under Rule 60(b)(1) would permit losing parties to sidestep the time limits on appealing by filing 60(b)(1) motions within a year. The Court addressed this issue in *Kemp* (142 S.Ct. at 1864):

> In any event, the alleged specter of litigation gamesmanship and strategic delay is overstated. Rule 60(b)(1) motions must be made "within a reasonable time." Fed. R. Civ. P. 60(c)(1). And while we have no cause to define the "reasonable time" standard, we note that Courts of Appeals have used it to forestall abusive litigation by denying Rule 60(b)(1) motions alleging errors that should have been raised sooner (*e.g.*, in a timely appeal). See, *e.g., Mendez v. Republic Bank*, 725 F.3d 651, 660 (CA7 2013).

The Seventh Circuit's *Mendez* decision (cited by the Court) held that, after a timely notice of appeal was filed in that case, the district court could entertain a Rule 60(b)(1) motion premised on an error that would lead to reversal unless corrected by the district court. It quoted Judge Henry Friendly: "no good purpose is served by requiring the parties to appeal to a higher court, often

requiring remand for further trial proceedings, when the trial court is equally able to correct its decision in the light of new authority on application made within the time permitted for appeal." *Id.* at 660, quoting *Schildhaus v. Moe*, 335 F.2d 529, 531 (2d Cir. 1964). It added (*id.*):

> To be clear, this conclusion does not undermine our effort to prevent Rule 60(b) from being used to evade the deadline to file a timely appeal. This concern may be adequately addressed through careful enforcement of the requirement that Rule 60(b) relief be sought within a "reasonable time." * * * [A] Rule 60(b) motion filed after the time to appeal has run that seeks to remedy errors that are correctable on appeal will typically not be filed within a reasonable time.

The Seventh Circuit's *Mendez* decision also stressed that "district courts are given broad discretion to deny motions for relief from judgment. Accordingly, we review the grant or denial of relief from judgment only for abuse of discretion." *Id.* at 657-58.

Under the circumstances, it does not appear likely that the Supreme Court's *Kemp* decision (adopting what seems to have been the majority view of the courts of appeals) will cause significant problems. One response might be to revise Rule 60(b)(1) to exclude legal errors by the court as a ground for relief under the that provision, and thereby to bring them within 60(b)(6). How exactly to phrase such an exclusion might prove tricky. In *Kemp*, the Government urged that Rule 60(b)(1)'s reference to "mistake" should be limited to "obvious errors," but the Court declined to engage in "complex line-drawing." 142 S.Ct. at 1863.

It may be that later developments will show that the Court's interpretation of Rule 60(b)(1) has indeed caused problems, but it does not appear to create an immediate need for a rule amendment.

Hon. Gene E.K. Pratter (23-CV-D)

Released on February 22, 2023
Category: Suggestions
Committee: Civil
Rules Status: Pending consideration
Rule or Form: Rule 60(b)

At the January 2023 Standing Committee meeting, Judge Pratter suggested that the Civil Rules Committee consider whether there is a need to address the recent Supreme Court decision, *Kemp v. United States* (2022). In that opinion, the Court held that a "mistake" under Civil Rule 60(b)(1) includes a judge's error of law.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KEMP *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 21–5726. Argued April 19, 2022—Decided June 13, 2022

Petitioner Dexter Kemp and seven codefendants were convicted of various drug and gun crimes. The Eleventh Circuit consolidated their appeals and, in November 2013, affirmed their convictions and sentences. In April 2015, Kemp moved the District Court to vacate his sentence under 28 U. S. C. §2255. The District Court dismissed Kemp's motion as untimely because it was not filed within one year of "the date on which [his] judgment of conviction [became] final." §2255(f)(1). Kemp did not appeal. Then, in June 2018, Kemp sought to reopen his §2255 proceedings under Federal Rule of Civil Procedure 60(b), which authorizes a court to reopen a final judgment under certain enumerated circumstances. As relevant here, a party may seek relief within one year under Rule 60(b)(1) based on "mistake, inadvertence, surprise, or excusable neglect." A party may also seek relief "within a reasonable time" under Rule 60(b)(6) for "any other reason that justifies relief," but relief under Rule 60(b)(6) is available only when the other grounds for relief specified in Rules 60(b)(1)–(5) are inapplicable. Kemp's motion to reopen his §2255 proceedings invoked Rule 60(b)(6), but his motion sought reopening based on a "mistake" covered by Rule 60(b)(1). Specifically, Kemp argued that the 1-year limitations period on his §2255 motion did not begin to run until his codefendants' rehearing petitions were denied in May 2014, making his April 2015 motion timely. The Eleventh Circuit agreed with Kemp that his §2255 motion was timely but concluded that because Kemp alleged judicial mistake, his Rule 60(b) motion fell under Rule 60(b)(1), was subject to Rule 60(c)'s 1-year limitations period, and was therefore untimely.

Held: The term "mistake" in Rule 60(b)(1) includes a judge's errors of

Syllabus

law. Because Kemp's motion alleged such a legal error, it was cognizable under Rule 60(b)(1) and untimely under Rule 60(c)'s 1-year limitations period. Pp. 3–10.

(a) As a matter of text, structure, and history, a "mistake" under Rule 60(b)(1) includes a judge's errors of law. When the Rule was adopted in 1938 and revised in 1946, the word "mistake" applied to any "misconception," "misunderstanding," or "fault in opinion or judgment." Webster's New International Dictionary 1383. Likewise, in its legal usage, "mistake" included errors "of law or fact." Black's Law Dictionary 1195. Thus, regardless whether "mistake" in Rule 60(b)(1) carries its ordinary meaning or legal meaning, it includes a judge's mistakes of law. Rule 60(b)(1)'s drafters could have used language to connote a narrower understanding of "mistake," yet they chose not to qualify that term. Similarly, the Rule's drafters could have excluded mistakes by judges from the Rule's reach. In fact, the Rule used to read that way. When adopted in 1938, Rule 60(b) initially referred to "his"—*i.e.,* a party's—"mistake," so judicial errors were not covered. The 1946 revision to the Rule deleted the word "his," thereby removing any limitation on whose mistakes could qualify. Pp. 4–6.

(b) Neither the Government nor Kemp offers a reason to depart from this reading of Rule 60(b)(1). Pp. 6–10.

(1) The Government contends that the term "mistake" encompasses only so-called "obvious" legal errors. This contention—also held by several Courts of Appeals—is unconvincing. None of the dictionaries from the time the Rule was adopted and revised suggests this "obviousness" gloss. Nor does the text or history of Rule 60(b)(1) limit its reach only to flagrant cases that would have historically been corrected by courts sitting in equity. Finally, requiring courts to decide not only whether there was a mistake but also whether that mistake was sufficiently "obvious" raises questions of administrability. P. 6.

(2) Kemp's arguments for limiting Rule 60(b)(1) to non-judicial, non-legal errors are also unconvincing. He claims that Rule 60(b)(1)'s other grounds for relief—"inadvertence," "surprise," and "excusable neglect"—involve exclusively non-legal, non-judicial errors, and thus "mistake" should be similarly limited. But courts have found that excusable neglect may involve legal error, see, *e.g., Lenaghan* v. *Pepsico, Inc.,* 961 F. 2d 1250, 1254–1255, and they have a similar history of granting relief based on "judicial inadvertence," *Larson* v. *Heritage Square Assocs.*, 952 F. 2d 1533, 1536. Kemp argues that Rule 60's structure favors interpreting the term "mistake" narrowly to include only non-legal errors, and the Court's contrary interpretation would create confusing overlap between Rule 60(b)(1) and relief available under other parts of Rule 60 not subject to Rule 60(c)'s 1-year limitations period. But the overlap Kemp suggests would exist even if "mistake"

reached only factual errors. Courts of Appeals have well-established tests for distinguishing between these Rules. And should such overlap ever create an irreconcilable conflict, courts may then resort to ordinary interpretive rules to determine which Rule to apply. As for Kemp's worry that the Court's interpretation would allow parties to evade other time limits by, for example, repackaging a tardy motion under Rule 59(e), the risk Kemp identifies would exist even under his own interpretation. And, in any event, the alleged specter of litigation gamesmanship and strategic delay is overstated because a Rule 60(b)(1) motion, like all Rule 60(b) motions, must be made "within a reasonable time." Finally, Kemp protests that this Court's reading is inconsistent with the history of Rule 60(b). But his argument is based on the mistaken notions that Rule 60(b)(1)'s list of grounds for reopening was understood to be a "term of art" when adopted, and that Rule 60(b)(6) alone was intended to afford relief for judicial legal errors that had previously been remedied by bills of review. Pp. 6–10.

857 Fed. Appx. 573, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, SOTOMAYOR, KAGAN, KAVANAUGH, and BARRETT, JJ., joined. SOTOMAYOR, J., filed a concurring opinion. GORSUCH, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 21–5726

DEXTER EARL KEMP, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 13, 2022]

JUSTICE THOMAS delivered the opinion of the Court.

Federal Rule of Civil Procedure 60(b)(1) allows a party to seek relief from a final judgment based on, among other things, a "mistake." The question presented is whether the term "mistake" includes a judge's error of law. We conclude, based on the text, structure, and history of Rule 60(b), that a judge's errors of law are indeed "mistake[s]" under Rule 60(b)(1).

I

In 2011, a federal jury convicted Dexter Kemp of various drug and gun crimes, and he was sentenced to 420 months in prison. Kemp, along with seven codefendants, appealed. The Eleventh Circuit consolidated their appeals and, in November 2013, affirmed their convictions and sentences. *United States* v. *Gray*, 544 Fed. Appx. 870. Kemp did not seek rehearing of the Eleventh Circuit's judgment or petition this Court for certiorari. Two of Kemp's codefendants did seek rehearing, which the Eleventh Circuit denied in May 2014.

In April 2015, Kemp moved the U. S. District Court for

the Southern District of Florida to vacate his sentence under 28 U. S. C. §2255. The Government objected that Kemp's §2255 motion was untimely. As relevant here, such motions must be filed within one year of "the date on which the judgment of conviction becomes final." §2255(f)(1). For someone who, like Kemp, does not petition this Court for certiorari, a judgment becomes final when the time to seek certiorari expires—ordinarily, 90 days after judgment. See *Clay* v. *United States*, 537 U. S. 522, 525 (2003); this Court's Rule 13.1. In this case, the District Court concluded that Kemp's judgment became final in February 2014 (90 days after the Eleventh Circuit's judgment affirming his conviction and sentence), making his April 2015 motion over two months late. The District Court dismissed Kemp's motion in September 2016, and Kemp did not appeal.

In June 2018—almost two years later—Kemp attempted to reopen his §2255 proceedings under Federal Rule of Civil Procedure 60(b), which authorizes a court to reopen a final judgment under certain enumerated circumstances. Rule 60(b)(1) permits a district court to reopen a judgment for "mistake, inadvertence, surprise, or excusable neglect," so long as the motion is filed "within a reasonable time," and, at most, one year after the entry of the order under review. See Fed. Rules Civ. Proc. 60(b)(1), (c)(1). Meanwhile, Rule 60(b)(6) permits reopening for "any other reason that justifies relief," so long as the motion is filed "within a reasonable time." Rule 60(c)(1).

Kemp invoked Rule 60(b)(6), but his motion arguably sought reopening based on a kind of "mistake" covered by Rule 60(b)(1). Specifically, Kemp argued that reopening was warranted because this Court's Rule 13.3 prescribes that the 90-day clock to seek certiorari does not begin to run until *all* parties' petitions for rehearing are denied, and the Eleventh Circuit denied his codefendants' rehearing petitions in May 2014. Thus, according to Kemp, the 1-year

period to file his §2255 motion began in August 2014, making his April 2015 motion timely.

The District Court rejected this timeliness argument and, in the alternative, held that Kemp's Rule 60(b) motion was itself untimely. The Eleventh Circuit affirmed. 857 Fed. Appx. 573 (2021) (*per curiam*). While it agreed with Kemp that his original §2255 motion "appear[ed] to have been timely," the Eleventh Circuit nonetheless concluded that he had filed his Rule 60(b) motion too late. *Id.,* at 575–576. The Eleventh Circuit held that Kemp's reopening motion alleged "precisely the sort of judicial mistak[e] in applying the relevant law that Rule 60(b)(1) encompasses," and thus was subject to Rule 60(b)(1)'s 1-year limitations period. *Id.,* at 576.

Kemp petitioned this Court for review, and we granted certiorari to resolve the Courts of Appeals' longstanding disagreement whether "mistake" in Rule 60(b)(1) includes a judge's errors of law.[1] 595 U. S. ___ (2022).

II

Federal Rule of Civil Procedure 60(b) permits "a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez* v. *Crosby*, 545 U. S. 524, 528 (2005). Under Rule 60(b)(1), a party may seek relief based on "mistake, inadvertence, surprise, or excusable neglect." Rules 60(b)(2) through (b)(5) supply other grounds for reopening a judgment. Finally, Rule 60(b)(6) provides a catchall for "any other reason that justifies relief." This last option is available only when

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[1] Compare *Spinar* v. *South Dakota Bd. of Regents*, 796 F. 2d 1060, 1063 (CA8 1986) (Rule 60(b)(1) does not cover claims "that the court erred as a matter of law"); *Elias* v. *Ford Motor Co.*, 734 F. 2d 463, 467 (CA1 1984) (same), with *Mendez* v. *Republic Bank*, 725 F. 3d 651, 659 (CA7 2013) (Rule 60(b)(1) "allows a district court to correct its own [legal] errors"); *In re 310 Assocs.*, 346 F. 3d 31, 35 (CA2 2003) (*per curiam*) (same); *United States* v. *Reyes*, 307 F. 3d 451, 455 (CA6 2002) (same); *Parks* v. *U. S. Life & Credit Corp.*, 677 F. 2d 838, 839–840 (CA11 1982) (*per curiam*) (same).

Rules 60(b)(1) through (b)(5) are inapplicable. See *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847, 863, n. 11 (1988). Even then, "'extraordinary circumstances'" must justify reopening. *Ibid.*

Rule 60(c) imposes deadlines on Rule 60(b) motions. All must be filed "within a reasonable time." Rule 60(c)(1). But for some, including motions under Rule 60(b)(1), that "reasonable time" may not exceed one year. Rule 60(c)(1). Motions under Rule 60(b)(6) are not subject to this additional 1-year constraint. Rule 60(c)(1).

Here, the parties dispute the extent to which a judge's legal errors qualify as "mistake[s]" under Rule 60(b)(1). The Government contends that Rule 60(b)(1) applies any time a party alleges that a judge has made an "obvious" legal error—*e.g.,* the "failure to apply unambiguous law to record facts." Brief for United States 11. Kemp's motion, the Government says, alleged an obvious legal error, so the Eleventh Circuit was correct to apply Rule 60(b)(1). According to Kemp, however, Rule 60(b)(1) applies only to factual errors made by someone other than the judge. Brief for Petitioner 3. So, in Kemp's view, his motion challenging the District Court's timeliness ruling was cognizable under Rule 60(b)(6), and the 1-year limit did not apply.

We ultimately disagree with Kemp and agree with the Government to a point. As a matter of text, structure, and history, the Government is correct that a "mistake" under Rule 60(b)(1) includes a judge's errors of law. But we see no reason to limit Rule 60(b)(1) to "obvious" legal mistakes, as the Government proposes. We first explain why Rule 60(b)(1) covers all mistakes of law made by a judge, and then address why the Government's and Kemp's contrary interpretations of "mistake" do not persuade us.

A

The ordinary meaning of the term "mistake" in Rule 60(b)(1) includes a judge's legal errors. When the Rule

was adopted in 1938 and revised in 1946, the word "mistake" applied to any "misconception," "misunderstanding," or "fault in opinion or judgment." Webster's New International Dictionary 1383 (1914) (Webster's); see also Funk & Wagnalls New Standard Dictionary of the English Language 1588 (1944) (Funk & Wagnalls) (defining "mistake" as an "error in action, judgment, or perceptions," including, *e.g.,* "a *mistake* in calculation"). In ordinary usage, then, a "mistake" was not limited only to factual "misconception[s]" or "misunderstanding[s]," or to mistakes by non-judicial actors. Webster's 1383. Likewise, in its legal usage, "mistake" included errors "of law or fact." Black's Law Dictionary 1195 (3d ed. 1933) (Black's). Thus, regardless whether "mistake" in Rule 60(b)(1) carries its ordinary meaning or legal meaning, it includes a judge's mistakes of law.

Had the drafters of Rule 60(b)(1) intended a narrower meaning, they "easily could have drafted language to that effect." *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 571 U. S. 161, 169 (2014). The difference between "mistake of fact" and "mistake of law" was well known at the time. Both lay and legal dictionaries identified them as distinct categories. See Funk & Wagnalls 1588; Black's 1195. Thus, Rule 60(b)(1)'s drafters had at their disposal readily available language that could have connoted a narrower understanding of "mistake." Yet they chose to include "mistake" unqualified.

Similarly, Rule 60(b)(1)'s drafters could just as easily have excluded mistakes by judges from the Rule's ambit. In fact, the Rule used to read that way. When adopted in 1938, Rule 60(b) initially referred to "his"—*i.e.,* a party's—"mistake," so judicial errors were not covered. Fed. Rule Civ. Proc. 60(b) (1938). In 1946, however, the Rule's amenders deleted the word "his," thereby removing any limitation on whose mistakes could qualify. See Fed. Rule Civ. Proc. 60(b)(1) (1946). Thus, as currently written, "mistake" in

Rule 60(b)(1) includes legal errors made by judges.[2]

B

Both the Government's and Kemp's interpretations of Rule 60(b) depart from aspects of our reading. Their reasons for doing so are unavailing.

1

The Government contends that the term "mistake" encompasses only so-called "obvious" legal errors. Brief for United States 11. Several Courts of Appeals agree that Rule 60(b)(1) may be used to correct only "'obvious errors' of law, such as overlooking controlling statutes or case law." *In re Ta Chi Navigation (Panama) Corp. S. A.*, 728 F. 2d 699, 703 (CA5 1984). The Government argues that this limitation "has historical roots" because courts of equity traditionally "could grant relief from legal errors, but only 'in the most unquestionable and flagrant cases.'" Brief for United States 18 (quoting *Snell* v. *Insurance Co.*, 98 U. S. 85, 91 (1878)).

We are unconvinced. None of the English language or legal dictionaries noted above, *supra,* at 4–5, suggests this "obviousness" gloss. Nor does the Government tie the equity practice it invokes to the text or history of Rule 60(b). Finally, we question the administrability of a rule that requires courts to decide not only whether there was a "mistake" but also whether that mistake was sufficiently "obvious." The text does not support—let alone require—that judges engage in this sort of complex line-drawing.

2

We are similarly unconvinced by Kemp's arguments for

[2] Here, Kemp alleged that the District Court erred by misapplying controlling law to record facts. In deciding that this alleged error is a "mistake," we do not decide whether a judicial decision rendered erroneous by subsequent legal or factual changes also qualifies as a "mistake" under Rule 60(b)(1).

limiting Rule 60(b)(1) to non-judicial, non-legal errors.

While Kemp does not dispute that "mistake" ordinarily would cover both legal and factual errors, he argues that the other grounds for relief in Rule 60(b)(1)—"inadvertence," "surprise," and "excusable neglect"—involve exclusively non-legal, non-judicial errors, and the word "mistake" should therefore be similarly limited. But courts have long found that excusable neglect may involve legal error. See, *e.g., Lenaghan* v. *Pepsico, Inc.*, 961 F. 2d 1250, 1254–1255 (CA6 1992) (*per curiam*) ("understandable, albeit mistaken, reading of" a local rule); *A. F. Dormeyer Co.* v. *M. J. Sales & Distribution Co.*, 461 F. 2d 40, 42–43 (CA7 1972) (misunderstanding of summons and relevant legal rules); *Provident Security Life Ins. Co.* v. *Gorsuch*, 323 F. 2d 839, 843 (CA9 1963) (erroneous understanding of Federal Rule of Civil Procedure 12). And they have a similar history of granting relief based on "*judicial* inadvertence." *Larson* v. *Heritage Square Assocs.*, 952 F. 2d 1533, 1536 (CA8 1992) (emphasis added); see also, *e.g., O'Tell* v. *New York, N. H. & H. R. Co.*, 236 F. 2d 472, 475 (CA2 1956) (judge's failure to deduct setoff in entering judgment was "inadvertence" under Rule 60(b)). Because the words surrounding "mistake" in Rule 60(b)(1) do not connote exclusively non-legal or non-judicial errors, they do not favor Kemp's narrower reading.

Kemp also argues that Rule 60's structure favors interpreting the term "mistake" narrowly. Our interpretation, he contends, would create confusing overlap between Rule 60(b)(1) and Rule 60(a), which authorizes a court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." We disagree. Because Rule 60(a) covers a subset of "mistake[s]"—*e.g.,* "clerical" ones—whereas Rule 60(b)(1) covers "mistake[s]" *simpliciter*, the overlap Kemp alleges would exist even if "mis-

take" reached only factual errors. And the Courts of Appeals have well-established rules for determining when Rule 60(a), rather than Rule 60(b), should apply. See, *e.g., United States* v. *Griffin*, 782 F. 2d 1393, 1397 (CA7 1986).

Kemp alleges that our interpretation of Rule 60(b)(1) would create a similar problem with respect to Rules 60(b)(4) and (b)(5), which authorize relief from voided judgments and judgments that lack legal effect. Specifically, Kemp contends that a legal "mistake" could warrant relief under both Rule 60(b)(1) and Rule 60(b)(4) or Rule (b)(5), and a conflict could then arise given that the latter Rules are not subject to a 1-year time limit. But, again, that could occur even if only factual errors count as "mistake[s]," since factual errors, too, may justify relief under Rules 60(b)(4) and (b)(5). And, regardless, should this overlap ever create an irreconcilable conflict, courts may then resort to ordinary rules of statutory construction when selecting which provision would govern in a particular case. See, *e.g., RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U. S. 639, 645 (2012) ("'the specific governs the general'").

Kemp also worries that our interpretation would allow parties to evade other time limits set forth in the Federal Rules. For instance, Rule 59(e) motions to alter or amend a judgment must be filed within 28 days, and appeals must generally be filed within 30 days, see Fed. Rule App. Proc. 4(a)(1)(a). Kemp suggests that our interpretation would allow someone to repackage a tardy Rule 59(e) motion as a timely Rule 60(b)(1) motion, or to generate a right to an untimely appeal by filing a Rule 60(b)(1) motion and appealing once it is denied. We are unpersuaded because, yet again, the risk Kemp identifies would exist even under his own interpretation. For example, Kemp provides no explanation why, under his interpretation of Rule 60(b), parties could not repackage tardy Rule 59(e) motions based on legal errors as motions under Rule 60(b)(6), or recharacterize

tardy motions based on factual errors as motions under Rule 60(b)(1). A denial in either case would then permit the litigant to appeal outside Appellate Rule 4's 30-day time limit.

In any event, the alleged specter of litigation gamesmanship and strategic delay is overstated. Rule 60(b)(1) motions, like all Rule 60(b) motions, must be made "within a reasonable time." Fed. Rule Civ. Proc. 60(c)(1). And while we have no cause to define the "reasonable time" standard here, we note that Courts of Appeals have used it to forestall abusive litigation by denying Rule 60(b)(1) motions alleging errors that should have been raised sooner (*e.g.,* in a timely appeal). See, *e.g.*, *Mendez* v. *Republic Bank*, 725 F. 3d 651, 660 (CA7 2013).

Nor, contrary to Kemp's protestations, is our interpretation inconsistent with the history of Rule 60(b). Kemp points out that Rule 60(b)(1) drew its text from existing state procedural rules. See, *e.g.,* Cal. Civ. Proc. Code §473 (Deering 1937). And he argues that its list of grounds for reopening—"'mistake, inadvertence, surprise, and excusable neglect'"—was understood when Rule 60(b) was adopted to be a "term of art" that excluded legal errors. Brief for Petitioner 10. But while some States interpreted their rules this way, see, *e.g., Lucas* v. *North Carolina Mut. Life Ins. Co.*, 184 S. C. 119, 120, 191 S. E. 711, 712 (1937) (collecting cases), others, like California, did not, see, *e.g., Mitchell* v. *California & O. C. S. S. Co.*, 156 Cal. 576, 578, 105 P. 590, 592 (1909). Moreover, at least one leading treatise from the era maintained, consistent with our view, that "mistake" encompassed legal errors. See 3 J. Moore & J. Friedman, Moore's Federal Practice §60.05, p. 3280 (1938). Although statutory language "obviously transplanted from another legal source" will often "bring the old soil with it," *Taggart* v. *Lorenzen*, 587 U. S. ___, ___ (2019) (slip op., at 5) (internal quotation marks and alterations omitted), that

principle applies only when a term's meaning was "well-settled" before the transplantation, *Neder* v. *United States*, 527 U. S. 1, 22 (1999). Here, it was not.

Finally, Kemp invokes Rule 60(b)'s 1946 amendments replacing "bills of review" and other traditional, postjudgment reopening mechanisms with Rules 60(b)(2) through (b)(6). See Fed. Rule Civ. Proc. 60(b) (1946). He argues that Rule 60(b)(6) alone was intended to afford relief for judicial legal errors that had previously been remedied by bills of review, because such errors were not cognizable under Rule 60(b)'s "mistake" provision or its predecessor state rules prior to the 1946 amendments. But, as noted, the pre-amendment Rule 60(b) covered only a party's mistakes, see *supra,* at 5–6, and for *that* reason could not be grounds to correct a judge's legal mistake. By eliminating that party-specific qualifier, the 1946 amendments opened Rule 60(b)(1) to judicial mistakes of law previously remediable only by bills of review.

* * *

In sum, nothing in the text, structure, or history of Rule 60(b) persuades us to narrowly interpret the otherwise broad term "mistake" to exclude judicial errors of law. Because Kemp's Rule 60(b) motion alleged such a legal error, we affirm the Eleventh Circuit's judgment that the motion was cognizable under Rule 60(b)(1), subject to a 1-year limitations period, and, therefore, untimely.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 21–5726

DEXTER EARL KEMP, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 13, 2022]

JUSTICE SOTOMAYOR, concurring.

I join the Court's opinion holding that the term "mistake" in Federal Rule of Civil Procedure 60(b)(1) encompasses a judge's mistake of law. I write separately to make two points.

First, I join the Court's opinion with the understanding that nothing in it casts doubt on the availability of Rule 60(b)(6) to reopen a judgment in extraordinary circumstances, including a change in controlling law. See, *e.g.*, *Buck* v. *Davis*, 580 U. S. 100, 126, 128 (2017) (concluding that the petitioner was "entitle[d] to relief under Rule 60(b)(6)" because of a change in law and intervening developments of fact); *Gonzalez* v. *Crosby*, 545 U. S. 524, 531 (2005) ("[A] motion might contend that a subsequent change in substantive law is a 'reason justifying relief,' Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim"); *Polites* v. *United States*, 364 U. S. 426, 433 (1960) (leaving open that a "clear and authoritative change" in the law governing judgment in a case may present extraordinary circumstances). Today's decision does not purport to disturb these settled precedents.

Second, I do not understand the Court's opinion to break any new ground as to Rule 60(c)(1), which requires that all Rule 60(b) motions be "made within a reasonable time." See 11 C. Wright, A. Miller, & M. Kane, Federal Practice and

Procedure §2866 (3d ed. 2022) ("What constitutes reasonable time necessarily depends on the facts in each individual case").

SUPREME COURT OF THE UNITED STATES

No. 21–5726

DEXTER EARL KEMP, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 13, 2022]

JUSTICE GORSUCH, dissenting.

The Court took this case to determine whether a district court's mistake of law is correctable under Federal Rule of Civil Procedure 60(b)(1) or 60(b)(6).

From the start, granting review was a questionable use of judicial resources. The answer matters only under rare circumstances: A losing party fails to appeal or secure relief under Rule 59(e), opting instead to file a Rule 60(b) motion. That motion comes more than a year after judgment but—piling contingency on contingency—within what the court would otherwise deem a "reasonable time." Rule 60(c)(1). By petitioner's own (uncontested) count, his is the first petition *ever* to present today's question for this Court's review. See Pet. for Cert. 24; Brief in Opposition 26. Beyond even that, an alternative route exists to resolve the question posed here. Congress has adopted the Rules Enabling Act. See 28 U. S. C. §§ 2071–2077. Under its terms, a committee composed of judges and practitioners may recommend to this Court any warranted clarifications to the Federal Rules of Civil Procedure. § 2073. Those recommendations generally take effect upon our approval and absent congressional objection. § 2074.

Undeterred, the Court takes up and resolves this case anyway. It holds that Rule 60(b)(1), not Rule 60(b)(6), applies. In an unexpected twist, the Court adopts a further position

neither party saw fit to advance. Going forward, *every* judicial legal error—not just an inadvertent or obvious "mistake"—is fodder for collateral attack under Rule 60(b)(1). And what is the basis for all this? A mysterious 1946 amendment deleting the word "'his.'" See *ante*, at 5–6.

Respectfully, I would have dismissed the writ of certiorari as improvidently granted. Not only does this case fail to meet our usual standards for review. See Supreme Court Rule 10. At bottom, this dispute presents a policy question about the proper balance between finality and error correction. Should a district court be able to clean up a legal error through a collateral proceeding on any reasonable timeline within a year of judgment? Or do Rule 59(e) and the appellate process provide the necessary corrective measures in ordinary cases, with Rule 60(b)(6) as a last, narrow avenue to relief? Questions like these are best resolved not through a doubtful interpretive project focused on a pronoun dropped in 1946, but through the rulemaking process. There, policy interests on both sides can be accounted for and weighed in light of the "collective experience of bench and bar." *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 114 (2009).

TAB 15

15. Rule 62(b) – Disclosure of Amount of Security Bond

This matter comes to the Civil Rules Committee on referral from the Appellate Rules Committee, which has prepared a set of proposed amendments to Appellate Rule 39 that are now out for public comment through February 2024.

These proposed amendments clarify Rule 39 and some of its terminology, such as replacing the word "taxed" with the word "allocated." As amended, Rule 39(a) contains the same basic provisions as current Rule 39(a).

But the amendments introduce in a new Appellate Rule 39(b) motion for reconsideration of costs:

> **(b) Reconsideration.** Once the allocation of costs is established by the entry of judgment, a party may seek reconsideration of that allocation by filing a motion in the court of appeals within 14 days of the entry of judgment. But issuance of the mandate under Rule 41 must not be delayed awaiting a determination of the motion. The court of appeals retains jurisdiction to decide the motion after the mandate issues.

As under current Appellate Rule 39(e)(3), costs taxable in the district court include "premiums paid for a bond or other security to preserve rights pending appeal."

The Rule 62 issue was explained in the Appellate Rules Committee's report to the Standing Committee for the June 2023 Standing Committee meeting (agenda book at 76):

> The Advisory Committee was unable to come up with a good way to make sure that the judgment winner in the district court is aware of the cost of the supersedeas bond early enough to ask the court of appeals to reallocate the costs. Allowing a party to move for reallocation in the court of appeals after the bill of costs is filed in the district court would mean that both courts are dealing with the same costs issue at the same time. Creating a long period to seek reallocation in the court of appeals would mean that the case would be less fresh in the judges' minds and begin to look like a wholly separate appeal. Requiring disclosure in the bill of costs filed in the court of appeals would be odd because those costs are not sought in the court of appeals. Plus, a party might forgo the relatively minor costs taxable in the court of appeals and care only about costs taxable in the district court. It would be possible to have the court of appeals tax the costs itself, but that would be a major departure from the principle, endorsed by the Supreme Court in [*City of San Antonio v.*] *Hotels.com*, that the court closest to the cost should tax it.
>
> For this reason, the Appellate Rules Committee believes that the easiest and most obvious time for disclosure is when the bond is before the district court for approval. It has requested the Civil Rules Committee to consider amending Civil Rule 62 to require that disclosure.

In *City of San Antonio v. Hotels.com, L.P.*, 141 S.Ct. 1628 (2021), the Court unanimously held that under Appellate Rule 39 the district court has no authority to decline to tax the entire cost of a bond on the party that won in the district court but lost in the court of appeals.

Ordinarily this is probably not a major concern, but in the *Hotels.com* case it was a major concern because the costs taxed in the district court totalled more than $2.3 million. The underlying lawsuit was a class action brought by San Antonio on behalf of a class of 173 Texas municipalities against a number of online travel companies (OTCs) that plaintiffs alleged had been systematically underpaying hotel occupancy taxes by using wholesale rather than retail rates for hotel rooms. After a jury trial, the district court entered judgment for $55 million in favor of plaintiffs. That led to a negotiation about supersedeas bonds (*id.* at 1632):

> The OTCs quickly sought to secure supersedeas bonds to stay the judgment. They negotiated with San Antonio over the terms of the bonds, and the city ultimately supported the OTCs' efforts to stay the judgment with supersedeas bonds totalling almost $69 million, an amount that was calculated to cover the judgment plus 18 months of interest and further taxes. The District Court approved the bonds, which were subsequently increased at San Antonio's urging to cover what grew to be an $84 million judgment after years of post-trial motions.

The court of appeals reversed, and defendants then filed a bill of costs in the court of appeals totaling $905.60 to cover the appellate docket fee and the cost of printing filings in the court of appeals. There was no objection to these costs.

In the district court, however, the OTCs filed a bill of costs for more than $2.3 million, mainly to cover the premium on the supersedeas bond. San Antonio urged the district court to decline to award these costs on the ground that "the OTCs should have pursued alternatives to a supersedeas bond and that it was unfair for San Antonio to bear the costs of the entire class rather than just its proportional share of the judgment." *Id.* at 1633. The district court declined San Antonio's invitation on the ground it had no discretion to reallocate costs, and the court of appeals affirmed.

The Supreme Court affirmed, reading Appellate Rule 39(a)(3) to refer to the court of appeals in directing that "if a judgment is reversed, costs are taxed against the appellee" unless "the court orders otherwise." [Under the pending amendment proposal, new Rule 39(b) would presumably expressly provide a vehicle for such a request to the court of appeals.] San Antonio argued that the district court should have discretion to determine an equitable allocation of the costs, but the Supreme Court held that "Rule 39 gives discretion over the allocation of appellate costs to the courts of appeals." *Id.* at 1634. As a consequence, "district courts cannot alter that allocation." *Id.* at 1636.

The published preliminary draft of proposed amendments to Appellate Rule 39 responds to this Supreme Court decision. The Committee Note begins: "The [*Hotels.com*] Court also observed that 'the current Rules and the relevant statutes could specify more clearly the procedure that such a party [as San Antonio] should follow to bring their arguments to the court of appeals.' This amendment does so."

But as noted above, it does not ensure that the losing party is aware of the premium for the supersedeas bond at the time it must file its motion for reconsideration under new Appellate Rule 39(b). Under Rule 62(a), there is an automatic 30-day stay of execution, but unless a further stay is obtained under Rule 62(b) the judgment may be enforced thereafter.

As suggested by the Appellate Rules Committee, a small change to Rule 62(b) could plug that gap:

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

This amendment does not specify who is to receive this disclosure, but suggests that the court might consider the prospective premium in deciding whether to approve the security. As a general matter, assuming "gold plated" providers of security tend to charge higher premiums than "fly by night" providers of security, it might be odd for the judgment winner to try to persuade the district court to reject the high-priced security. But introducing the amount of the premium might occasionally produce tricky issues for district courts making Rule 62(b) decisions in some cases.

One question is whether such an amendment is really needed. As the Supreme Court noted in *Hotels.com* (*id.* at 1636-37):

> Most appellate costs are readily estimable, rarely disputed, and frankly not large enough to engender contentious litigation in the great majority of cases. We recognize that supersedeas bond premiums are a bit of an outlier in that they can grow quite large. But the underlying supersedeas bonds will often have been negotiated by the parties, as happened here. They will in any event have been approved by the district court, see Fed. Rule Civ. Proc. 62(b), and their premiums will have been paid by one of the parties to the appeal. There is no reason to think that litigants and courts will be forced to operate without any sense of the magnitude of the costs at issue. Indeed, San Antonio admits that it was largely aware of the costs of the bonds in this case when they were approved.

So it may be that the predicament in which San Antonio found itself was a result of its expectation that it could pitch its arguments to the district court after the appellate reversal. Given the Court's ruling that the district court has no such discretion in the face of Appellate Rule 39, that problem should not recur. The fact this was a class action, and it seems that San Antonio alone faced taxation for the premium presumably keyed to hotel taxes not paid to many other class members is another complicating factor in that case.

But the Supreme Court recognized a solution: the losing party can ask the court of appeals to delegate the authority to allocate costs to the district court (*id.* at 1637):

> In all events, if a court of appeals thinks that a district court is better suited to allocate the appellate costs listed in Rule 39(e), the court of appeals may delegate

that responsibility to the district court, as several Courts of Appeals have done in the pat. And nothing we say here should be read to cast doubt on that.

It would seem that a motion under proposed Appellate Rule 39(b) could invite the court of appeals to do this rather than make its own allocation decision.

Going forward, then, there may be no need for an amendment to Rule 62(b) because this is not likely to be a real problem, though amending the rule seems unlikely to produce a real problem, and it would respond to the suggestion of the Appellate Rules Committee.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CITY OF SAN ANTONIO, TEXAS, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED TEXAS MUNICIPALITIES *v*. HOTELS.COM, L. P., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20–334. Argued April 21, 2021—Decided May 27, 2021

The City of San Antonio—acting on behalf of a class of 173 Texas municipalities—was awarded a multi-million dollar judgment in Federal District Court against a number of popular online travel companies (OTCs) over the calculation of hotel occupancy taxes. To prevent execution on that judgment pending appeal, the OTCs obtained supersedeas bonds securing the judgment. See Fed. Rule Civ. Proc. 62. On appeal, the Court of Appeals determined that the OTCs had not underpaid on their taxes. In accordance with Federal Rule of Appellate Procedure 39(d), the OTCs filed with the circuit clerk a bill of costs seeking appellate docketing fees and printing costs, which were taxed without objection. The OTCs then filed a bill of costs in the District Court seeking more than $2.3 million in costs—primarily for premiums paid on the supersedeas bonds that are listed in Rule 39(e) as "taxable in the district court for the benefit of the party entitled to costs." San Antonio objected and urged the District Court to exercise its discretion to decline to tax all or most of those costs. The District Court held that it had no discretion to deny or reduce those costs under Circuit precedent. The Court of Appeals affirmed, reasoning that the District Court lacked discretion to deny or reduce appellate cost awards.

Held: Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. Pp. 5–14.

(a) Rule 39 creates a cohesive scheme for taxing appellate costs that gives discretion over the allocation of appellate costs to the courts of appeals. Rule 39(a) sets out default rules for cost allocation based on

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the outcome of an appeal and provides that these default rules apply unless the court "orders otherwise." Nothing in the broad language of Rule 39(a) suggests that a court of appeals may not divide up costs in such an order. Quite the opposite, Rule 39(a)(4) suggests that a court of appeals may apportion costs based on each party's relative success when the results of the appeal are something other than complete affirmance or reversal. Rule 39(e) points in the same direction; it addresses appellate costs taxable in the district court for the benefit of "the party entitled to costs" under the rule (not to a party entitled to seek costs). The court of appeals' determination that a party is "entitled" to a certain percentage of costs would mean little if the district court could take a second look at the equities. San Antonio contends that the plain text of subsection (e) providing for costs "taxable in the district court" vests district courts with discretion over cost allocations, but that interpretation reads too much into the term "taxable" and ignores the history of the Rule. The real work done by the phrase "taxable in the district court" is in specifying the court in which these costs are to be taxed. Pp. 5–9.

(b) The Court is not persuaded that applying the plain text of Rule 39 will create the problems that San Antonio envisions. First, awarding costs incurred prior to appeal is different from taxing appellate costs. Limiting a district court's discretion to allocate appellate costs will not cause confusion with the equitable discretion district courts exercise with respect to certain costs incurred in the district court that are customarily taxed under Federal Rule of Civil Procedure 54(d). Second, there is no evidence to suggest that appellate courts have struggled to allocate appellate costs due to factual disputes better handled by the district court. And nothing in the Court's decision should be read to cast doubt on the approach taken by some courts of appeals to delegate this responsibility to the district court. See, *e.g., Emmenegger* v. *Bull Moose Tube Co.,* 324 F. 3d 616, 626. Third, it makes sense for the district court to tax the costs in Rule 39(e) because those costs relate to events in that court. This process requires more than a "ministerial order," as San Antonio would have it, because the district court will ensure that the amount of appellate costs requested is "correct," 28 U. S. C. §1924, and that the cost submissions otherwise comply with the relevant rules and statutes. Finally, that the current rules and relevant statutes could specify more clearly the procedure that a party should follow to obtain review of their objections to Rule 39(e) costs in the court of appeals does not mean that a district court can reallocate those costs. A simple motion "for an order" under Rule 27 should suffice to seek an order under Rule 39(a), and the Court does not foreclose parties from raising their arguments through other procedural vehicles. Pp. 9–13.

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959 F. 3d 159, affirmed.

ALITO, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 20–334

CITY OF SAN ANTONIO, TEXAS, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED TEXAS MUNICIPALITIES, PETITIONER *v.* HOTELS.COM, L. P., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 27, 2021]

JUSTICE ALITO delivered the opinion of the Court.

Civil litigation in the federal courts is often an expensive affair, and each party, win or lose, generally bears many of its own litigation expenses, including attorney's fees that are subject to the so-called American Rule. *Baker Botts L. L. P.* v. *ASARCO LLC*, 576 U. S. 121, 126 (2015). But certain "costs" are treated differently. Federal Rule of Appellate Procedure 39 governs the taxation of appellate "costs," and the question in this case is whether a district court has the discretion to deny or reduce those costs. We hold that it does not and therefore affirm the judgment below.

I

A

There is a longstanding tradition of awarding certain costs other than attorney's fees to prevailing parties in the federal courts. *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 377, and n. 3 (2013); see, *e.g., Winchester* v. *Jackson*, 3 Cranch 514 (1806). Today, Federal Rule of Appellate Procedure 39 sets out the procedure for assessing and taxing

costs relating to appeals. Subdivision (a) provides a series of default rules that govern "unless the law provides or the court orders otherwise." Under these default rules:

> "(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
>
> "(2) if a judgment is affirmed, costs are taxed against the appellant;
>
> "(3) if a judgment is reversed, costs are taxed against the appellee;
>
> "(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders."

The remaining subdivisions of the Rule deal with related issues. Subdivision (b) limits costs for or against Federal Government litigants to those "authorized by law." Subdivision (c) directs the courts of appeals to fix a maximum rate for taxing the costs of briefs, appendices, and (where applicable) the original record. Subdivision (d) provides the procedure for seeking certain appellate costs, filing objections to those costs, and preparing an itemized statement of costs for insertion in the mandate. And subdivision (e) lists four categories of "costs on appeal" that "are taxable in the district court for the benefit of the party entitled to costs under this rule."

This case concerns one of the categories of costs that are taxable in the district court under subdivision (e): "premiums paid for a bond or other security to preserve rights pending appeal." Fed. Rule App. Proc. 39(e)(3). These costs arise because the Federal Rules of Civil Procedure generally stay the execution or enforcement of a district court judgment for only 30 days after its entry. Fed. Rule Civ. Proc. 62(a). Unless a further stay is granted, the prevailing party can attempt to execute on that judgment while an appeal is pending. See 12 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Moore's Federal Practice §62.02 (3d

ed. 2020). To prevent complications arising from pre-appeal enforcement of judgments, Federal Rule of Civil Procedure 62(b) provides that a party "may obtain a stay by providing a bond or other security." These bonds are often called supersedeas bonds, tracking the name of a traditional writ that was used to stay the execution of a legal judgment. See, *e.g., Hardeman* v. *Anderson*, 4 How. 640, 642 (1846) (issuing a "writ of supersedeas to stay execution on the judgment"). "A supersedeas bond is a contract by which a surety obligates itself to pay a final judgment rendered against its principal under the conditions stated in the bond." 13 A Cyclopedia of Federal Procedure §62.19 (3d ed. Supp. 2021).

B

The cost dispute before us arises out of litigation between the city of San Antonio—acting on behalf of a class of 173 Texas municipalities—and a number of popular online travel companies (OTCs). In 2006, San Antonio alleged that the OTCs had been systematically underpaying hotel occupancy taxes by calculating them using the wholesale rate that the OTCs negotiated with hotels rather than the retail rate that consumers paid for hotel rooms. After a jury trial, the District Court entered a judgment of approximately $55 million in favor of the class.

The OTCs quickly sought to secure supersedeas bonds to stay the judgment. They negotiated with San Antonio over the terms of the bonds, and the city ultimately supported the OTCs' efforts to stay the judgment with supersedeas bonds totaling almost $69 million, an amount that was calculated to cover the judgment plus 18 months of interest and further taxes. The District Court approved the bonds, which were subsequently increased at San Antonio's urging to cover what grew to be an $84 million judgment after years of post-trial motions.

The OTCs eventually appealed, and the Court of Appeals

held that the OTCs had not underpaid the hotel occupancy taxes. Its mandate stated: "[T]he judgment of the District Court is vacated and rendered for OTCs." App. 100. In accordance with Federal Rule of Appellate Procedure 39(d), the OTCs filed a bill of costs with the Circuit Clerk and requested $905.60 to cover the appellate docket fee and the cost of printing their briefs and appendix. App. to Pet. for Cert. 28a–30a. These items were taxed without objection. See Rule 39(d)(2).[1]

Back in the District Court, the OTCs filed a bill of costs for more than $2.3 million. The lion's share of these costs were supersedeas bond premiums. San Antonio objected, urging the District Court to exercise its discretion and decline to tax all or most of those costs. The city argued, among other things, that the OTCs should have pursued alternatives to a supersedeas bond and that it was unfair for San Antonio to bear the costs for the entire class rather than just its proportional share of the judgment. The District Court thought San Antonio had made "some persuasive arguments." App. to Pet. for Cert. 16a. But based on Circuit precedent, the court held that it lacked discretion "regarding whether, when, to what extent, or to which party to award costs of the appeal" and that "its sole responsibility [was] to ensure that only proper costs are awarded." *Id.*, at 17a (internal quotation marks omitted). The court ultimately taxed costs of just over $2.2 million.

San Antonio appealed, and this time the Court of Appeals affirmed. 959 F. 3d 159 (CA5 2020). It reasoned that its earlier decision had "reversed" the District Court's judgment within the meaning of Rule 39(a)(3) and that it had not departed from the default allocation under that Rule.

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[1] Rule 39 has been amended since the Court of Appeals issued its first decision in this case. The changes are not material for our purposes here, so for simplicity we cite the current version of the Federal Rules of Appellate Procedure unless otherwise noted.

Id., at 164–165.[2] And the Court of Appeals held that the District Court was compelled to award the disputed costs to the OTCs. *Id.*, at 166–167.

San Antonio sought this Court's review. We granted certiorari, 592 U. S. ___ (2021), and now affirm.

II

We hold that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule.

A

Rule 39 creates a cohesive scheme for taxing appellate costs. As noted, it sets out default rules that are geared to five potential outcomes of an appeal: dismissal, affirmance, reversal, affirmance in part and reversal in part, and vacatur. Each of these default rules tracks the "venerable presumption that prevailing parties are entitled to costs." *Marx*, 568 U. S., at 377.

These default rules give way, however, when "the court orders otherwise." Rule 39(a). The parties agree that this reference to "the court" means the court of appeals, not the district court, see Brief for Petitioner 17–18; Brief for Respondents 20–21, and we agree with that interpretation. In the Rules of Appellate Procedure, which "govern procedure in the United States courts of appeals," Rule 1(a)(1), references to a "court" are naturally read to refer to a court of appeals unless the text or context clearly indicates otherwise.

The parties do not agree, however, on what the court of appeals has the power to "orde[r]." San Antonio thinks that the appellate court may say "*who* can receive costs (party A, party B, or neither)" but lacks "authority to divide up costs." Reply Brief 5. So, the city argues, the district court

[2] San Antonio does not challenge these features of the court's decision, see, *e.g.*, Brief for Petitioner 8, n. 2, and we do not address them.

must have the discretion to do that. By contrast, the OTCs argue that the appellate court has the discretion to divide up the costs as it deems appropriate and that a district court cannot alter that allocation. The OTCs have the better of the argument.

The text of subdivision (a) cuts decisively in their favor. That provision states that the court of appeals need not follow the default rules, which allocate costs based on the outcome of the appeal, but can "orde[r] otherwise." This broad language does not limit the ways in which the court of appeals can depart from the default rules, and it certainly does not suggest that the court of appeals may not divide up costs.

On the contrary, the authority of a court of appeals to do just that is strongly supported by the relationship between the default rules and the court of appeals' authority to "order otherwise." For example, under Rule 39(a)(4), if a district court judgment is affirmed in part and reversed in part, "costs are taxed only as the court [of appeals] orders." The most natural meaning of this provision is that a court of appeals may apportion costs in accordance with the parties' relative success, so that if, for example, the appellant wins what is essentially a 75% victory, the appellant can be awarded 75% of its costs.[3] It would be strange to read this provision to mean that the court of appeals' only option where a reversal is not complete is to award the appellant all its costs or no costs at all. Similarly, in cases that fall under subdivisions (a)(2) and (a)(3), where the default rules allocate 100% of the costs to the winning party, it is natural

[3] Both parties recognize the familiar practice of awarding some proportion of the costs to the winning party. See Tr. of Oral Arg. 15, 44, 76; see, *e.g., Massachusetts Eye & Ear Infirmary* v. *QLT Phototherapeutics, Inc.*, 552 F. 3d 47, 75 (CA1 2009); *In re New Times Securities Servs., Inc.*, 371 F. 3d 68, 88 (CA2 2004); *Burrell* v. *Star Nursery, Inc.*, 170 F. 3d 951, 957 (CA9 1999); *Quaker Action Group* v. *Andrus*, 559 F. 2d 716, 719 (CADC 1977) (*per curiam*).

to understand the court of appeals' authority to "order otherwise" to include the authority to make a different allocation.

Subdivision (e), which concerns appellate costs that are taxed in the district court, points in the same direction. It refers to "the party *entitled* to costs under this rule." Rule 39(e) (emphasis added). Thus, if a party is awarded costs under subdivision (a), it is "entitled" to those costs—*i.e.*, has a right to obtain them and not merely to seek them—when a proper application is made in the district court. See Black's Law Dictionary 626 (rev. 4th ed. 1968) ("In its usual sense, to entitle is to give a right or title"); see also *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 477 (1992) ("Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies").

Read properly, then, Rule 39 gives discretion over the allocation of appellate costs to the courts of appeals. With that settled, it is easy to see why district courts cannot exercise a second layer of discretion. Suppose that a court of appeals, in a case in which the district court's judgment is affirmed, awards the prevailing appellee 70% of its costs. If the district court, in an exercise of its own discretion, later reduced those costs by half, the appellee would receive only 35% of its costs—in direct violation of the court of appeals' directions. Or suppose that the court of appeals, believing that the decision below was plainly wrong, awards the prevailing appellant 100% of its costs. It would subvert that allocation if the district court declined to tax costs or substantially reduced them because it thought that there was at least a very strong argument in favor of the decision that the court of appeals had reversed—which, of course, was the district court's own decision. In short, the court of appeals' determination that a party is "entitled" to costs would mean little if, as San Antonio believes, the district court could take a second look at the equities.

San Antonio nonetheless maintains that the plain text of subdivision (e) vests district courts with discretion over cost allocations. That provision lists costs that "are *taxable* in the district court for the benefit of the party entitled to costs under this rule." Rule 39(e) (emphasis added). As San Antonio notes, the word "taxable" can be used to describe something that may, but need not necessarily, be taxed. See, *e.g.*, Random House Dictionary of the English Language 1947 (2d ed. 1987) (defining "taxable" as "capable of being taxed"); Webster's Third New International Dictionary 2345 (1976) (same). And San Antonio argues that the use of this "permissive" term shows that the district court has discretion to refuse to award costs on equitable grounds. Brief for Petitioner 15.

San Antonio reads too much into the term "taxable." The use of that term does suggest that the costs in question are not automatically or necessarily taxed when the case returns to the district court, but that may mean no more than that the party seeking those costs will not get them unless it submits a bill of costs with the verification specified by statute and complies with any other procedural requirements that the local rules of the court in question impose. See 28 U. S. C. §§1920, 1924.

This modest understanding of the use of the term "taxable" is reinforced by the circumstances under which the term was added to Rule 39. Before 1998, subdivision (e) did not provide that the listed costs "are taxable in the district court," but instead stated that those costs "shall be taxed in the district court." Rule 39(e) (1994). The language of Rule 39 was changed in 1998 as part of a general "restyling" of the Rules of Appellate Procedure, and the Advisory Committee's Note stated that the changes made as part of this project were "intended to be stylistic only." 28 U. S. C. App., p. 804 (1994 ed., Supp. IV); see also C. Wright, A. Miller, & C. Struve, Federal Practice and Procedure, Introduction,

§3946.1 (5th ed. Supp. 2021) (1998 restyling was "not intended to make substantive changes").

The real work done by the phrase "taxable in the district court" is the specification of the court in which these costs are to be taxed—that is, in the district court. Assigning this work to the district court makes good sense. Under Rule 39, costs incurred in the court of appeals, such as the fee for docketing the case in that court and the cost of printing the party's briefs and appendices, are taxed in the court of appeals. See Rule 39(d). And the costs incurred in the district court—that is, the costs listed in subdivision (e)—are taxed in the district court. These are the costs attributable to "the preparation and transmission of the record," "the reporter's transcript, if needed to determine the appeal," "premiums paid for a bond or other security to preserve rights pending appeal," and "the fee for filing the notice of appeal."

The nature of these costs makes it fitting for them to be taxed in the district court. The first enumerated cost—the cost of "the preparation and transmission of the record"—relates to the district court clerk, who has the responsibility of performing those tasks. See Fed. Rule App. Proc. 11(b)(2). The second category, the cost of "the reporter's transcript," concerns work done in the district court. See Rule 10(b). The third category, "premiums paid for a bond or other security to preserve rights pending appeal," relates to a matter previously approved by the district court. See Fed. Rule Civ. Proc. 62(b). And the last category, "the fee for filing the notice of appeal," is an amount that was paid to the district court clerk. See 28 U. S. C. §1917.

For the reasons set out above, we hold that courts of appeals have the discretion to apportion all the appellate costs covered by Rule 39 and that district courts cannot alter that allocation.

B

San Antonio offers a variety of practical arguments why

district courts should have the discretion to alter the allocation of appellate costs, but each of these arguments falls away upon inspection.

First, San Antonio argues that any limits on a district court's discretion are incompatible with the equitable discretion district courts exercise with respect to certain costs incurred in the district court. *Those* costs are customarily taxed under Federal Rule of Civil Procedure 54(d), which "gives courts the discretion to award costs to prevailing parties." *Taniguchi* v. *Kan Pacific Saipan, Ltd.*, 566 U. S. 560, 565 (2012); see also 28 U. S. C. §1920 ("A judge or clerk of any court of the United States *may* tax as costs the following . . . " (emphasis added)).[4] In San Antonio's view, it will create confusion if a district court acting under Appellate Rule 39(e) lacks the discretion it exercises under Civil Procedure Rule 54(d).

We do not see why our interpretation will lead to confusion. District courts have discretion in awarding costs incurred prior to appeal, but when they tax appellate costs, they perform a different function. This interpretation quite sensibly gives federal courts at each level primary discretion over costs relating to their own proceedings. See this Court's Rule 43; Fed. Rule App. Proc. 39; Fed. Rule Civ. Proc. 54.

Second, San Antonio contends that appellate courts are not well-positioned to make cost allocations under Rule 39(a). In its view, decisions about appellate costs might turn on factual disputes that district courts are better able

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[4] As the United States points out, see Brief for United States as *Amicus Curiae* 19, n. 4, we have interpreted Rule 54(d) to provide for taxing only the costs already made taxable by statute, namely, 28 U. S. C. §1920. See *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, 441–442 (1987). Supersedeas bond premiums, despite being referenced in Appellate Rule 39(e)(3), are not listed as taxable costs in §1920. San Antonio has not raised any argument that Rule 39 is inconsistent with §1920 in this respect. We accordingly do not consider this issue.

to resolve. For example, a party might suggest that taxing costs against it would be unjust because of its precarious financial position, and an opposing party might dispute that contention on factual grounds. San Antonio also contends that it will be difficult to allocate appellate costs equitably before the amount of those costs is known.

These concerns are overblown. Most appellate costs are readily estimable, rarely disputed, and frankly not large enough to engender contentious litigation in the great majority of cases. We recognize that supersedeas bond premiums are a bit of an outlier in that they can grow quite large. See, *e.g., The Exxon Valdez* v. *Exxon Mobil Corp.*, 568 F. 3d 1077 (CA9 2009) (more than $60 million). But the underlying supersedeas bonds will often have been negotiated by the parties, as happened here. They will in any event have been approved by the district court, see Fed. Rule Civ. Proc. 62(b), and their premiums will have been paid by one of the parties to the appeal. There is no reason to think that litigants and courts will be forced to operate without any sense of the magnitude of the costs at issue. Indeed, San Antonio admits that it was largely aware of the costs of the bonds in this case when they were approved, see Tr. of Oral Arg. 18.

Nor is there reason to think that factual disputes will pose a recurring problem. Experience proves the point. Rule 39's basic structure has been in place for more than 50 years. Compare Fed. Rule App. Proc. 39 with Rule 39 (1968). And the courts of appeals resolve tens of thousands of cases each year. Admin. Office of the U. S. Courts, Statistical Tables for the Federal Judiciary, Table B–1 (Dec. 31, 2020) (counting 46,788 appeals terminated in 2020). Yet San Antonio has not identified any substantial number of cases where cost allocations under Rule 39(a) have imposed real difficulties. In sum, we see no evidence that appellate courts have struggled to allocate costs in the past, and we have no reason to anticipate new problems in the future.

In all events, if a court of appeals thinks that a district court is better suited to allocate the appellate costs listed in Rule 39(e), the court of appeals may delegate that responsibility to the district court, as several Courts of Appeals have done in the past. See, *e.g., Emmenegger* v. *Bull Moose Tube Co.*, 324 F. 3d 616, 626 (CA8 2003); *Guse* v. *J. C. Penney Co.*, 570 F. 2d 679, 681–682 (CA7 1978). The parties agree that this pragmatic approach is permitted. See Tr. of Oral Arg. 15, 44. And nothing we say here should be read to cast doubt on it. See Rule 39(a) (imposing no direct limitations on the court's ability to "orde[r] otherwise"); Rule 41(a) (the mandate includes "any direction about costs").

Third, San Antonio contends that there would be no reason for Rule 39(e) costs to be taxed in the district court, as opposed to the court of appeals, if the district court was simply required to enter "a ministerial order." Brief for Petitioner 17. But it makes sense for these costs to be taxed in the district court because they relate to events in that court, and the district court's responsibility is not ministerial. The district court will ensure that the amount requested for the appellate costs in question is "correct." 28 U. S. C. §1924. In addition, the district court will consider whether the costs were "necessarily" incurred, §1924, to the extent that the costs in question are taxable only if they were needed for the appeal or to stay the district court's judgment pending appeal. See Rule 39(e)(2) (cost of reporter's transcript taxable only "if needed to determine the appeal"). Other costs taxable in the district court under Rule 39(e) are either fixed (subdivision (e)(4): the fee for filing the notice of appeal); calculated by the district court clerk (subdivision (e)(1): preparation and transmission of the record); or concern a matter already approved by the district court (subdivision (e)(3): supersedeas bond premiums; see Fed. Rule Civ. Proc. 62(b)).

San Antonio, however, asked the District Court to do much more. It implored the court to exercise a free-ranging

form of equitable discretion that would directly conflict with the equitable discretion of the Court of Appeals. See Brief for Petitioner 20, n. 5 (outlining a wide range of equitable considerations). And it invited the District Court to deny or reduce for equitable reasons the bona fide costs that the OTCs had paid as premiums for supersedeas bonds that were known and negotiated by San Antonio and were approved by the District Court without objection under Rule 62. The lower courts were correct to hold that the District Court lacked the authority to entertain San Antonio's broad, equitable arguments.

Finally, San Antonio worries that parties will be unable to obtain review of their objections to Rule 39(e) costs if the district court cannot provide relief after the matter returns to that court. We agree that the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals, but this does not lead to the conclusion that a district court can reallocate those costs.

Rule 27 sets forth a generally applicable procedure for seeking relief in a court of appeals, and a simple motion "for an order" under Rule 27 should suffice to seek an order under Rule 39(a). Compare Fed. Rule App. Proc. 39(a) ("The following rules apply unless . . . the court orders otherwise") with Rule 27(a) ("An application for an order . . . is made by motion unless these rules prescribe another form"). The OTCs also identify instances where parties have raised their arguments through other procedural vehicles, including merits briefing, see Rule 28, objections to a bill of costs, see Rule 39(d)(2), and petitions for rehearing, see Rule 40. Brief for Respondents 42, nn. 9–11. We do not foreclose litigants from raising their arguments in any manner consistent with the relevant federal and local Rules.

In short, we are not persuaded that applying the plain text of Rule 39 will create the practical problems that San Antonio envisions.

* * *

The judgment of the Court of Appeals is affirmed.

It is so ordered.

TAB 16

16. Rule 81(c) – 15-CV-A

This submission has been revived because an intervening submission has been removed from the Committee's agenda. In January, 2015, attorney Mike Wray submitted 15-CV-A, arguing that a change made during the "restyling" of the whole set of Civil Rules in 2007 had inadvertently produced a change to Rule 81(c) that created a trap for litigants about the need to make a prompt demand for a jury trial after removal from state court. As Mr. Wray puts it, his client lost a right to jury trial due to the "botched 'style' changes of 2007." In support of his submission, he cites records of the rules committees reflecting opposition in the bar to the overall restyling project. 15-CV-A should be included in this agenda book.

It is not clear that the change of verb tense effected by the restyling in 2007 contributed to the problem raised by Mr. Wray. Instead, it seems that a Ninth Circuit decision from 1983, under the previous version of the rule, was the principal reason why his belated jury demand in a removed case was stricken. As he says in his submission, at pp. 4-6, his objection is that district courts in the Ninth Circuit *continue* to apply the 1983 Ninth Circuit Ruling even though the rule was slightly changed in 2007.

Rule 81(c)(3)(A) says that no demand for jury trial need be made after removal "[i]f the state law did not require an express demand for a jury trial * * * unless the court orders the parties to do so within a specified time." Thus, it seems to be focused on removal from state courts in which there is no requirement to demand a jury trial, and not focused on when in a state court proceeding the jury demand must be made.

Under Rule 38(b)(1), a party must demand a jury trial "no later than 14 days after the last pleading directed to the issue is served." But state court requirements may vary. Rule 81(c)(1) is clear that different state practices do not matter from the time the case is removed. Rule 81(c)(3)(A) makes it clear that if a party expressly demanded a jury trial before removal, it need not renew the demand after removal. But in many states the time to demand a jury trial is later in the case. So the rule as of the time the Ninth Circuit made its 1983 decision said that if state law "does not require an express demand," none is required in federal court unless the court so orders in the case.

In *Lewis v. Time, Inc.*, 710 F.2d 557 (9th Cir. 1983), the court applied Rule 81(c) as then written to require a demand for jury trial within the time specified in Rule 38(b)(1) (*id.* at 556):

> Lewis did not request a jury trial before his case was removed from California state court. Under California law, a litigant waives trial by jury by, *inter alia*, failing to "announce that one is required" when the trial is set. Cal. Civ. Proc. Code § 631, 631.1. We understand that to mean that an "express demand" is required. Therefore, F.R. Civ. P. 38(d), made applicable by Rule 81(c), required Lewis to file a demand "not later than 10 days after the last pleading directed to such issue [to be tried]." Failure to file within the time provided constituted a waiver of the right to trial by jury. Rule 38(d).

When this submission was presented to the Standing Committee at its June 2016 meeting, two members of that committee – then-judge Neil Gorsuch and Judge Susan Graber – submitted 16-CV-F, a proposal to amend Rule 38 so it would direct a jury trial occur whenever there was a

right to jury trial, which is the treatment of jury trial under the Criminal Rules. Had this change been adopted, there would be no need to address this submission; jury demands would not be necessary under Rule 38 if so amended. In that sense, one might say the federal rule would be the same as the state-court rule addressed in Rule 81(c)(3)(A) – "state law did not require an express demand for a jury trial" – because there would be a jury trial unless both sides and the judge agreed to have a court trial.

The Federal Judicial Center did extensive research on jury demands under Rules 38 and 39, ultimately finding little or no evidence that the demand requirements of Rule 38 resulted in the loss of the right to jury trial. Based on that research, the Advisory Committee during its March 2023 meeting decided to remove the Gorsuch/Graber proposal from the agenda.

But that did not resolve the question whether a change to Rule 81(c) should be considered to avoid loss of the right to a jury trial in removed actions. Accordingly, below is the report made to the Standing Committee for its January 2016 meeting; the matter is now restored to the Advisory Committee's agenda.

But as suggested above, the change in verb tense in the 2007 restyling seems somewhat remote from the underlying concern, which appears to be that the Ninth Circuit has not correctly interpreted the rule. But it is not clear that the Ninth Circuit interpretation was wrong. And it is not clear that – even if the Ninth Circuit's interpretation was wrong – the rule should be changed because one circuit has interpreted them in an inappropriate way. Going back to the pre-2007 wording does not seem to solve the problem, since that is the wording the Ninth Circuit was interpreting in 1983.

* * * * *

Agenda Memo, Spring 2016 meeting

This submission was on the November agenda but was carried forward without an opportunity for consideration. It addresses a single word in Rule 81(c)(3)(A), altered in the Style Project. The specific problem is narrow; it will be identified after setting out the full text of Rule 81(c)(3). Examination of the specific problem in the setting of the full rule suggests more serious questions. It seems worthwhile to identify the questions, even if the most likely outcome will be to put all of them aside to defer to more pressing work. Apart from this one submission, there is little reason to believe that significant problems are arising in practice.

RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS

(c) Removed Actions.

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

* * *

(3) ***Demand for a Jury Trial.***

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

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

(i) it files a notice of removal; or

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

[The Style Project rewording challenged by 15-CV-A is shown by overlining the pre-2007 word, "does," and underlining the substitute, "did."]

The specific suggestion focuses narrowly on the change from "does" to "did." The suggestion is that the change has created a trap for the unwary. So long as the rule said "does," it was clear that an express demand for jury trial must be made unless state law allows a jury trial without making an express request at any time. Saying "did" may lead some to believe that they need not make an express demand for jury trial after removal if state law, although requiring a demand at some point, allowed the demand to be made later than the time the case was removed to federal court. Cases are cited to show that federal courts continue to interpret the rule as if it says "does;" an appendix includes a decision granting a motion to strike a jury demand made by the lawyer who made the submission. The opinion relies on the 2007 Committee Note stating that the changes were intended to be stylistic only.

Initial research into the change from "does" to "did" has explored Civil Rules Committee agenda books, Committee Minutes, and a substantial number of memoranda prepared for the Style Subcommittees. They show that "did" appeared in the style draft at least as early as September 30, 2004, but do not show any discussion of this specific change. They also show an intriguing hint in a note recognizing that "Joe Spaniol is right" that there is a gap in the rule, but suggesting that it cannot be fixed — if fixing is needed — in the Style Project. One question is whether there is a gap that is worth filling. A broader question is whether the whole rule is unnecessarily complicated. The complication can be illustrated by looking for the gap.

At least these situations can be imagined:

(1) A jury trial was "expressly demanded * * * in accordance with state law" before removal. It makes sense to carry the demand forward after removal.

(2) Rule 81(c)(3)(B): All necessary pleadings have been served at the time of removal, but no express demand for jury trial was made. The rule applies the same principle as Rule 38(b)(1), adjusting the time for the circumstance of removal — a demand must be served, not "14 days after the last pleading directed to the issue is served," but 14 days after removing or being served with

the notice of removal. This provides the advantages sought by Rule 38(b): the parties and the court know whether this is to be a jury case early in the proceedings.

(3) All necessary pleadings have not been served at the time of removal. Here the principle of Rule 81(c)(1) seems to do the job — Rule 38 applies of its own force after removal. The most sensible reading of the rule text is that an exception is made for cases where state law does not require a demand for jury trial.

(4) State law does not require a demand for jury trial at any point. The Rule was amended in 1963 to say that a demand need not be made after removal. The Committee Note said this is "to avoid unintended waivers of jury trial." But the amendment went on to provide, as the rule still does, that the court may order that a demand be made; failure to comply waives the right to jury trial. The Committee Note added the suggestion that "a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases." Professor Kaplan, Reporter for the Committee, elaborated on the Note in a law review article quoted in 9 Federal Practice & Procedure: Civil 3d, § 2319, p, 230, n. 12. He suggested that it might be useful to adopt a local rule "under which the direction is to be given routinely." But he further suggested that it is important to give the parties notice in each case, since relying on a local rule alone "would recreate the difficulty which the amendment seeks to meet." These observations may address the question why it would not be better to complement subparagraph (B) by providing that if all necessary pleadings have not been served at the time of removal, Rule 38(b) applies. The apparent concern is that people will not pay attention to the Federal Rules after removal when they are habituated to a state procedure that provides jury trial without requiring an express demand at any point. That explanation seems to fit with the observation in § 2319 that "a number of courts have held that this provision is applicable only if the case automatically would have been set for jury trial in the state court * * * without the necessity of any action on the part of the party desiring jury trial."

(5) State law does require an express demand for jury trial, but the time for the demand is set at a point after the time when the case is removed. The Nevada rule involved in the docket suggestion, for example, allows a demand to be made not later than entry of the order first setting the case for trial. This is the circumstance in which the change from "does" to "did" may create some uncertainty. One possible reading is that the change reflects concern that state law may have changed after removal: it did not require an express demand at any time in the progress of the case, but has been revised after removal to require an express demand. That is a fine-grained explanation. Another possible reading is that no demand need be made after removal so long as the state-court deadline had not been reached before removal. That reading can be resisted on at least two grounds. One is that the change was made in the Style Project, and thus must be read to carry forward the meaning of the rule as it was. A second is that the result is unfortunate: although both state and federal systems require an express demand, none need be made because of the differences in the deadlines. There is little reason to suppose that a party who wishes a jury trial should believe that removal provides relief from the demand requirement. Anyone who actually reads the rules should at least recognize the uncertainty and make a demand. It makes little sense to read the rule in a way that is most likely to make a difference only when a party belatedly decides to opt for a jury trial.

The immediate question is whether the style choice should be reversed to promote clarity. "Does" took on an apparently established and quite limited meaning. It is possible to read "did" in

the Style Rule to have a different meaning. But the Committee has been reluctant to revisit choices made in the Style Project, particularly when the courts — no matter what may be the experience of particular lawyers — seem to be getting it right. If that were all that might be considered, the case for amending the rule may not be strong.

But it is worth asking whether it makes sense to perpetuate the exception for cases removed from courts in however many states there be that do not require a demand for jury trial at all. One example would be a state that does not provide for jury trial in a particular case — but that does not offer much reason to excuse a demand requirement after removal. Perhaps the rule has been too eager to protect those who refuse to read Rule 81(c) to find out that federal procedure governs after removal. There is a strong federal interest in the early demand requirement of Rule 38(b). All parties and the court know from the outset whether they are moving toward a jury trial, however likely it is that the case will ever get there. The risk that a party may decide to opt for a jury trial only because the judge does not seem sufficiently sympathetic is reduced. Rule 39(b) protects the opportunity to reclaim a jury trial after failing to make a timely demand.

Rule 81(c) would be much simpler, a not inconsiderable virtue in this setting, if it were recast to read something like this:

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

With all of this, the two most likely choices are these: Do nothing, or undertake a thorough reexamination of Rule 81(c). Matters can be resolved reasonably without changing "did" back to "does." But the complex and incomplete structure of Rule 81(c), built on sympathy for those who refuse to consult the rules, might benefit from significant simplification.

* * * * *

From: Mark Wray <mwray@markwraylaw.com>
To: "Rules_Support@ao.uscourts.gov" <Rules_Support@ao.uscourts.gov>
Date: 01/17/2015 06:51 PM
Subject: Change to Rule 81

As for the body of people that apparently is meeting April 9-10 in Wash., D.C., to discuss the civil rules, please consider the following:

I propose that Fed. R. Civ. P. 81 be amended by adding words to clarify that in a case removed from state to federal court, if the state law requires a jury demand to be filed, and one was not required to be filed before the removal under the applicable state law, a jury demand does not have to be filed following removal until the federal judge orders it to be filed.

I actually think the rule already reads the way I stated it in the previous sentence, but in the Ninth Circuit, relying on an old case that predates the 2007 rule changes, the judges have uniformly denied jury demands for allegedly being untimely, using an interpretation of the rule that frankly is contrary to the way the rule actually reads. I have attached a brief and a court order to prove my point. I am not alone on this issue. There are dozens of cases from across the country that have dealt with it.

One would think that of all the things that should be protected by a simple rule, it is the ability to have a jury trial. Under Rule 81, however, that fundamental right is easily lost, due to the botched "style" changes of 2007.

As my reason for this rule change, I submit that Rule 81 as amended by this Committee in 2007 during the so-called "style" changes has created a trap for the unwary by changing the present tense to the past tense, and yet courts continue interpreting the rule in the present tense, to make jury demands untimely, as occurred in my case. If what I just said is unclear, please read the attached brief, which I hope will make the problem clearer. In short, the rule itself needs to be clarified, so that the courts will apply it according to the way it is actually written.

Many of the contributors to the process of the 2007 "style" changes objected repeatedly that the "style" changes would lead to costs to parties that were not acceptable. They included the group from the Eastern District of New York and others. I don't know why their cogent and compelling input was ignored, but it was ignored.

Somehow, some sub-committee of persons operating under the auspices of the full committee (the administrative office of the courts repelled my efforts to get the actual records to find out who, and why, and where, and how) approved Rule 81 language that changed the present tense to past tense, and the overall rules committee then pronounced that draft acceptable.

The big committee has minutes stating that the big committee felt that whatever "costs" may be borne by those of us subject to the substantive and unintended consequences of "style" changes, those costs are "acceptable".

I respectfully disagree. Enough people, like my client, have paid the "costs", and the "costs" are unacceptable. This is an unfairly tricky rule that can be easily clarified, and needs to be fixed. Please do so. Thanks.

Regards,

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TOM GONZALES

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TOM GONZALES,

Plaintiff,

vs.

SHOTGUN NEVADA INVESTMENTS, LLC, a Nevada limited liability company; SHOTGUN CREEK LAS VEGAS, LLC, a Nevada limited liability company; SHOTGUN CREEK INVESTMENTS, LLC, a Washington State limited liability company; and WAYNE PERRY, an individual,

Defendants.
_____/

Case No. 2:13-cv-00931-RCJ-VPC

(Eighth Judicial District Court Case No. A-13-679826)

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE JURY DEMAND

In this action removed from the District Court in and for Clark County, Nevada, Plaintiff filed a jury demand September 18, 2014, two days after this Court denied the Defendants' motion for summary judgment. With summary judgment having been denied, Plaintiff believed it was appropriate to consolidate

this action with the Desert Lands case (3:11-cv-00613-RCJ-VPC), file demands for jury in both cases, and prepare for trial. *See Wray Decl., attached.*

According to the applicable rule for jury demands in actions removed from state court, Plaintiff believes his jury demand was timely. Fed. R. Civ. P. 81(c)(3)(A) states:

> (3) *Demand for a Jury Trial.*
>
> (A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

This case was removed from a state court in Nevada. Under Nevada law, "[a]ny party may demand a trial by jury of any issue triable of right by a jury by serving as required by Rule 5(b) upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than the time of the entry of the order first setting the case for trial." Nev. R. Civ. P. 38(b). Thus, jury demands are not required to be filed in Nevada state court until the time of the entry of the order first setting the case for trial.

Defendants removed this action within 30 days of being served with the Summons and Complaint and before even filing their Answer to the Complaint. *ECF No. 1, 4.* Obviously, at that point in time, a jury demand was not required by Nevada law. In such a situation, the second sentence of Rule 81(c)(3)(A) states: "If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." The Court still has not ordered the parties to file a jury demand

within a specified time, and thus the Plaintiff's jury demand filed September 18, 2014 was timely under the rule.

Defendants now bring this Motion to Strike Plaintiff's Jury Demand (*ECF No. 69*), objecting that the second sentence of Fed. R. Civ. P. 81(c)(3)(A) is inapplicable because "the second sentence applies where State Law *does not require an express demand for jury trial* and Nevada law, NRCivP Rule 38, does require an express demand for a jury trial." *Motion, ECF No. 69, p. 8:5-7* (*emphasis* in original).

The Defendants' argument incorporates a subtle, yet significant, anachronism that leads to a faulty interpretation of Rule 81(c)(3)(A). The Defendants argue that Rule 81(c)(3)(A) applies when state law "**does** not require an express demand for jury trial," thus using the present tense of the verb. The second sentence of the rule actually is written in the past tense: "If the state law **did** not require an express demand for jury trial . . .". The shift from present to past tense results in a change in the meaning of the rule that is significant to deciding this motion.

Using the present tense, as the Defendants choose to do, the meaning is that if the state law does not require an express demand for jury trial; i.e., if no express demand for jury trial is required by state law *at any time*, then the Court must order the parties to file a demand. Stated alternatively, using the present tense, if *at any time* the state law requires an express demand for jury trial, then Rule 81(c)(3)(A) does not apply, and a jury demand must be filed with 14 days of filing of the last pleading directed to the issue. *See Fed. R. Civ. P. 38(b)(1).*

On the other hand, using the past tense, which is how the rule is written, of course, the meaning is that if the state law did not require an express demand for jury trial; i.e., if the Plaintiff did not have to make a jury demand under state law *before the case was removed*, then the Plaintiff need not make a jury demand until

ordered to do so. Reading Rule 81(c)(3)(A) as it is written, therefore, Plaintiff filed a timely jury demand on September 18, 2014.

The use of the present tense is an anachronism because prior to 2007, the rule was written in the present tense -- "does not" -- and starting in 2007, the rule was changed to the past tense -- "did not". The Defendants' motion disregards this distinction, but in fairness, court decisions have overlooked it as well.

A leading case on Rule 81(c) in the Ninth Circuit is *Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983), which has been cited by courts in the Ninth Circuit at least 27 times for its interpretation of the rule. When *Lewis* was decided in 1983, Rule 81(c) was written in the present tense, and stated, in pertinent part: "If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so. . . ". *Id.* The court held in *Lewis* that California law does require an express demand when the trial is set. *Id.* Lewis had not requested a trial before his case was removed from California state court. *Id.* "Therefore, F.R. Civ. P. 38(d), made applicable by Rule 81(c), required Lewis to file a demand 'not later than 10 days after the service of the last pleading directed to such issue [to be tried].' Failure to file within the time provided constituted a waiver of the right to trial by jury. Rule 38(d)." *Id.* (The 10-day deadline subsequently was extended to 14 days by other rule amendments.)

This holding from *Lewis* continues to be followed, uncritically, by district courts in the Ninth Circuit. *See, e.g., Ortega v. Home Depot U.S.A., Inc.*, 2012 U.S. Dist. LEXIS 2787 (E.D.Cal. 2012) (following *Lewis* as to its interpretation of Rule 81(c)(3)(A)); *Nascimento v. Wells Fargo Bank*, 2011 U.S. Dist. LEXIS 111019 (D.Nev. 2011) (applying the *Lewis* holdings to an action removed from Nevada state court); *Kaldor v. Skolnik*, 2010 U.S. Dist. LEXIS 137109 (D.Nev. 2010) (finding that under *Lewis*, Rule 81(c)(3)(A) is inapplicable if state law

requires an express demand for jury trial, "regardless of when the demand is required").

With due respect for these district court decisions, it is questionable that they would follow the holding in *Lewis* today, as a matter of *stare decisis*, given the intervening changes in Rule 81(c). For *Lewis* to supply the rule of decision, it would seem that one must discount the change from the present to the past tense – from "does not" to "did not" -- as having no effect on the meaning of the second sentence of Rule 81(c)(3)(A). Disregarding differences in words runs counter to well-established rules of statutory construction. *See Boise Cascade Corp. v. United States EPA,* 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."); *In re Transcon Lines,* 58 F.3d 1432, 1437 (9th Cir. 1995) (the cardinal principle is that the plain meaning of a statute controls).

Furthermore, taking the view that the change from "does not " to "did not" makes no difference to the meaning of the second sentence then begs the question as to why rule-makers made the change at all.

The Notes of the Advisory Committee on 2007 Amendments state: "The language of Rule 81 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The problem with the Advisory Committee's note is that a change in "style" can also affect meaning, and therefore affect substance. A practitioner can read the amended Rule 81(c)(3)(A) to mean exactly what it says, and can reasonably believe that a jury trial demand that state law did not require to be filed before removal is not required to filed in federal court unless and until ordered by the federal judge. The problem with the note of the Advisory Committee is that in the

case of Rule 81(c)(3)(A), the effect of "style" changes is a critical change in meaning; if that meaning is not applied and the result is the loss of the right to trial by jury, the rule has become a trap for the unwary.

Many district courts in the Ninth Circuit have acknowledged that Rule 81 suffers from poor drafting and tricky wording, but have applied *Lewis* regardless. In *Rump v. Lifeline,* 2009 U.S. Dist. LEXIS 98506 (N.D.Cal. 2009), the court said:

> The Court recognizes that the federal rules governing jury demands after removal, in conjunction with California's rules permitting a plaintiff to make a jury demand up until the time of trial, creates ambiguity and a trap for the unwary. However, *Lewis* addressed the interplay between California's rules and Rules 38 and 81, and held that a jury demand must be made within 10 days of removal. Accordingly, ***because the Court is bound by Lewis***, the Court GRANTS defendants' motion and STRIKES plaintiff's jury demand.

Id., emphasis added; see also: Gilmore v. O'Daniel Motor Ctr., Inc., 2010 U.S. Dist. LEXIS 57792 (D.Neb. 2010); *Cross v. Monumental Life Ins. Co.,* 2008 U.S. Dist. LEXIS 109235 (D.Ariz. 2008) ("[T]he needless complexity of the removal rule, Rule 81(c), sometimes creates a trap for the unwary.")

Indeed, if Rule 81(c)(3)(A) cannot be relied upon to mean what it says, it is not only a trap for the unwary, it is an ***unfair*** trap for the unwary.

The problem with altering the "style" of any rule is that it requires changes in language, and changes in language alter meaning, which is a principle that was recognized by the people who changed the rules in 2007. The Judicial Conference Committee on Rules of Practice and Procedure keeps online records of its proceedings through the Administrative Office of the U.S. Courts in Washington, D.C. The online archives[1] contain the minutes and reports of various rules committee meetings. Attached as Exhibit 1 to this Opposition are copies of

[1] http://www.uscourts.gov/rulesandpolicies/rules/archives.aspx

excerpts from the June 2, 2006 report of the Civil Rules Advisory Committee on the subject of "style" changes, with portions highlighted for purpose of emphasis. The report refers to various contributors to the process who were highly critical of the "style" changes, including the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York, whose members wrote:

> The unanimous judgment of every member of the Committee who expressed a view was that the costs and other disadvantages of the style revision project outweigh its benefits. First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found they had uncovered many more – and there was almost no overlap, suggesting that there remain a significant number of unintended consequences that neither we nor they have spotted. Second, any style revisions will bring disruptions. The sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come.

See Exhibit 1, attached. The words of the committee from the Eastern District of New York are amazingly prescient in anticipating the current situation with the Plaintiff.

In its "Overall Evaluation", the rules committee asked Profession Stephen B. Burbank and Gregory P. Joseph, Esq. (the "Burbank-Joseph" group) to comment on their working group's view of the wisdom of the style project. Burbank-Joseph reported that 14 members participated in the final conference call. "Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed." *See Exhibit 1, attached.*

The rules committee spoke of "costs that will be entailed", which in this case, is the cost of losing the right to a jury trial. Forfeiting that Constitutional

right because of a tricky rule, which cannot be relied upon to mean what it says, is not a cost that can or should be borne by the Plaintiff or any other litigant.

Nor is the situation in the Plaintiff's case in any way unique. Dozens of cases are reported from U.S. District Courts across the country where a party was deprived of a right to a jury trial in a case removed from state court based on an interpretation of Rule 81(c)(3)(A). This means attorneys across the land are losing the right to jury trials for their clients in cases that are removed from state court to federal court because the rule is not being interpreted the way it reads.

To Plaintiff's knowledge, only one of the many reported decisions on this issue explicitly discusses the change from the present to past tense, and is the only case that squarely addresses the issue raised by this Opposition. In *Kay Beer Distrib. v. Energy Brands, Inc.*, 2009 U.S. Dist. LEXIS 49792 (E.D. Wisc. 2009), the district judge analyzed and decided the issue as follows:

> The language of the current Rule 81 is ambiguous. At least one court has observed that the Rule is "poorly crafted." Cross v. Monumental Life Ins. Co., 2008 U.S. Dist. LEXIS 109235, 2008 WL 2705134, *1 (D. Ariz. July 8, 2008). This court agrees. The use of the past tense -- "If state law did not require an express demand" -- without any qualification, makes it unclear whether the exception is intended to apply to cases in which a demand for a jury under state law was not yet due when the case was removed, or to cases in which a demand is not required at all. Kay's interpretation of Rule 81(c)(3)(A) thus has some merit. But ultimately, I conclude that Energy's interpretation is correct. Rule 81(c)(3)(A) only applies when the applicable state law does not require a jury demand at all. It has no application when, as in this case, the applicable state law requires an express demand, but the time for making the demand has not yet expired when the case is removed.
>
> This is apparent from the language of the Rule prior to its amendment in 2007. Prior to the 2007 amendment to Rule 81, it read:
>
> If state law applicable in the court from which the case is removed *does not* require the parties to make express demands after removal in

order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury.

Fed. Rule Civ. P. 81(c) (2006) (amended 2007) (italics added).

The Advisory Committee Notes for the 2007 Amendments to Rule 81 state that the language of the Rule was amended "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules." The note states that the changes were intended to be "stylistic only."

The earlier version of Rule 81(c) was the result of the 1963 amendment to the Rules which added the exception in the first place. The Advisory Committee Notes relating to the 1963 Amendment state that the change was meant to avoid unintended waivers of a party's right to a jury trial in cases that are removed to federal court from state courts in which no demand is required. To achieve this purpose, "the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal." Fed. R. Civ. P. 81 Advisory Committee Note, 1963 Amendment. See also 9 Wright & Miller, Federal Practice and Procedure (hereafter Wright & Miller) § 2319 at 228-29 (3d ed. 2008). It therefore follows that the exception in Rule 81(c)(3)(A), which relieves a party in a removed case from the obligation to demand a jury trial, applies only where the applicable state law does not require an express demand for a jury trial. Since Wisconsin law does require a jury demand, Rule 81(c)(3)(A)'s exception does not apply.

Kay cites Williams v. J.F.K. Int'l Carting Co., 164 F.R.D. 340 (S.D.N.Y. 1996) and Marvel Entm't Group, Inc. v. Arp Films, Inc., 116 F.R.D. 86 (S.D.N.Y. 1987), in support of its interpretation of Rule 81, but both dealt with actions removed from New York courts. Cases removed from New York court provide little guidance because "the practice in New York falls within a gray area not covered by Rule 81(c)." Cascone v. Ortho Pharm. Corp., 702 F.2d 389, 391 (2d Cir. 1983); see also 9 Wright & Miller § 2319 at 231 ("Many cases

> removed from New York state courts pose a unique situation."). Wisconsin law unequivocally requires a demand in order to preserve one's right to a jury trial. I therefore conclude that Rule 81(c)(3)(A) is inapplicable and Kay's demand for a jury trial was untimely under Rule 38(b).

Plaintiff respectfully urges that this Court *not* adopt the reasoning of *Kay Beer*. The court in *Kay Beer* did not apply the language of the rule as it reads today, and instead reverted to the former version of the rule. The court stated: "Rule 81(c)(3)(A) only applies when the applicable state law **does not** require a jury demand at all." (Emphasis added). The only rationale offered by the court in *Kay Beer* for applying the former version of the rule instead of the current rule is that the Notes of the Advisory Committee state that the 2007 changes to the rules were intended to be "stylistic only". Respectfully, changes that may have been intended to be "stylistic only" can in fact be substantive. The people that adopted the rules openly debated the effect that the "stylistic" changes would have on the substantive law, and ultimately, the rules committee adopted the rules knowing that certain "costs" would be borne by litigants and the court system, including "costs" in the form of substantive rule changes that may not have been intended. The rules committee nonetheless deemed these costs to be acceptable in adopting the new rules. *See Exhibit 1, attached.* When a "stylistic" change alters the meaning of a rule, this is deemed an acceptable cost, and the Court should apply the rule as it is written. Practitioners also should be able to rely on the rules as written.

As an additional consideration, the court in *Kay Beer* only followed the rationale that the general purpose of the 2007 changes was to effect changes in style and not substance. The court in *Kay Beer* had no apparent knowledge as to the specific reasons why the change was made from "does not" to "did not". One would have to access the minutes and reports of the style subcommittee of the Civil Rules Advisory Committee to obtain that knowledge. The minutes and reports of the style subcommittee do not appear to be available online or in any

readily available alternative source, however, and Plaintiff is unable to provide them to the Court. *See Wray Decl., attached.*

In the absence of the subcommittee minutes and reports, the proper approach is to apply ordinary rules of statutory construction and construe the rule as it is written. By applying the plain language of the rule, one must reasonably conclude that in cases removed from state to federal court, when the applicable state law requires an express jury demand, but the time for making the demand has not yet expired when the case is removed, the time for making a jury demand is to be set by the court.

Accordingly, the jury demand filed September 18, 2014 in this action is timely. It respectfully requested that the Defendants' Motion to Strike Plaintiff's Jury Demand be denied.

DATED: October 16, 2014 LAW OFFICES OF MARK WRAY

By __/s/ Mark Wray_____
MARK WRAY
Attorneys for Plaintiff TOM GONZALES

DECLARATION OF MARK WRAY IN SUPPORT OF OPPOSITION TO STRIKE JURY DEMAND

I, Mark Wray, declare:

1. My name is Mark Wray. I substituted in as attorney for Plaintiff Tom Gonzales in this action on June 11, 2014. I know the following facts of my personal knowledge and could, if asked, competently testify to the truth of the same under oath.

2. On September 16, 2014, the Court denied the Defendants' motion for summary judgment. *ECF No. 65.*

3. Upon receiving the order, I reviewed Fed. R. Civ. P. 81(c)(3)(A) and prepared a jury demand which I filed with the Court on September 18, 2014. I also called Defendants' counsel, Mr. Schwartzer, and asked if he would inquire about obtaining his clients' permission to consolidate the trial of the two related actions.

4. On September 26, 2014, Mr. Schwartzer advised me that his clients would not agree to consolidation and that he would be filing a motion to strike the jury demand.

5. After receiving the Defendants' motion and re-reading Rule 81(c)(3)(A), I reviewed minutes and reports of the Judicial Conference Committee on Rules of Practice and Procedure for the years 2003 through 2007. I also contacted the support staff of the committee in Washington, D.C. I learned there are six members of the support staff, headed by their chief, Jonathan Rose, and they are busy with six different committees. Over a period of days and follow-up phone calls, I attempted to find out whether anyone on the support staff has access to any minutes and reports of the style subcommittee of the Advisory Committee on Civil Rules during the years leading up to the 2007 rule changes. I spoke to Mr. Rose specifically about this subject, explaining my interest in knowing the genesis of the change from "does not" to "did not". Although I followed up several times

seeking to obtain this information from Mr. Rose or his staff, I did not receive a response from them before having to prepare and file this Opposition.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on October 16, 2014 at Reno, Nevada.

/s/ Mark Wray
MARK WRAY

CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray hereby certifies that a true copy of the foregoing document was sealed in an envelope with first-class postage prepaid thereon and deposited in the U.S. Mail at Reno, Nevada on October 16, 2014 addressed as follows:

Lenard E. Schwartzer
Schwartzer & McPherson Law Firm
2850 S. Jones Blvd., Suite 1
Las Vegas, NV 89146

_____/s/ Theresa Moore_____

EXHIBIT INDEX

EXHIBIT 1

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **June 2, 2006**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on May 22-23, 2006. Draft minutes of the meeting are attached.

Part I of this report presents action items. Subpart A recommends approval for adoption of two sets of proposals. The first is Civil Rule 5.2, the Civil Rules version of the E-Government Rules developed under direction by the Standing Committee Subcommittee on the E-Government Act. The second is the package of Style amendments — Style Rules 1-86; Style-Substance amendments to Rules 4(k), 9(h), 11(a),14(b),16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78; Style Forms; and the Style versions of the amended rules on electronic discovery now pending in Congress and scheduled to take effect on December 1, 2006 (Rules 16, 26, 33, 34, 37, and 45).

Subpart I B recommends approval for publication of new Rule 62.1 on indicative rulings and amendments to Rules 13(f), 15(a)(amended pleadings), and 48 (jury polling). The recommendation is to publish these proposals — along with the modest amendment of Rule 8(c) approved for publication at the January meeting — at a later date, presumably August, 2007, when they can be included in a package with other proposals.

Part II of this report presents information items describing the projects that are being developed for further consideration.

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.	**(b) Scire Facias and Mandamus.** The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.
(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.	**(c) Removed Actions.** **(1)** ***Applicability.*** These rules apply to a civil action after it is removed from a state court.
Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.	**(2)** ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods: **(A)** 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief; **(B)** 20 days after being served with the summons for an initial pleading on file at the time of service; or **(C)** 5 days after the notice of removal is filed.
A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.	**(3)** ***Demand for a Jury Trial.*** **(A)** *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial. **(B)** *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after: **(i)** it files a notice of removal; or **(ii)** it is served with a notice of removal filed by another party.

Summary of Comments

The written comments on Style Rules 1-86, the Style-Substance Rules, and the Style Forms, are described in the Summary of Comments. The hearing on November 18, 2005, and discussion at the Committee meeting that followed, are described in the Notes on the meeting.

SUMMARY OF COMMENTS: STYLE RULES

(Two of the most detailed sets of comments are identified without repeating the full CV designation each time. One set, 05-CV-22, was submitted by Professor Stephen B. Burbank and Gregory P. Joseph, Esq., on the basis of work done by a 21-person working group, is identified simply as "Burbank-Joseph." Similarly, 05-CV-008, submitted by the Committee on Civil Litigation of the United States District Court for the Eastern District of New York, is identified as "EDNY.")

The summaries are at times embroidered by responses. Although this approach is new to the task of summarizing comments, the Style Project presents some issues that may benefit from counterpoint.

Overall Project

Hon. W. Eugene Davis, 05-CV-007: Judge Davis chaired the Criminal Rules Advisory Committee during the style revision project. He opposed the project while the decision to go ahead was deliberated, fearing that "we would make inadvertent, substantive changes or create ambiguities that would result in wasteful, satellite litigation." But the fears "turned out to be almost totally unfounded. We have experienced minimal litigation over the meaning of the style changes. Judge Will Garwood, who was Chair of the Appellate Rules Committee during their style revision project, also tells me that satellite litigation over the meaning of the changes to those rules has not been a problem." "I have every reason to believe that the concern about significant satellite litigation over the meaning of the changes to the Civil Rules will turn out to be just as unfounded as it was with the Criminal Rules."

EDNY: Review of the Burbank-Joseph comments led to an independent consideration of the costs of the style enterprise. "[T]he unanimous judgment of every member of the Committee who expressed a view" was that "the costs and other disadvantages of the style revision project outweigh its benefits." First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found that they had uncovered many more — and that there was almost no overlap, suggesting that "there remain a significant number of unintended consequences that neither we nor [they] have spotted." Second, any style revision will bring "disruptions." "[T]he sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come." Third, courts and the profession will be so occupied "in digesting the style revisions" that it will be more difficult to accomplish desirable substantive rules revisions. It would be better to implement style revisions of particular rules or groups of rules "as the need for substantive changes in those rules or groups of rules becomes apparent."

Prof. Bradley Scott Shannon, 05-CV-009: "The non-substantive problems associated with the Federal Rules of Civil Procedure are sufficiently great so as to warrant revision. Overall, the Advisory Committee has done a fine job in this regard, and the restyled rules as proposed, whatever their flaws, are superior to the Rules as they currently exist."

Plain Language Action and Information Network (PLAIN), 05-CV-010: "This draft is a tremendous improvement over the current version. It will be easier to use, and thus should save time and effort, and achieve a higher degree of conformance with the procedures it outlines."

Hon. Peter D. Keisler, Assistant Attorney General, 05-CV-011: In the judgment of the United States Department of Justice "the revisions should help simplify and clarify the text of many of the Rules so that practitioners can better understand and apply them." Attorneys in the Criminal Division and in the Civil Division's appellate staff have found that the style changes in the Criminal Rules and Appellate Rules "have been positive and beneficial. the Department strongly supports the current initiative to restyle the Civil Rules * * *."

Susan Kleimann, President Kleimann Communications Group, 05-CV-012: The style amendments "will make it easier for judges, lawyers, and the public to find the information they need, understand what they find, and be able to use that information effectively."

Lawyers for Civil Justice, 05-CV-014: "Plain language is critical to clear understanding and our reading of the Style Revisions convinces us that lawyers and litigants will save lots of time and trouble in reading and interpreting these rules, if they are adopted. * * * Increased clarity will bring about easier and faster understanding of the Rules and dealings among lawyers will be simplified and facilitated." LCJ disagrees with those who believe the changes are not worth the effort. "Similar claims were made about the re-styling of the Criminal and Appellate Rules, but those have been on the books for some time and appear to have worked well in practice."

John Beisner, Esq. 05-CV-015: The restyled rules attempt to minimize the frequent debates about the meanings of even familiar Civil Rules, "to ensure that our federal judicial rules provide a clear roadmap to litigating in our federal courts — rather than construct a trap for the unwary." Simplifying the rules "will also increase attorney efficiency and even has the potential to reduce ever-escalating attorneys' fees. One study conducted in Australia found that on average, lawyers are able to arrive at a solution 30 percent faster when they consult plain versions of legislation versus traditionally styled legislation. See Law Reform Comm'n of Victoria, Plain English and the Law 69-70 (1987)." "[T]he restyling * * * reflects a broadly-based, overdue realization by public and private entities that simpler is better."

Some comments suggest that the Style Project will interfere with the more important need "to rewrite the rules for 21st Century legal practice. * * * I believe that these concerns are ill-founded." There is no apparent present plan to convene a "Constitutional convention" to rewrite the Civil Rules from scratch. The wisdom of any such project is questionable. Some of the rules are controversial, but gradational change is better than wholesale change. And in any event, a sweeping revision of the whole system would take many years, if not decades. "It makes no sense to force attorneys to litigate under potentially confusing rules for several years simply because a more ambitious project is being planned that could easily take many years to implement." Indeed, by making the rules clearer the style project will save attorneys time, not waste their time by forcing them to relearn a new set of rules and then put aside the new learning for a still newer set of rules.

Hon. Thomas S. Zilly, Advisory Committee on Bankruptcy Rules, 05-CV-016: "The restyling significantly improves the Civil Rules both as to their clarity and readability."

Donald P. Byrne, Esq., 05-CV-017: After a career writing FAA regulations as Assistant Chief Counsel for Regulations, finds the revised rules "a great improvement in communication, especially for lawyers like me who refer to the Civil Rules only occasionally. They're easier to read, digest, and remember." It was a challenge to get through the original rules. "The proposed style revisions make the ride much smoother and the road map much clearer."

ABA Section of Litigation, 05-CV-018: The Litigation Section Council has not taken a position on the Style Rules, but notes the honor and privilege of enjoying the opportunity to participate in the style process through two members assigned to assist in the project and through the Section's liaison to the Advisory Committee. The Committee responded to countless questions raised by these Section representatives.

Committee on United States Courts, State Bar of Michigan, 05-CV-019: "The amendments will enhance the readability, internal consistency and organization of the Federal Rules."

Hon. Bill Wilson, 05-CV-020: Writes in response to the doubts expressed by the EDNY committee. Judge Wilson was a member of the Style Subcommittee when the restyling of the Criminal Rules began. The same objections to restyling were voiced then. "The legal profession has traditionally been very conservative about changes (style or substantive) to any rules with which members of the profession have worked. I am satisfied that plain, simple language is to be preferred." "We need rules so plain that practicing lawyers can understand them. In fact, we ought to make them so plain that even judges can understand them. I urge full steam ahead on this restyling project and others."

Patricia Lee Refo, Esq., and Scott J. Atlas, Esq., 05-CV-021: Scott Atlas and Patricia Refo are past chairs of the ABA Section of Litigation and both were members of the Burbank-Joseph Committee. "In our view, the potential benefits outweigh any conceivable transaction costs. The revised rules represent a significant improvement over the existing rules in terms of resolving ambiguities to conform to clear case law and using plain English so that younger and less experienced federal court practitioners can more easily comprehend the text. We have long thought that the language used in the original rules has outlived its usefulness and that practitioners would be better served by a more straightforward text. The Restyling Project accomplishes this goal."

Burbank-Joseph: "[A] number of members favored continuing the effort." They thought the restyling of other sets of rules had been successful. They agreed that there will be some unintended changes in meaning, but noted that this Committee's comments and others will reduce the number. They conclude that such disadvantages are outweighed by the advantages in greater accessibility of the restyled rules, "particularly to younger and less experienced practitioners." But "[a] greater number of participants were either mildly or strongly negative." The Committee found a number of serious problems, and there may be many more that have not been identified. Whatever benefits may be realized "will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules." Beyond these costs, restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century." It would be better to include restyling as one component of the substantive enterprise — "the bar would not tolerate having to relearn the rules more than once in a generation." Finally, Burbank and Joseph themselves are concerned with problems that "have negative implications for access to court (e.g., Rule 68) and/or for the protection of individual rights (e.g., Rule 65) * * *."

Federal Magistrate Judges Assn., 05-CV-024: "The FMJA supports the proposed restyling of the Civil Rules. The proposed style revisions improve the Civil Rules both as to their clarity and readability."

Rather than revert to the present rule, which refers only to stenographic reporting, there would be no harm in simply dropping Rule 80. Others suggested that perhaps Rule 80 should be retained, to be reconsidered in the context of a broader project to review the Civil Rules provisions on evidence for better integration with the Evidence Rules. It was further noted that Rule 80 should not be confused with possible evidentiary uses of deposition testimony — it addresses only testimony "at a trial or hearing." That might include an administrative hearing, or a state-court trial or hearing. The problems of various recording methods may not be as acute as they would be if deposition testimony were included. At the end, Mr. Joseph suggested that Style Rule 80 would be appropriate if it refers only to stenographically recorded testimony.

Rules 72, 73: Professor Burbank noted that Professor Linda Silberman, who was involved in drafting the original versions of Rules 72 and 73, was directed to follow the language of the magistrate-judge statute, and still thinks that is a good idea. Perhaps style conventions should not trump fealty to the statutory language here. To be sure, it was a new statute at the time, and one purpose of adhering to the statutory language may have been to serve a "teaching" purpose. They may have wanted to be sure they were not changing anything. That purpose may not be as important now. If we can be sure that there are no possible changes of meaning, and no significant transaction costs arising from transitional confusion or efforts to create confusion, the Style changes may be appropriate. So, it was noted, the Criminal Rules have adhered to the Civil Style drafts.

Rule 36(b): Professor Burbank noted that the Style-Substance proposal to amend Rule 36(b) presents a problem. The present rule permits amendment of an admission "[s]ubject to the provisions of Rule 16 governing amendment of a pre-trial order." Present Rule 16(e) states two different things about amending a pretrial order. First it provides generally that an order reciting the action taken at a Rule 16 conference "shall control the subsequent course of the action unless modified by a subsequent order." That provision does not establish any standard for modification; it simply recognizes that modification may occur. The second provision is that an order following a final pretrial conference "shall be modified only to prevent manifest injustice." The Style Rules divide these two provisions between Style Rule 16(d) and (e). The Style-Substance proposal is to limit Rule 36(b) to an order permitting withdrawal or amendment of an admission "that has not been incorporated in a pretrial order." The result is that there is no standard for withdrawal or amendment of an admission that has been incorporated in a pretrial order before the final pretrial order. The appropriate rule instead should be that the Rule 36(b) standard governs withdrawal or amendment except as to an admission that has been incorporated in a final pretrial order. Withdrawal or amendment of an admission incorporated in a final pretrial order should be governed by the more demanding standard of Style Rule 16(e).

Overall Evaluation: A Committee Member asked Professor Burbank and Mr. Joseph to comment on their written summary of the working group's views on the wisdom of undertaking the Style Project. Professor Burbank replied that the group was divided. Fourteen members participated in the final conference call. Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed. The strength of their convictions varied. Some thought the goals of the project are admirable, but were concerned that there are not insignificant problems even in light of the perception that the Styled Appellate Rules and Criminal Rules work. The problems that can be identified now can be fixed now. But there will be other problems that are not identified. And there will be transaction costs as lawyers attempt to bend the Style Rules by arguing for unintended changes of meaning. In addition, there is an opportunity cost in losing the occasion for addressing the entire corpus of rules by asking whether the present Federal Rules of Civil Procedure embody the right procedure for the 21st Century.

November 22 draft

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TOM GONZALES, Plaintiff, vs. SHOTGUN NEVADA INVESTMENTS, LLC et al., Defendants.	)	2:13-cv-00931-RCJ-VPC **ORDER**

This case arises out of the alleged breach of a settlement agreement that was part of a confirmation plan in a Chapter 11 bankruptcy action. Pending before the Court are a Motion to Reconsider (ECF No. 68) and a Motion to Strike Jury Demand (ECF No. 69). For the reasons given herein, the Court denies the motion to reconsider and grants the motion to strike jury demand.

I. FACTS AND PROCEDURAL HISTORY

This is the second action in this Court by Plaintiff Tom Gonzales concerning his entitlement to a fee under a Confirmation Order the undersigned entered over ten years ago while sitting as a bankruptcy judge.

A. The Previous Case

On December 7, 2000, Plaintiff loaned $41.5 million to Desert Land, LLC and Desert

Oasis Apartments, LLC to finance their acquisition and/or development of land ("Parcel A") in Las Vegas, Nevada. The loan was secured by a deed of trust. On May 31, 2002, Desert Land and Desert Oasis Apartments, as well as Desert Ranch, LLC (collectively, the "Desert Entities"), each filed for bankruptcy, and the undersigned jointly administered those three bankruptcies while sitting as a bankruptcy judge. The court confirmed the second amended plan, and the Confirmation Order included a finding that a settlement had been reached under which Gonzales would extinguish his note and reconvey his deed of trust, Gonzales and another party would convey their fractional interests in Parcel A to Desert Land so that Desert Land would own 100% of Parcel A, Gonzales would receive Desert Ranch's 65% in interest in another property, and Gonzales would receive $10 million if Parcel A were sold or transferred after 90 days (the "Parcel Transfer Fee"). Gonzales appealed the Confirmation Order, and the Bankruptcy Appellate Panel affirmed, except as to a provision subordinating Gonzales's interest in the Parcel Transfer Fee to up to $45 million in financing obtained by the Desert Entities.

In 2011, Gonzales sued Desert Land, Desert Oasis Apartments, Desert Oasis Investments, LLC, Specialty Trust, Specialty Strategic Financing Fund, LP, Eagle Mortgage Co., and Wells Fargo (as trustee for a mortgage-backed security) in state court for: (1) declaratory judgment that a transfer of Parcel A had occurred entitling him to the Parcel Transfer Fee; (2) declaratory judgment that the lender defendants in that action knew of the bankruptcy proceedings and the requirement of the Parcel Transfer Fee; (3) breach of contract (for breach of the Confirmation Order); (4) breach of the implied covenant of good faith and fair dealing (same); (5) judicial foreclosure against Parcel A under Nevada law; and (6) injunctive relief. Defendants removed that case to the Bankruptcy Court. The Bankruptcy Court recommended moving to withdraw the reference, because the undersigned issued the underlying Confirmation Order while sitting as a bankruptcy judge. One or more parties so moved, and the Court granted the motion. The Court dismissed the second and fifth causes of action and later granted certain defendants' counter-

motion for summary judgment as against the remaining claims. Plaintiff asked the Court to reconsider and to clarify which, if any, of its claims remained, and defendants asked the Court to certify its summary judgment order under Rule 54(b) and to enter judgment in their favor on all claims. The Court denied the motion to reconsider, clarified that it had intended to rule on all claims, and certified the summary judgment order for immediate appeal. The Court of Appeals affirmed, ruling that the Parcel Transfer Fee had not been triggered based on the allegations in that case, and that Plaintiff had no lien against Parcel A.

B. The Present Case

In the present case, also removed from state court, Plaintiff recounts the Confirmation Order and the Parcel Transfer Fee. (*See* Compl. ¶¶ 10–14, Apr. 10, 2013, ECF No. 1, at 11). Plaintiff also recounts the history of the '613 Case. (*See id.* ¶¶ 17–21). Plaintiff alleges that Defendant Shotgun Nevada Investments, LLC ("Shotgun") began making loans to Desert Entities for the development of Parcel A between 2012 and January 2013 despite its awareness of the Confirmation Order and Parcel A transfer fee provision therein. (*See id.* ¶¶ 22–23). Plaintiff sued Shotgun, Shotgun Creek Las Vegas, LLC, Shotgun Creek Investments, LLC, and Wayne M. Perry for intentional interference with contract, intentional interference with prospective economic advantage, and unjust enrichment based upon their having provided financing to the Desert Entities to develop Parcel A. Defendants removed and moved for summary judgment, arguing that the preclusion of certain issues decided in the '613 Case necessarily prevented Plaintiffs from prevailing in the present case. The Court granted that motion as a motion to dismiss, with leave to amend.

Plaintiff filed the Amended Complaint ("AC"). (*See* Am. Compl., Aug. 20, 2013, ECF No. 28). Plaintiff alleges that the Confirmation Order permitted Parcel A to be used as collateral for up to $25,000,000 in mortgages of Parcel A itself or as collateral for a mortgage securing the purchase of real property subject to the FLT Option if the proceeds were used only for the

purchase of that real property, but that any encumbrance of Parcel A outside of these parameters would trigger the Parcel Transfer Fee. (*See id.* ¶¶ 15–16). Various Shotgun entities made additional loans to the Desert Entities in 2012 and 2013 "related to the development of Parcel A." (*Id.* ¶¶ 25–26). Multiple Shotgun entities have also invested in SkyVue Las Vegas, LLC ("SkyVue"), the company that owns the entities that own Parcel A. (*Id.* ¶ 27). Plaintiff alleges that the reason Perry, the principal of the Shotgun entities, did not document his $10 million investment was to "avoid evidence of a transfer," and thus the triggering of the Parcel Transfer Fee. (*See id.* ¶ 29).

Defendants moved for summary judgment, and Plaintiff moved to compel discovery under Rule 56(d). The Court struck the conspiracy and declaratory judgment claims from the AC, because Plaintiff had no leave to add them. The Court otherwise denied the motion for summary judgment and granted the motion to compel discovery, although the Court noted that the intentional interference with prospective economic advantage claim (but not the intentional interference with contractual relations claim) was legally insufficient. Defendants again moved for summary judgment after further discovery and filed a motion in limine asking the Court to exclude any testimony of witnesses or documents not disclosed in discovery. The Court denied the motion for summary judgment because the allegations in the AC concerned events subsequent to the events alleged in the '613 Case, and Plaintiff had submitted evidence sufficient to create a genuine issue of material fact for trial as to the sole remaining claim for intentional interference with contractual relations. The Court denied the motion in limine because it identified no particular evidence to exclude but simply asked the Court to enforce the evidence rules at trial as a general matter.

Defendants have asked the Court to reconsider their latest motion for summary judgment and to strike Plaintiff's recently filed jury demand.

///

II. DISCUSSION

A. Motion to Reconsider

Defendants argue that the Court noted no timely reply had been filed, but that they in fact filed a reply that was timely under a stipulation to extend time. The Court has examined the reply, and it does not negate the genuine issue of material fact Plaintiff showed in his response.

B. Motion to Strike Jury Demand

Plaintiff did not demand a jury trial in the Complaint, (*see* Compl., ECF No. 1, at 11), or in the AC, (*see* Am. Compl., ECF No. 28). Defendants did not demand a jury trial in the Answer to the Complaint, (*see* Answer, ECF No. 4), or in the Answer to the AC, (*see* Answer, ECF No. 30). A jury must be demanded by serving the other parties with a written demand no later than fourteen days after service of the last pleading directed to the issue for which a jury trial is demanded. Fed. R. Civ. P. 38(b)(1). The last such pleading in this case was the Answer to the AC, which was served upon Plaintiff via ECF on September 3, 2013. (*See* Cert. Service, ECF No. 30, at 8). The deadline for any party to demand a jury trial was therefore Tuesday, September 17, 2013. The Jury Demand at ECF No. 67 was served upon Defendants via ECF on September 18, 2014, over a year after the deadline. (*See* Cert. Service, ECF No. 67, at 3). Defendants are therefore correct that the demand is untimely and should be stricken.

In response, Plaintiff notes that in removal cases such as the present one, an express jury demand made before removal that is sufficient under state law need not be renewed after removal, and that where state law requires no express jury demand, a party need not make such a demand after removal unless specially ordered to do so by the court within a specified time. *See* Fed. R. Civ. P. 81(c)(3)(A). Plaintiff argues that Nevada law requires a jury demand "not later than the time of the entry of the order first setting the case for trial." Nev. R. Civ. P. 38(b). Plaintiff argues that because a jury demand was not yet due under state law at the time the case was removed, he need not make such a demand after removal unless ordered to do so by the

court within a specified time, and the Court has not issued such an order in this case.

Rule 81 waives the requirements of Rule 38 where an express jury demand has been made under state law before removal. Plaintiff does not claim to have made any express jury demand before removal, however. It is also true that where state law does not require an express jury demand, none need be made after removal. The questions here are whether and when a party must make a jury demand in federal court after removal in cases where state law does in fact require a jury demand, but where it was not yet due under state law at the time of removal. In such cases, is the jury demand requirement under Rule 38 negated, as is the case where state law requires no demand at all?

Plaintiff candidly admits that the Court of Appeals has ruled that in such cases a jury demand must be made in accordance with Rule 38, and that district courts typically follow that rule. *See Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983). However, Plaintiff also notes that the rule at the time of *Lewis* read, "If state law applicable in the court from which the case is removed *does* not require the parties to make express demands in order to claim trial by jury . . . ." *See id.* (quoting Fed. R. Civ. P. 81(c) (1983)) (emphasis added). Plaintiff argues that the result should be different today, because the rule was amended in relevant part in 2007 to read, "If the state law *did* not require an express demand for a jury trial . . . ." Fed. R. Civ. P. 81(c)(3)(A) (emphasis added). Plaintiff argues that because the current rule uses the past tense as to the requirement to make a jury demand under state law when viewed from the point of removal, that there is no requirement to make a jury demand in federal court if none was yet due under state law at the time of removal. Plaintiff admits that the 2007 amendments to the rules were "intended to be stylistic only," *see* Fed. R. Civ. P. 81 advisory committee's note, but argues that the stylistic change is an "unfair trap for the unwary."

The Court agrees with the district courts that continue to enforce the *Lewis* rule. Rule 81 is not a trap for the unwary. Even if that had been a fair argument when Rule 81 was newly

amended, as Plaintiff notes, district courts, including those in this district, have consistently enforced the *Lewis* rule under Rule 81 as amended. *See Nascimento v. Wells Fargo Bank*, No. 2:11-cv-1049, 2011 WL 4500410, at *2 (D. Nev. Sept. 27, 2011) (Mahan, J.); *Kaldor v. Skolnik*, No. 3:10-cv-529, 2010 WL 5441999, at *2 (D. Nev. Dec. 28, 2010) (Hicks, J.). And the new language of the rule is not particularly confusing. The Rule 38 demand is required unless the state law "did not require an express demand," not only if the state law "did not *yet* require an express demand *to have been served at the time of removal*." The latter reading of the rule is improbable. The committee's notes make clear that such a meaning was not intended, as the amendment was only for style. The authors of the rule surely knew how to distinguish the concepts of whether and when, and they did not add any language reasonably invoking the concept of timing into the amendment of Rule 81(c)(3)(A).

Moreover, Plaintiff's own Case Management Report of July 30, 2013 notes that "A jury trial has not been requested" under paragraph VIII, entitled "JURY TRIAL." (*See* Case Mgmt. Report 6, July 30, 2013, ECF No. 25). If Plaintiff had truly been under the impression that the right to a jury trial had been preserved under Rule 81(c)(3)(A) because no jury demand was yet due at the time of removal, he surely would have noted his expectation of a jury trial and/or explained his position that no jury demand was necessary; he would not have simply noted that no jury trial had been requested and left it at that. Plaintiff's "unfair trap for the unwary" argument in this case is therefore not made in good faith, even if the argument could avail a litigant in an appropriate case.

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CONCLUSION

IT IS HEREBY ORDERED that the Motion to Reconsider (ECF No. 68) is DENIED.

IT IS FURTHER ORDERED that the Motion to Strike Jury Demand (ECF No. 69) is GRANTED.

IT IS SO ORDERED.

Dated this 23rd day of October, 2014.

ROBERT C. JONES
United States District Judge

TAB 17

17. Rule 54(d)(2)(B) – 23-CV-L

Magistrate Judge Patricia Barksdale proposes that the Advisory Committee consider a rule amendment to deal with a timing problem in handling fee awards under 42 U.S.C. § 406(b). She calls attention to local rule changes being considered in the M.D. Fla. that might be a model for an amendment to Rule 54(d)(2)(B)(i), which requires generally that a motion for attorney's fees must be made "no later than 14 days after the entry of judgment." Here is the local rule proposal:

> (e) ATTORNEY'S FEE IN A SOCIAL SECURITY CASE AFTER REMAND. No later than fourteen days after receipt of a "close out" letter, a lawyer requesting an attorney's fee, payable from withheld benefits, must move for the fee and include in the motion:
>
> (1) the agency letter specifying the withheld benefits;
>
> (2) any contingency fee agreement; and
>
> (3) proof that the proposed fee is reasonable.

The basic problem arises in connection with judicial review of decisions by the Social Security Administration (SSA) denying benefits. The fee award for in-court work by the attorney ordinarily depends on the outcome of further proceedings before the SSA because the normal relief in court for a successful plaintiff under 42 U.S. § 405(g) is remand to the SSA for further proceedings, and the attorney fee award under § 406(b) must be "reasonable" but is limited to "25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." When the court orders a remand, that depends on the eventual outcome of those proceedings after remand.

As spelled out in the Committee Note to Rule 54(b)(2), the 14-day deadline assures that the opposing party knows of the attorney fee claim before the time to appeal expires, but that does not seem to be important frequently in court remands of SSA denials of benefits. Another goal was to provide "an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind." That objective might be served by the deadline, but since the statutory limit on the fee award can't be known until further proceedings before the SSA it hardly seems dispositive.

Review of SSA benefits decisions occupied much Advisory Committee time and energy recently, so some background on that effort seems in order. In 2017, the Administrative Conference of the U.S. made a proposal that explicit rules be developed for civil actions under 42 U.S.C. § 405(g) to review denial of individual disability claims under the Social Security Act.

The ACUS recommendation was based in large part on a 180-page study by Professors Jonah Gelbach and David Marcus entitled A Study of Social Security Disability Litigation in the Federal Courts. That study was very thorough and raised questions about many aspects of the SSA's internal processes in reviewing such claims. But it also suggested that the ordinary Civil Rules did not work well for what were essentially appellate proceedings, though conducted in the district court.

The Standing Committee decided that the Civil Rules Committee should address the ACUS proposal. On the day before the Advisory Committee's November 2017 meeting, an informal subcommittee met with representatives of SSA and of claimant organizations. At that meeting, SSA representatives strongly urged the adoption of uniform national rules, in part because SSA attorneys have to handle cases in a number of courts or regions and the procedures may differ significantly from one court to the next. For details, see Minutes of the Nov. 7, 2017, Advisory Committee meeting at 7-12.

A major difficulty in SSA benefits decisions was the amount of time the SSA takes to resolve claims. It was recognized during the informal meeting a national rule for in-court handling of appeals would not address those problems, which had been detailed in the Gelbach/Marcus report. So in-court procedural difficulties did not seem to be a big part of the overall SSA claims-processing activity.

But it was also clear that because there are so many such proceedings – about 18,000 per year – and that SSA review usually differs in kind from other administrative review matters before the district courts, which are also much less numerous. Furthermore, these in-court proceedings very frequently end with a remand to the SSA for further proceedings, presenting the timing difficulty raised by this submission. Considerable grounds for specialized treatment appeared to exist.

Moreover, one potential upside of a national rule for SSA appeals was that it could simplify service of the complaint on the SSA. Some districts were experimenting with that. But it was also noted that designing rules for only one type of case runs against the grain of the transsubstantive federal rules. There are exceptions, however, including the rules for § 2255 proceedings and the provisions of Supplemental Rule G for forfeiture proceedings.

A formal Subcommittee was formed, with Judge Sara Lioi as Chair. The SSA continued to press for broad and detailed national rules. In particular, it urged the following as a model for a rule on attorney fee awards:

(c) PETITIONS FOR ATTORNEY'S FEES UNDER 42 U.S.C. § 406(b).

(1) Timing of petition. Plaintiff's counsel may file a petition for attorney's fees under 42 U.S.C. § 406(b) no later than 60 days after the date of the final notice of award sent to Plaintiff's counsel of record at the conclusion of Defendant's past due benefit calculation stating the amount withheld for attorney's fees. The court will assume counsel representing Plaintiff in federal court received any notice of award as of the same date that Plaintiff received the notice, unless counsel establishes otherwise.

(2) Service of Petition. Plaintiff's counsel must serve a petition for fees on Defendant and must attest that counsel has informed Plaintiff of the request.

(3) Contents of petition. The petition for fees must include:

(A) a copy of the final notice of award showing the amount of retroactive benefits payable to Plaintiff (and to any auxiliaries, if applicable), including the amount withheld for attorney's fees, and, if the date that counsel received the notice is different from the date provided on the notice, evidence of the date counsel received the notice;

(B) an itemization of the time expended by counsel representing Plaintiff in federal court, including a statement as to the effective hourly rate (as calculated by dividing the total amount requested by number of hours expended);

(C) a copy of any fee agreement between Plaintiff and counsel;

(D) statements as to whether counsel:

(i) has sought, or intends to seek, fees under 42 U.S.C. § 406(a) for work performed on behalf of Plaintiff at the administrative level;

(ii) the award to any other representative who has sought, or who may intend to seek, fees under 42 U.S.C. § 406(a);

(iii) was awarded attorney's fees under 42 U.S.C. § 2412, the Equal Access to Justice Act, in connection with the case and, if so, the amount of such fees; and

(iv) will return the lesser of the § 2412 and § 406(b) awards to Plaintiff upon receipt of the § 406(b) award.

(E) any other information the court would reasonably need to assess the petition.

(4) Response. Defendant may file a response within 30 days of service of the petition, but such response is not required.

In the agenda book for the November 2018 Advisory Committee meeting, the following report appears on p. 223:

> SSA reports that the general Civil Rules provisions work well for awarding fees under the Equal Access to Justice Act. But there are serious difficulties with the procedure for awarding fees under § 406(b). These fees, which come out of the award of benefits, are for attorney services in the court. The award is made by the court, not SSA. The substantive calculation can be difficult, including integration with fees awarded by the Commissioner for work in the administrative proceedings under § 406(a) and fees awarded by the court under the Equal Access to Justice Act. Rule text addressing those substantive issues does not seem appropriate, even if the substantive rules are clearly established.

> It may be possible, however, to address the problem of timing a motion for an award by the court under § 406(b). In a great many cases the result of the court's judgment is a remand to SSA for further proceedings. The Civil Rule 54(d)(2) timing requirements geared to judgment do not fit well with a motion that cannot become ripe until conclusion of the administrative proceedings. There are serious problems.
>
> To recognize that there are serious problems, however, is not to agree that they can be resolved by a new court rule. There is a mess, but it originates primarily outside the Civil Rules. Attempts to clean it up would be difficult and might make matters worse.
>
> Despite the sentiment that these problems may be too varied and too complicated to address by rule, the Subcommittee concluded that the topic should be carried forward for further consideration.

The SSA Subcommittee spent two years developing its proposal for Supplemental Rules. Those eight Supplemental Rules in relatively brief compass set out a specialized sequence of actions for "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." Supp. Rule 1(a). Supplemental Rule 1(b) then provides that the Civil Rules apply to proceedings under § 405(g) "except to the extent that they are inconsistent with these rules."

Subsequent rules prescribe the contents of the complaint (Rule 2), service in a simplified manner (Rule 3), the answer and any motions (Rule 4), the method of presenting the action for decision (Rule 5), the plaintiff's brief (Rule 6), the Commissioner's Brief (Rule 7), and a reply brief by the plaintiff (Rule 8). There is no mention of attorney fee awards.

The Supplemental Rules went into effect on Dec. 1, 2022.

One contrast between Judge Barksdale's submission and the SSA submission is that the SSA focused only on § 406(b), while the judge's proposal applies to any application for an award of attorney fees in § 504(g) proceedings. Either way, it might be odd to add a provision to Rule 54(d)(2) if it is only about § 405(g) proceedings, or perhaps only some of them. There may well be other situations in which the same sort of timing disjunctions could be urged as a basis for an exception to the timing requirements of Rule 54(d)(2)(B). If we are to proceed down this line, it might be better to consider an amendment to the Supplemental Rules, perhaps a new rule solely about attorney fee awards under section 406(b). But given that the new Supplemental Rules went into effect less than a year ago, it might seem premature to change them now.

It also seems worth noting that there are somewhat complex statutory provisions about attorney fees in § 405(g) proceedings. This seems to be a specialized practice with a specialized bar, and less familiar to others. And as one might imagine, the stakes can be considerable for the cognoscenti. But some introductory points can be made.

Representation before SSA: 42 U.S.C. § 406(a) contains extensive provisions about fees for representation before the SSA. It permits non-attorneys to provide such representation, but the Commissioner may refuse to recognize a proposed representative or disqualify the representative.

§ 406(a)(1). In general, the Commissioner can by rule or regulation prescribe the maximum fees for such services.

Section 406(a)(2) further limits such fees to 25% of the total payment of past-due benefits, and limits that to $4,000 total, though the Commissioner may increase that dollar amount if that increase is keyed to "the rate of increase in primary insurance amounts under section 415(i) of this title." "[T]he term 'past-due benefits' excludes any benefits with respect to which payment has been continued pursuant to [provisions of another section] of the title." See § 406(a)(2)(B).

There are also fairly elaborate provisions in § 406(a)(3) - (5) regarding the SSA determination whether a fee claimed under this provision exceeds the maximum amount allowed under the statute.

But it appears that § 406(a) is entirely or mainly about fees claimed without regard to an action in court governed by the new Supplemental Rules. If that is correct, there seems no need to address such determinations in the Civil Rules.

Section 406(b) addresses attorney fee awards for proceedings in court. But it is not the only statute that addresses that. The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, also can apply to a proceeding in court. Indeed, a 1985 amendment to the EAJA provided that "where the claimant's attorney receives fees for the same work under both [§ 406(b) and the EAJA] the attorney [must] refun[d] to the claimant the amount of the smaller fee." *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010) (holding that the EAJA award belongs to the client, not the lawyer). In that case, the Court pointed out that the award to the attorney under § 406(b) went directly to the attorney, but the EAJA award went to the claimant, so the Government could offset the Claimant's other obligations to the Government against the amount of the fee award.

Though the SSA reported that the Civil Rules work well for EAJA applications in § 405(g) actions, EAJA decisions in such cases provide reasons for caution. This topic almost certainly is of great importance to both sides, and questions of timing (central to the current submission) have proved very challenging under the EAJA. It is likely that substantial education will be needed to gain a full grasp of these issues.

Perhaps a good illustration is provided by *Shalala v. Schaefer*, 113 S. Ct. 2625 (1993), which Justice Scalia, speaking for the Court, introduced as presenting the question of "the proper timing of an application for attorney's fees under the [EAJA] in a Social Security case."

Plaintiff Schaefer was denied disability benefits and sought judicial review under § 405(g). The district court found that the SSA had committed three errors and remanded to the SSA. As we shall see, the Court regarded it as important that the original court decision was under sentence four of § 405(g): "The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the case for a rehearing."

After remand, Schaefer's application was granted. He then applied for an attorneys fee award under the EAJA. Under the EAJA, such an application must be made "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). The SSA argued that the trigger for applying the 30-day requirement would be the end of the 60-day period from the entry of the

court's remand order. The district court, however, found that the remand order was not a final judgment if "the district court retain[s] jurisdiction . . . and plan[s] to enter dispositive sentence four judgmen[t]" after the administrative proceedings were complete, and made a fee award. The court of appeals affirmed.

The Supreme Court emphasized that the EAJA requires the application for attorneys fees to be made within 30 days of "final judgment." Schaefer argued, however, that in a sentence four ruling the court need not enter judgment at the time of remand, but could postpone entry and judgment and retain jurisdiction pending completion of the administrative proceedings on remand. Justice Scalia rejected this argument as "inconsistent with the plain language of sentence four, which authorizes a district court to enter a judgment 'with or without' a remand order, not a remand order 'with or without' a judgment." *Id.* at 297.

Indeed: "Immediate entry of judgment (as opposed to entry of judgment after post-remand agency proceedings have been completed and their results filed with the court) is in fact the principal feature that distinguishes a sentence-four remand from a sentence-six remand." *Id.* At the time, Sentence six provided as follows:

> The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

Id. at 297, n.2.

Schaefer relied on *Sullivan v. Hudson*, 490 U.S. 877 (1989), holding that under the EAJA the fee award may include fees in connection with further proceedings before SSA. In that case, the district court said it was retaining jurisdiction for such a potential award. But in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), the Court "made clear . . . that th[e] retention of jurisdiction . . . was error . . . and a sentence-four remand order '*terminate[s]* the civil action' seeking judicial review of the Secretary's final decision." 509 U.S. at 299. "We therefore do not consider the holding of *Hudson* binding as to sentence-four remands that are ordered (as they should be) without retention of jurisdiction." *Id.* It added in a footnote that "*Hudson* remains good law as applied to remands ordered pursuant to sentence six." *Id.* n.4.

Nonetheless, the Court also held that the appeal in Schaeffer's case was timely because the district court had not entered a judgment as a separate document as required by Rule 58, meaning that the remand judgment remained appealable at the time Schaefer applied for an EAJA fee award, making the application timely under the EAJA. So the award of fees was upheld.

Justice Stevens (joined by Justice Blackmun) concurred in the judgment upholding the award of fees, but rejected the majority's reasoning because the EAJA permits an award only to a "prevailing party," so "it makes little sense to start the 30-day EAJA clock running before a claimant even knows whether he or she will be a 'prevailing party' under EAJA by securing benefits on remand." *Id.* at 304. He also rejected the "major premise" underlying the Court's decision "that there is a sharp distinction, for purposes of the EAJA, between remands ordered pursuant to sentence four and sentence six of 42 U.S.C. §405(g)." *Id.* at 305.

Though *Schaefer* has been cited in more than 7,000 decisions since it was decided, it does not appear that the Supreme Court has addressed these issues again. Under the circumstances, caution is indicated before adopting a timing rule applicable to fee awards under § 406(b)(1)(A), which provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation a reasonable fee for such representation, not in excess of 25 percent of the total past due benefits to which the claimant is entitled by reason of such judgment . . . .

As with the EAJA, it would seem difficult for the court to determine the "past due benefits to which the claimant is entitled by reason of such judgment" until the further proceedings before the SSA are completed. But under *Schaeffer*, it appears that (at least for EAJA purposes) a sentence-four remand order is a judgment. And *Finkelstein* seemingly means that the court cannot retain jurisdiction to address fees after remanding under sentence four.

Nevertheless, if it seems worthwhile, it may be possible to obviate the timing impact of Rule 54(d)(2)(B) as an additional Supplemental Rule 9:

> **Rule 9. Attorney fee award under § 406(b).**
>
> In its judgment remanding to the Commissioner, the court may[, without regard to Rule 62(d)(2)(B),] {notwithstanding Rule 62(d)(2)(B),} retain jurisdiction to permit plaintiff to [move] {apply} for an attorney fee award under 42 U.S.C. § 406(b) within __ days of the [final decision of the Commissioner] {final notice of the award sent to plaintiffs' counsel} after the remand.

The foregoing is a very tentative draft. Whether retention of jurisdiction is really valid with regard to a sentence-four remand remains uncertain. Recommending that district courts disregard Rule 58 when they want to do so seems to invite a violation of the Civil Rules. The draft is focused only on changing the time limits for a motion for an attorney fee award. Rule 54(d)(2)(B) refers to a motion, not an application. Rule 7(b)(1) says requests to the court for an order must be made by motion.

The draft speaks of the "final decision" of the Commissioner because that is the term used in the Supplemental Rules. See Supplemental Rule 2(b)(1)(B), requiring that the complaint "identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision." As noted in braces, the original proposal by SSA used "final notice of the award sent to plaintiff's counsel."

The SSA proposal and Judge Barksdale's M.D. Fla. local rule both contain specifics about that the moving party ought to provide in support of the motion. It is not clear why the procedures of Rule 54(d)(2) need elaboration, and Rule 54(d)(2)(D) authorizes local rules for resolving fee-related issues. It is not clear why more is needed in a national rule, and could be that some parties might regard some features to afford them an advantage. The problem to be solved is a timing problem, not a content problem.

If this task is undertaken, it will probably be important for the Advisory Committee to become better educated about the details of § 406(b) fee awards.

From: Patty Barksdale
To: RulesCommittee Secretary
Cc: Julie Wilson
Subject: Suggestion for Social Security Supplement Rules
Date: Monday, April 24, 2023 8:54:08 AM

Hello, Ms. Wilson.

I hope this email finds you well.

I present for consideration an addition to the new social security supplemental rules on the timing of a motion for attorney's fees under 42 U.S.C. § 406(b).

As background, for representation during court proceedings, 42 U.S.C. § 406(b) (disability insurance benefits) and 42 U.S.C. § 1383(d)(2) (supplemental security income) provide that an attorney who obtains remand may petition for attorney's fees incurred during the court proceeding, and the court, as part of its judgment under 42 U.S.C. § 405(g) or 42 U.S.C. § 1383(c)(3), may allow reasonable fees not exceeding 25 percent of past-due benefits. *Bergen v. Comm'r of Soc. Sec.*, 454 F.3d 1273, 1275–77 (11th Cir. 2006). The fee statutes do not displace contingency-fee agreements within the statutory ceiling. *Gisbrecht v. Barnhart*, 535 U.S. 789, 793 (2002).

Federal Rule of Civil Procedure 54(d)(2)(B) requires a party to move for attorney's fees no later than 14 days after the entry of judgment.

In *Bergen*, the Eleventh Circuit held the 14-day deadline in Rule 54(d)(2)(B) applies to motions for attorney's fees under § 406(b) and § 1383(d)(2). But recognizing that the amount of fees under a contingency arrangement is not established until long after remand (once the amount of past-due benefits is determined), the Eleventh Circuit suggested a "best practice"; specifically, for a plaintiff to request, and a district court to include in the remand judgment, a statement that attorney's fees may be applied for within a specified time after the Commissioner's determination of past-due benefits. *Bergen*, 454 F.3d at 1278 n.2.

The Eleventh Circuit later acknowledged that "best practice" was not a "universally workable solution" and suggested another solution:

> Perhaps another vehicle for creating some much needed certainty in this area of the law is for the district courts to fashion a general order or a local rule permitting district-wide application of a universal process for seeking fees under these unique circumstance. It is our hope the district courts, in doing so, will keep in mind Congress's intent behind § 406(b), to encourage attorneys to represent Social Security claimants.

Blitch v. Astrue, 261 F. App'x 241, 242 n.1 (11th Cir. 2008). From there, disparate local rules or administrative orders attempted to create a best practice. Other circuits have similarly struggled with the issue.

Now that supplemental rules for social security cases are in place, a universal rule regarding the timing of a § 406(b) fee motion appears warranted. Making the timing universal would accord with the reasoning behind the new supplemental rules for social security cases. No reason for local variations is apparent.

The Middle District of Florida is working on revisions to its local rules, and in the absence of a rule in the supplemental rules, is considering the following local rule to address the issue.

> (e) ATTORNEY'S FEE IN A SOCIAL SECURITY CASE AFTER REMAND. No later than fourteen days after receipt of a "close-out" letter, a lawyer requesting an attorney's fee, payable from withheld benefits, must move for the fee and include in the motion:
>
> (1) the agency letter specifying the withheld benefits,
>
> (2) any contingency fee agreement, and
>
> (3) proof that the proposed fee is reasonable.

Thank you for considering this issue.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202

TAB 18

18. Rule 30(b)(6) – 23-CV-I

Submission 23-CV-I, from William D. Sanders, proposes an amendment to Rule 30(b)(6):

> **(6)** ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, an association, a governmental agency, or other entity and must describe with reasonable particularity the matter for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. <u>As part of deponent's duty to confer in "good faith," it shall identify the witness or witnesses who will testify as to each of the matters for which testimony is sought in the Notice of Deposition at least seven days prior to the deposition. Such identification shall include the name and business address of the witness, and position held within the deponent organization.</u> This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

In the same vein, Mr. Sanders also proposes adding a new sub-paragraph to Rule 33(a):

> **(3)** <u>An interrogatory may inquire as the identification of any witness for whom a deponent is required to make a designation for testimony pursuant to a Notice of Deposition issued pursuant to Rule 30(b)(6) and the time for response to such interrogatory shall be governed by the time for such identification pursuant to Rule 30(b)(6).</u>

As Mr. Sanders recognizes, this set of issues were addressed in detail during the consideration of the Rule 30(b)(6) amendments that went into effect in 2020. He regards his proposal as plugging "a gap in the rule." Suitable treatment of that concern requires considerable attention to the evolution and careful consideration of the 2020 amendment. In fact, the published amendment proposal had something Mr. Sanders would likely have approved. But after very extensive public comment that was withdrawn by the Rule 30(b)(6) Subcommittee. Then the issues were discussed at great length during the Advisory Committee's April 2019 meeting, extending over two days. The minutes of that extensive discussion are reproduced below. It may well be that the current Committee would come out differently, but it is difficult to regard the actual 2019 outcome as resulting from inattention.

The Advisory Committee still includes members who were involved in the consideration of Rule 30(b)(6) leading up to the Spring 2019 meeting – Judge Rosenberg, Judge Jordan, Joseph Sellers, Ariana Tadler, Helen Witt, and Dean Spencer. At least for them, this discussion revisits recent business. The point of this presentation, however, is to show that the Advisory Committee (and its Rule 30(b)(6) Subcommittee chaired by Judge Joan Ericksen and including Judge Jordan

and Mr. Sellers) spent a lot of effort considering kindred issues and eventually hit on the compromise amendment that went into effect in 2020.

Perhaps it is time to revisit these issues, but doing so should occur with eyes open about the efforts of the recent past. Perhaps experience in the two plus years since the 2020 amendments went into effect warrants taking up this rule again. But it may better to recognize that Mr. Sanders raises important issues, but also that the Advisory Committee has recently spent a very large amount of time and energy on very similar ideas.

A further note is that the Rule 33(a)(3) suggestion seems to present serious timing issues, to the extent it seems to be triggered by the service of a Rule 30(b)(6) notice, and that rule does not impose a 30-day limit on response, as does Rule 33. Rule 30(b)(1) requires only "reasonable notice" without specifying a number of days.

As a summary, one could begin with cartoonish versions of what might be called the contending objections to existing 30(b)(6) practice when the Rule 30(b)(6) Subcommittee set to work: For simplicity's sake, we can consider them "plaintiff" and "defendant" views. Either side can use the rule, but it seems that the plaintiff side does so more frequently and the defense side most frequently is on the receiving end. Here are the cartoons:

> Plaintiff view: Routinely corporate defendants send people to the deposition who do not know what they are supposed to testify about and have no knowledge about any or most of the matters on which testimony is sought. The practice of "bandying" – hiding behind the ignorance of corporate employee A, B, and C while the plaintiff tries to find the "right" person has continued despite the goal the rulemakers had of ending it in adopting 30(b)(6) – continued despite the adopting of 30(b)(6).

> Defense view: Plaintiffs routinely abuse the rule by submitting long lists of broadly-worded categories having only minimal relevance to the case (if that) and then surprise well-prepared witnesses with tangential inquiries, later contending that the corporation is "bound" by the witness's testimony that she has no knowledge on the subject and forbidden to offer evidence on the topic. Any effort to limit our choice whom to designate to testify on the organization's behalf undermines the rights of the organization; if plaintiffs want to take depositions of specific people they can do so, but those people do not "bind" the organization.

After a considerable amount of discussion and meeting with bar groups, the Advisory Committee ultimately proposed a preliminary draft that was published for public comment in August 2018:

> **(6)** ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must ~~then~~ designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena

is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

The public comment period brought much commentary. 25 witnesses testified at a hearing in Phoenix, and 55 at a hearing in Washington, D.C. More than 1780 written comments were received. It is difficult to summarize all those submissions briefly, but one major debate was about the proposed requirement that the organization confer about which person it would designate. "Defense" side witnesses repeatedly stressed that the organization has an unfettered choice whom to designate, and that this designation sometimes must be changed at the last moment, either due to illness or some unforeseen development affecting the witness's ability to testify at the appointed time and place. "Plaintiff" side witnesses stressed that they too often found that the designated witnesses lacked familiarity with critical matters, sometimes only after traveling along distance to attend the deposition.

After the public comment ended, the 30(b)(6) Subcommittee met again and carefully reviewed the input it has received. Notes of that meeting are at pp. 115-23 of the agenda book for the April 2019 meeting. That discussion led to a consensus to revise the published proposal in three respects:

(1) The requirement that the organization confer about the identity of its representative was deleted. The Subcommittee was persuaded that a mandatory requirement that the organization confer "in good faith" about the identity of the representative could encroach on the organization's recognized right to pick its witness.

(2) The phrase "continue as necessary" was also deleted as representing an intrusive overlay suggesting unduly extended conversations.

(3) The requirement that the conference address "the number and description of" the matters for examination was removed. Much debate had occurred about imposing a numerical limit on matters for examination, and during the public comment period there was strong objection to an abstract number of matters. To the extent including this factor would matter, it might result in broader description of matters for examination, which was contrary to the thrust of the overall amendment.

But because requiring advance notice of the identity of the organization's representative received much support during the public comment period, the Subcommittee also presented an alternative approach to the full Committee at the April 2019 meeting. Alternative 2 was as follows:

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity, ~~and~~ must describe with

reasonable particularity the matters for examination, and must give at least 30 days notice of the deposition. The named organization must ~~then~~ designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf~~; and it may set out the matters on which each person designated will testify~~. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. No fewer than [7] {5} [3] days before the deposition, the organization must identify the person or persons It has designated by name and, if it has designated more than one person, set out the matters on which each person will testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Alternative 2 is not exactly the same as what Mr. Sanders proposes, but it addresses the same basic concerns. During the April 2019 two-day meeting of the Advisory Committee, there was very extensive discussion of these issues, and the eventual decision was not to pursue Alternative 2. The discussion is reflected in the minutes of that meeting:

Minutes of Advisory Committee meeting
April 2-3, 2019, San Antonio, TX
Rule 30(b)(6)

Judge Bates introduced the Rule 30(b)(6) Subcommittee Report by suggesting that it probably will prove to be the major item for discussion at this meeting. The proposal to require a conference of the noticing party and the deponent about a Rule 30(b)(6) deposition of an organization was published last August. Hearings were held this January and February, drawing some 80 witnesses. Reporter Marcus records a count of 1,780 written comments; many of the comments were repetitive — they did not reflect 1,780 different viewpoints.

The Subcommittee has recommended revisions of the published proposal in response to the testimony and comments. They recommend that the amended rule continue to require a conference about the matters for examination. But they also recommend deleting the proposed requirement to confer about the identity of the witnesses to appear for the organization, and to delete the requirement to confer about the number of matters for examination. Related changes also are recommended.

The Subcommittee also advances, without a recommendation either way, an alternative that would add a requirement that 30-days notice be given of a Rule 30(b)(6) deposition, and that some number of days before the deposition the organization name the witnesses who will appear.

Judge Ericksen delivered the Rule 30(b)(6) Subcommittee Report. She began by noting that "the hearings were very helpful." They, and the written comments, led the Subcommittee to recommend revisions of the published draft. The Subcommittee is unanimously behind the recommended revisions. They are solid. With these revisions, the Subcommittee recommends that the Committee recommend adoption of the proposal. It also presents two possible alternative

additions for consideration, without recommendation. The most "vociferous" comments addressed the published proposal's requirement that the conference include discussion of the identity of the persons who would appear as witnesses for the organization. Everyone agrees that the organization retains sole discretion to designate who its witnesses will be. What, then, is the point of conferring? There also was some concern that knowing the identity of the witnesses would lead to the misuse of social media research to turn the deposition into a personal deposition, not an organization deposition.

The testimony and comments also expressed concern about requiring discussion of the number of matters for examination. Many suggested that if the number of matters described for examination is reduced, the matters will be described with greater breadth. Broad descriptions, even if not vague, make it difficult to focus witness preparation and to conduct the deposition without disagreements. The Subcommittee long since abandoned any idea of prescribing a numerical limit on the number of matters for examination. Requiring discussion of the number could lead some lawyers to assert an implied right to limit the number.

Withdrawal of the requirement to confer about the identity of the witnesses led to a recommendation to withdraw the words that the parties confer, "continuing as necessary." Those words were inserted because it was recognized that an organization cannot determine who its witnesses will be until it knows what the matters for examination will be. They are no longer needed for this purpose, and could become an occasion for mischief. To be sure, conferring still may need to be continued in stages to satisfy the good-faith requirement, but a careful balance is needed when adding possible points for strategic posturing. The constant precept to do no harm supports deletion of "continuing as necessary."

Judge Ericksen went on to describe the two alternatives presented by the Subcommittee without recommendation. They grow out of deliberations about the withdrawn recommendation to require discussion of the identity of the witnesses to be designated by the organization. Rather than discuss identity, the organization could be required to name them at some interval before the time designated for the deposition. To make this work, it seems necessary to set a minimum notice period. The alternative draft therefore would add a requirement that the notice of a Rule 30(b)(6) deposition be given at least 30 days before the designated time. The time for the organization to name the designated witnesses could be 7, or 5, or 3 days before the deposition — those alternatives are offered as illustrations without suggesting a choice among them. One important reason for identifying the designated witnesses is that the organization may designate more than one, assigning them to different matters for examination. The party taking the deposition should know what matters will be addressed by each witness as it prepares to depose them.

Alternative 2A reacts to the fears that advance notice of witness names will foster misuse by requiring that the organization specify, without naming them, which witness will address which matters for examination. The Subcommittee believes that if either version of Alternative 2 comes to be recommended, it should be published for comment. Much testimony and many comments addressed the advantages and disadvantages of requiring that the organization's witnesses be named in advance, perhaps in such detail that the Committee would not likely learn anything more by republication. But there has been no opportunity to address the advance notice requirements.

Professor Marcus added the suggestion that it might be better to defer discussing the number of days set for the notice provisions until there is at least a tentative Committee position on Alternatives 2 and 2A. Judge Bates expressed the Committee's thanks to Judge Ericksen, Professor Marcus, and the Subcommittee. He noted that some comments have been addressed to the Subcommittee Report as it appears in the agenda book for this meeting. Lawyers for Civil Justice supports adoption of the revised proposal, adding a 30-day notice requirement but not adding a requirement that witnesses be named before the deposition. They urge that republication would not be required. Several groups support Alternative 2, requiring the organization to name its designated witnesses before the deposition, and supporting the 7-day period.

Judge Bates also noted that the limited advance allocation of unnamed witnesses to different matters for examination set out in Alternative 2A might, by example, discourage organizations that now name witnesses in advance from continuing to do so. Several comments have said that the best practice of the best lawyers now provides names in advance. It would be unwise to discourage it. Resistance to advance naming of witnesses arises from distrust of the not-so-good lawyers who may misuse the names for social media research that supports efforts to convert the occasion from an organization deposition into a personal deposition of the witness. Judge Bates also suggested that the prospect of republication should not deter consideration of the advance-naming proposal. The Committee should generate the best rule possible. The notice provisions might well require republication. If so, so be it. The fear of bad practices that seek to convert the deposition to a personal deposition are offset by the advantages of advance identification. Among the advantages are those that arise when the same witness has previously testified for the organization on the same matters — the transcript may be available to support better focus in taking the deposition, and it may be possible to select documents shown to be familiar to the witness.

Members of the Subcommittee then provided further views. One Subcommittee member was "not a proponent of Alternative 2." Naming the witness might lead to gamesmanship. Questions may be prepared that seek the witness's personal information, not information the organization has had an opportunity to prepare the witness to understand and relate accurately. The questions may elicit "I don't know" responses, creating a false appearance of inadequate preparation.

Another Subcommittee member offered some support for requiring advance notice of witness names. Without this requirement, the direction to confer about the matters for examination "is pretty weak sauce." The fear that requiring advance notice will deter lawyers from continuing their present best practices — for example by shortening the period of advance notice down to the required minimum — seems overdrawn. The less we require, the more room there will remain for controversy about the desirable more.

Still another Subcommittee member said that Subcommittee discussions had been robust. "Concerns were expressed on both sides of the 'v.'" about requiring advance notice of witness names. The purpose of discovery is to provide information for the efficient and just resolution of litigation. Advance disclosure of witness identities can advance that goal. Yes, there is an opportunity to abuse social media information and bleeding over into making it an individual deposition. But good lawyers can handle these extreme situations when they occur. The alternative that would simply allocate unidentified witnesses to different subsets of the matters for

examination is interesting, but it does not add enough — it does not advance preparation for inquiring into each matter.

A Committee member began the all-Committee discussion by suggesting that the rule should be guided by, and should reinforce, best practices. Testimony at the February hearing revealed that some lawyers are reluctant to reveal witness identity in advance. "That gave me pause." But identification — not conferring about it — is a good thing. "Social media are part of how we live today." Abusive questioning can be managed. And advance identification can be useful if the witness has testified for the organization on other occasions. "I support Alternative 2."

Another Committee member "inclined" toward the revised version of the published proposal. "Rule 30(b)(6) is a unique tool to get information from an organization." It is not designed to get individual knowledge. "The overlap between corporate and personal is a problem now," creating problems in sorting out what is "binding" on the organization. And forgoing a requirement of advance naming can lead to desirable trading — for example, an agreement to provide names in advance in return for identification of the documents that will be used in examining the witness. We should be careful to not get in the way of current best practices.

This initial discussion was punctuated by a reminder that if Alternative 2 is approved, it will be for republication. If views continue to be divided, republication will provide an opportunity to gather more information. The 30-day notice provision won support as something that could be added to the original proposal. "You need it to prepare the witness." Judge Ericksen responded that this view had been expressed by many organizations. But the Subcommittee is not recommending it. The 30-day notice provision was inserted in Alternatives 2 and 2A — remember that the Subcommittee advanced them for discussion without making any recommendation — because it seemed a necessary support for a provision requiring disclosure of witness names at any interval before the time for the deposition.

Another Committee member offered support for Alternative 2. The downside that advance identification of the organization's witness will lead to social media searches for personal information does not seem much entrenched by advance notice. Millennial lawyers can undertake a comprehensive search even if the witness is identified only at the moment the deposition begins. Even for the Subcommittee's recommended revision of the published rule, the draft Committee Note, p. 105, lines 193-194 of the agenda materials, suggests that it may be productive to discuss at the conference the numbers of witnesses and the matters on which they will testify. Is this a tentative backdoor approach to embracing Alternative 2?

Judge Ericksen responded that "the mandated conference could include lots of things. We hear of many things that are discussed now." Professor Marcus added that there is a legitimate concern about "legislating by Committee Note," but this is a pretty soft sentence. It says only that "it may be productive" to discuss a few suggested topics. It does not support any argument that there is a right to confer about them. These responses were accepted as fair.

The Department of Justice does not favor identification of witnesses before the deposition. The organization is the deponent, not the individual. The deposition is not about the individual witness. Better practice is to have the parties frame the matters for examination, but not to name

the witnesses. A Committee member went to the Notes on the February 22 Subcommittee conference call, pointing to lines 692-694 at page 120 of the agenda materials. That sentence observed that it might be useful to add to the Committee Note for the recommended amendment a statement about the value of specifying which topics the various witnesses would address as part of the conference about the matters for examination. There are concerns about the need to change witnesses at the last minute before the deposition, and about misuse of the fruits of social media research, but why not at least suggest in the Committee Note that it may be helpful to discuss which matters which witness will address? The response was that this suggestion in fact appears in the draft note, p. 105 at line 194. But the rejoinder was that at this point the Note might refer to discussing the identity of the witnesses. Another Committee member agreed — if it is best practice to discuss the identity of witnesses, why not refer to it in the Note?

The characterization of best practice was questioned. The hearings and comments repeatedly emphasized that the best lawyers regard discussion of witness identity as the best practice "when they choose to do it." It is the best practice in the right circumstances. "We should not strip professional judgment out of what is best practice." It would not be the end of the world to adopt Alternative 2 and require advance notification of witness identity, but that is not the same as hinting that best practice, even if not rule text, requires discussion of witness identity. We should remember that the possibility of requiring advance naming of witnesses arose during the January hearing as Committee members raised it as one possible response to the difficulties of requiring that the conference include discussion of identity. Another Committee member noted that advance identification of witnesses was not included among the many proposed Rule 30(b)(6) amendments that the Subcommittee considered and rejected, as described beginning at line 738 of page 121 of the agenda materials. It is a new-found issue. Yet another Committee member agreed. Advance identification of witnesses arose as an alternative to the many protests about requiring discussion of witness identity.

Broader doubts were raised about recommending any Rule 30(b)(6) amendments at all. There is a good bit of anecdotal information about problems in some cases, but it is not clear that this is enough to support any amendments. The revised proposal recommended by the Subcommittee could lead to gamesmanship. The proposed rule text direction to confer about the matters for examination does not embrace all of the six things the Committee Note recommends for discussion. The rule does not require discussion of those things. They should be put into rule text, or removed from the Note.

These doubts expanded to consider the discussion of "good faith" in the draft Note. Even after deleting "continuing as necessary" from the proposed rule text, the Note says that a single conference may not suffice. It also says that agreement is not required. So what does good faith require — when can it be established without reaching agreement? The Note seems to suggest

that if the parties fail to agree, they should ask the court for guidance. Why not rely on Rule 26(c) without revising Rule 30(b)(6)? A motion for a protective order must be preceded by conferring or attempting to confer in good faith, accomplishing the same purpose — a conference among those affected.

Judge Ericksen agreed that the Note does speak to matters not included in the rule text. But the Note provides insight into what can be accomplished in conferring about the matters for

examination, and to encourage it. "It's hard to convey the breadth of what can be ironed out" by conferring. And requiring a conference is useful — witnesses have told us that they attempt to initiate discussion of the matters for examination and are rebuffed. Professor Marcus noted that generalized discussions of what constitutes "good faith" are always possible. But good-faith conferring is already required in other discovery rules, see Rule 26(c) and 37(a)(1), and has worked. We can give examples of good practices in the Committee Note, even if some of them extend beyond the obligation to discuss in good faith the matters for examination. This is not legislating by Committee Note, but simply offering observations about what might happen during the conference. It is better to discuss things in advance than during a partially failed deposition.

Professor Coquillette agreed that a Committee Note cannot add to, or withdraw from, the rule text. But this draft Note does not run afoul of that precept. This discussion led to the suggestion that perhaps the Committee Note should add to the second paragraph that appears on p. 105 the express statement that appears in the third paragraph, recognizing that the opportunity to discuss does not imply any obligation to agree. Moving back to the recommended rule text, it was noted that the Federal Magistrate Judges' comment on the published proposal observed that Rule 30(b)(6) raises issues that are often litigated. They think that a rule will help — indeed they support the published proposal that requires conferring about the choice of witnesses.

A different perspective on the recommended rule text was offered. The MDL Subcommittee continually encounters the question whether any MDL-specific rules should be detailed or general. The need to preserve wide margins of discretion is often expressed. The recommended revision of the published proposal is more open-ended than the Alternative 2 requirement to name witnesses in advance of the deposition, and to give at least 30 days notice of the deposition. These concerns suggest that it is safer to stick with the less aggressive changes in Alternative 1.

More hesitating support was offered for Alternative 2. The argument that it will promote gamesmanship does not seem persuasive at first. But caution is warranted by the observation that naming the witnesses before the deposition date is the best practice only in the right circumstances. Still, there are obvious advantages in advance naming.

A counter concern was offered. It often happens that just before the deposition "you realize the first chosen witness won't work." If you change to a different witness, the noticing party will take that as a signal to take a personal deposition of the first-named witness. That is not harmless — the withdrawn witness may have no personal knowledge, but have been instructed in organization knowledge to some uncertain extent and with uncertain results. When subjected to an individual deposition, the witness may get it garbled, confusing a distorted version of organization information with personal knowledge. Beyond that, Rule 26(c) already includes an obligation to confer, or to attempt to confer. And the recommended proposal does not state any consequences for failing to agree.

The concern about the last-minute need to change witnesses was addressed by asking whether the risk would be reduced by adopting a brief period for providing the names. Perhaps the 3-day alternative in the draft, or even less — 2 days, or even 1. The distinction between deposing the organization and a personal deposition of the same witness was noted again. The two should not be conflated, even when the witness is a fact witness as well as an organization's designated

witness. The confusion can be aggravated when the witness is named in advance. The confusion can be dispelled in part by scheduling back-to-back depositions, one confined to deposing the organization through the individual and the other to deposing the individual, but the lines are not always observed.

A Committee member suggested that requiring that witnesses be named in advance would inevitably draw the parties into discussing who the witness should be. The noticing party will say that it is the wrong person, we need to discuss the choice. There is an argument that requiring advance naming is a step back toward requiring the parties to confer about the choice. Another member agreed that requiring names can lead to talking about the choice, but Alternative 2 does not require the organization to confer. The organization has the prerogative to refuse to discuss its choice. Professor Marcus observed that the sequence of steps appears clear enough, but something still more explicit could be added to the Note: First, there must be at least 30 days notice. Then, before or promptly after the notice, the parties must confer about the matters for examination. Then, having settled the matters for examination however well the conference permits, the organization chooses its witness or witnesses and names them at the required interval before the deposition.

Discussion returned to the question whether Rule 30(b)(6) should be amended at all. A judge said that "this may be the most used, most valuable discovery tool. It is used in almost every case. We do not want to weaken it." The Committee studied it intensely twelve years ago. The complaints, then as now, went to both sides. Organizations protested that there were too many possible matters for examination. Deposing parties complained that organization witnesses were not adequately prepared. The best lawyers confer before the deposition now, and the most we think we can do by amending the rule is to require them to confer. But requiring them to confer has a potential to solve a lot of the problems. "This will not cause the structure to fail." Disputes happen at depositions now, and will continue to occur no matter what.

The same judge added that experience with 30(b)(6) depositions, although some years ago, suggests that it is not necessary to know the name of the organization's witness. The inquiring party has a lot of information from documents. The questions can be asked no matter who the witness is. And there are potential downsides in requiring advance notice of witness names. But if the Committee finds substantial reasons to inquire further, it may be wise to go ahead and republish for comments on witness naming. Another judge agreed with these thoughts. And yet another agreed. Advance naming may upset the balance of what good lawyers do now. Experience as a judge shows frequent encounters with disagreements about the number of matters for examination, but none about the identity of the organization's witnesses.

A different Committee member thought these observations by three judges make sense. But the problem remains with the draft Committee Note for the revised proposal. It seems to expand on what good faith means for discussing issues beyond defining the matters for examination, and to encourage parties to ask the court for guidance.

Another Committee member suggested that a value of conferring about the matters for examination is often to reduce the number. A party can agree to provide the requested information in documents, suggesting that there will be no need for a witness if the inquiring party is satisfied by the documents. As to identifying the organization's witnesses, there have been cases where my

colleagues refuse to provide names as a bargaining tactic to seek tradeoffs. "Gamesmanship happens on both sides." But we would like for more lawyers to follow best practices, and that can be encouraged by establishing them in rule text.

A different judge said that the rule should retain the meet-and-confer requirement. And it is desirable to provide a Committee Note that, in the very beginning, suggests discussion of other topics. The draft Note discussion of good faith, appearing at p. 106 of the agenda materials, "accomplishes a lot." But what about the sentence that suggests the parties seek guidance from the court if they reach an impasse?

Professor Marcus responded that the suggestion about seeking guidance from the court is a suggestion, not a command. It responds to many comments that the rule does not provide any means to resolve disputes when the parties do not reach agreement. A related suggestion appears in the next-to-final paragraph of the draft note, noting that when the parties anticipate the need for Rule 30(b)(6) depositions they may be able to begin planning during the Rule 26(f) conference and in Rule 16 pretrial conferences. All of these suggestions are aimed at avoiding combative positions — "Give me what I want or I'll make a motion." The open-ended suggestion to seek guidance reflects the practice of many judges to entertain discovery disputes without requiring a formal motion.

A judge noted that the note does not tell lawyers they have to go to the court, and, even without this sentence, they know they can seek the court's help. The same observation was extended to the suggestions in the preceding Note paragraph about other matters the parties may find appropriate for discussion. Judge Ericksen added that many magistrate judges and district judges who do discovery disputes report that they like to be available by phone to facilitate discussions without the formality of a motion.

William Hangley reminded the Committee that the letter from active members of the ABA Litigation Section that launched the current Rule 30(b)(6) project noted that the Civil Rules do not provide for anything short of motion practice to resolve disputes. They asked for language like the Note draft, suggesting that the parties "confer" with the court. He further noted that some courts will rule against objections by a party that has not sought a protective order. Counsel often suggest that moving for a protective order is the only way to resolve disputes. "That's a wasteful way of doing it." He added that it is a mistake to think that organizations want to provide a witness whose response is "I do not know." That means another deposition. "We want to produce the most knowledgeable person."

An observer noted that the proposed rule applies to nonparty organizations as well as party organizations. It imposes obligations akin to Rule 45 obligations to produce documents, but it lacks the safety valve remedies in Rule 45(d)(1)(B). Protections are not provided even for nonparties that are not within the jurisdiction of the court where the action is pending. The misuse of social media research when a witness is named in advance is an issue, but so is the ability of the inquiring lawyer to go to the networks of lawyers to find out about the witness's testimony in other cases and use it to shape the deposition.

The drafting of this sentence in the proposed rule text was questioned: "A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving

party." It might be better if the provisions were flipped: "its duty to confer with the serving party and to designate each person who will testify." A different suggestion was to simplify it: "must advise a nonparty organization of these duties." This was resisted by suggesting that it is better to revise current rule text as little as possible, and that "these duties" may not be sufficiently specific. It was agreed that the rule text should spell out the duties, that this is not a point where brevity is a virtue.

Discussion returned to the question whether either alternative version calling for advance notice of witness names should go forward. Experience suggests that there are fewer disputes when people exchange more information. Perhaps further advice should be sought, as from the Federal Magistrate Judges rules committee? Judge Bates suggested that the discussion had moved to a point to support a decision whether to approve the revised Rule 30(b)(6) recommended by the Subcommittee. The draft Committee Note need not be included in the vote. If the proposal is approved, voting can turn to the alternatives that would require advance notice of witness identity, or at least assignment of unnamed witnesses to particular matters for examination. All of the Subcommittee recommended amendment is included in the alternatives, so this path avoids the prospect of approving an alternative and then gutting it. But it does not make sense to approve a recommendation that the Subcommittee proposed amendment be adopted, and also to approve publication for comment of an alternative. Only one proposal for adoption should be made, whether now or after a year's delay for republication.

A motion to recommend adoption of the Subcommittee's proposed amended Rule 30(b)(6), with the style revision noted above, was approved, 12 votes for and 2 votes against. Discussion of Alternatives 2 and 2A began with the suggestion that if republication is approved, the Committee need not choose between the bracketed alternatives that would require 7, or 5, or only 3 days' notice of witness names. Committee practice has included publication of proposals with bracketed alternatives, or even with complete alternative provisions, as a means of stimulating comments on issues that seem likely to benefit from further discussion. A Committee member added that absent any opportunity to address the time for naming or allocating witnesses in comments on the published proposal, it would be a mistake for the Committee to attempt to choose a single time period in a republished proposal. A suggestion to narrow the focus by publishing with only 7- or 3-day alternatives was met by a decision to set out all three alternative periods in brackets.

A motion to approve publication of Alternative 2, including 30-day notice of a Rule 30(b)(6) deposition, advance naming of organization witnesses, and alternative naming times of 7, 5, or 3 days failed, 6 votes for and 9 votes against. A motion to approve publication of Alternative 2A, including notice periods similar to Alternative 2, but requiring only advance designation of which matters for examination would be addressed by which unnamed witnesses failed, 2 votes for and 13 votes against. The first day's discussion of Rule 30(b)(6) concluded with these votes. The questions raised by discussion of the draft Committee Note were carried forward for consideration on the next day of such revisions as might be prepared by the Subcommittee in overnight deliberations.

Deliberations on the Committee Note resumed the next day. Judge Ericksen thanked Judge Goldgar for style suggestions. The revised draft retained the substance of the second paragraph, but with style improvements. The third paragraph was revised to make it clear that it does not suggest there is an obligation to confer about anything other than the matters for examination.

Further style changes were suggested and accepted: "and enable the ~~responding party~~ organization to ~~identify~~ designate and * * *.

The next suggestion was to recognize the value of discussing witness identity: "It may be productive also to discuss * * * the number and identity of witnesses * * *." This suggestion was resisted, in part by offering an analogy to the changes in rule text. The published rule required discussion of the identity of each person the organization will designate to testify, and also discussion of the number of matters for examination. Both of these requirements were deleted from the amendments recommended for adoption. The references to each in the published Committee Note have been deleted. It would be a mistake to bring back a suggestion to discuss witness identity, even though it is a suggestion, not a command. Strong agreement was offered — bringing this back to the Note would seem to retract the revision of the rule text.

The proponent responded that the suggestion is only precatory. And the comments showed that discussing the number of topics can be counterproductive. Efforts to reduce the number lead to increasingly broad and vague descriptions of the matters for examination. Many comments showed that witness identity is often discussed to good effect. A Note suggestion that it may be helpful to discuss witness identity is not likely to add much to the burden of conferring. Putting this in the Note does not imply a suggestion to discuss the number of matters for examination. Another participant agreed that there is no known tendency to interpret a Committee Note discussion of one topic to imply anything about a matter not discussed, much less to draw the implication from a decision to withdraw a provision that appeared in the rule text published for comment. The proponent added that courts do cite Committee deliberations in interpreting rules.

Adding "and identity" of the witnesses was resisted. It would move back toward the published rule and Note that drew 1,780 comments, mostly negative on the requirement to confer about witness identity. Some comments said that this should not be in the Note. Another member agreed with this view. The rule text proposed for adoption does not impose a duty to discuss witness identity.

Adding it to the Note might generate disputes. Another participant added that Committee Notes should not, and do not, give advice on how to practice law. Discussion continued with a question whether it would be wise to delete the entire sentence that enumerates issues that might be discussed. One member answered that it is useful to encourage the good practices identified in the public comments. Another suggested that "We're giving useful advice, based on the public comment process, not telling people how to practice law." Yet another member agreed generally, but opposed adding a suggestion to discuss witness identity. Discussing witness identity was removed from the published rule text for good reasons. A prompt in the Committee Note is not needed to enable discussion of witness identity by parties who wish to do so. The proponent rejoined that the discussion can be productive, and it is useful to remind the parties of its value.

A different part of the draft Committee Note was addressed by asking what it means to advise about seeking guidance from the court if the discussion reaches "an impasse." Professor Marcus replied that this sentence reflects a hope that the parties and the court will have used Rule 16 to establish a procedure for resolving discovery disputes. We could leave it to Rule 26(c) protective order practice, "or to trying to iron it out as a deposition mess."

A reminder in the Note can help. The many suggestions in the 2018 Committee Note for amended Rule 23 provide a useful illustration. Judge Ericksen added that this Note sentence relates to the inability to agree about the matters for examination. Another Committee member observed that lawyers know they can seek the court's guidance on discovery disputes. This sentence comes close to telling lawyers how to practice law. The suggestion to strike the entire sentence illustrating issues that it might be productive to discuss was renewed, along with a suggestion to delete the sentence on seeking court guidance when an impasse is reached. Lawyers will react to these observations in the Note, arguing that the Note says they should discuss these things but they do not want to.

Another participant observed that "impasse" means "can't move forward." It is the organization that will want to take disputes to the court, not the noticing party. Judge Ericksen noted that there had been a lot of pressure to add an express objection procedure to Rule 30(b)(6). Many judges will not hear a dispute about the matters for examination without a Rule 26(c) motion for a protective order. Another participant noted that the comments sought some uniform method for resolving disputes. Some courts refuse to entertain Rule 26(c) motions before the deposition, insisting that disputes be brought to the court only as problems arise during the course of the deposition. The Subcommittee considered adopting an objection procedure and decided not to. The duty to confer expedites the process by starting with the conference that would have to precede any Rule 26(c) motion.

Doubts about the "impasse" sentence were expressed in other terms. One question asked whether it adds anything of value. Another observation suggested that it may hint that there is an objection procedure, and will encourage arguments to the court that a party is not conferring in good faith. This discussion led to a suggestion to delete the Note statement that the obligation to confer in good faith "does not require the parties to reach agreement."

The participant who first asked about the meaning of "impasse" said that the discussion showed that this sentence can be useful to suggest that difficulties can be brought to the court by means short of a formal motion. They might be raised in a status conference, or by other means.

Attention turned to this Note sentence: "The duty to confer continues if needed to fulfill the requirement of good faith." Professor Marcus noted that good-faith conferring requirements appear in Rule 26(c) and Rule 37(a)(1). "Walking out of the room does raise an issue of good faith." The purpose of requiring a conference could be defeated by an approach that automatically accepts "once is enough." But it was rejoined that an earlier sentence already says that the process of conferring may often be iterative. Judge Ericksen agreed to delete the "continues if needed" sentence.

Style suggestions were accepted, adding two words to the list of things it might be productive to discuss: "the number of witnesses and the matters on which each witness will testify * * *." Another accepted suggestion was "The process of discussion ~~will~~ may ~~often~~ be iterative."

The Committee moved to voting on the Committee Note. The first paragraph was accepted without a formal vote. Adding "the" before matters on which each witness will testify was approved by vote, 10 for and 3 against. Adding a suggestion to discuss the identity of witnesses

was rejected by vote, 2 for and 11 against. The Note language suggesting that it might be productive to discuss "the documents the noticing party intends to use during the deposition," not earlier discussed, was challenged. Many comments opposed this practice as interfering with work-product protections.

A motion to delete this suggestion was adopted by vote, 8 for and 5 against. Another part of a sentence was challenged: "The process of conferring will often be iterative, and a single conference may not suffice." A motion to delete the "single conference" clause was adopted by vote, 12 for and 1 against. The sentence stating that the amendment does not require the parties to reach agreement was examined next. A Committee member urged that it is important to say there is no obligation to agree.

And a suggestion to combine this statement with the next sentence about seeking guidance from the court was resisted on the ground that a single sentence would discourage efforts to work things out in favor of running to the court. A motion was made to reorganize the sentence to read: "Consistent with Rule 1, the obligation is to confer in good faith about the matters for examination, but the amendment does not require the parties to reach agreement." The motion was adopted, 10 for and 3 against.

A motion was made to revise the "impasse" sentence" to read: "In some circumstances, it may be desirable to seek guidance from the court." The motion was adopted, 8 for and 5 against.

A motion to strike the Note sentence stating that "The duty to confer continues if needed to fulfill the requirement of good faith" was adopted, 11 for and 1 against. (The Subcommittee Report recommendation to delete the preceding sentence from the Committee Note as published was accepted without discussion. This sentence read: "But the conference process must be completed a reasonable time before the deposition is scheduled to occur.") A motion to adopt the final two paragraphs of the draft Committee Note was adopted, 13 for and 0 against.

* * * * *

It may be that the passage of time or change in Committee membership justify reopening this discussion, but it should be clear that the issues were carefully examined four years ago. The current Discovery Subcommittee was polled, and no member expressed an interest in returning to these issues at this time.

From: William D. Sanders
To: RulesCommittee Secretary
Subject: RE: Rule 30(b)(6)
Date: Thursday, March 16, 2023 10:57:08 AM

Further to my email below and telephone conversation this morning with Staff Attorney Alison Bruff, Esq., I would like the Advisory Committee to formally consider an amendment to Rule 30(b)(6) that would provide as follows with my proposed language highlighted:

"In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. **As part of the deponent's duty to confer in "good faith", it shall identify the witness or witnesses who will testify as to each of the matters for which testimony is sought in the Notice of Deposition at least seven days prior to the deposition. Such identification shall include the name and business address of the witness, and position held within the deponent organization.** This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules."

For "belt and suspenders" purposes, and because interrogatories are often used to inquire as to the identification of "persons with knowledge," etc., I also propose a cognate amendment to Rule 33(a) to add the following as subsection (3):

"**(3). An interrogatory may inquire as to the identification of any witness for whom a deponent is required to make a designation for testimony pursuant to a Notice of Deposition issued pursuant to Rule 30(b)(6) and**

the time for response to such interrogatory shall be governed by the time for such identification pursuant to Rule 30(b)(6).”

Thank you very much for your consideration. Please let me know if you need any further information.

William D. Sanders, Esq.

wsanders@postpolak.com
973.228.9900 x251
973.994.1705 *fax*

From: William D. Sanders
Sent: Wednesday, March 15, 2023 5:59 PM
To: RulesCommittee_Secretary
Subject: Rule 30(b)(6)

I recently noted the following apparent *hiatus* in Rule 30(b)(6) as to the designation of organizational representatives for deposition testimony. I note the Committee’s work in achieving the 2020 Amendments that require a “meet and confer” prior to the deposition. The gap in the Rule that persists, at least in my view, is that there is *no* requirement for the party from whom testimony is sought, or non-party if a subpoena is used, as to *when* the designation of witness/disclosure of her/his identify must actually be made, and such designation should be disclosed, in relation to either the timing of the “meet and confer” session or the actual deposition itself. Simply stated, I do not see a requirement that the identity of the designated witness must be disclosed at *any* time prior to the deposition itself. Was this issue discussed at all during the last ‘cycle’ that produced the 2020 Amendments? In looking at the Advisory Committee Notes and excerpts of its Reports online, I did not see a reference to this specific issue.

If it is worthy of further consideration, please let me know the most appropriate way to place it before the Committee for such. Please feel free to contact me if you have any questions or suggestions. Thank you.

William D. Sanders, Esq.
Counsel

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TAB 19

19. Rule 11 – 23-CV-N

Joseph Leckenby proposes an amendment to Rule 11(c)(1) as follows:

> **(1)** *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may in its discretion impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. However, if Congress has mandated by statute that Rule 11 sanctions be impose[d] for violations of Rule 11(b) which occur in suits brought under Federal statutes, then the court must impose sanctions. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Some background on Rule 11 may be useful in considering the current proposed amendment. Until 1983, the rule was not much noted, but in that year it was amended to broaden the availability of sanctions. The Third Circuit commissioned a book-length study of the effects of the amended rule. See Rule 11 in Transition (S. Burbank, ed., 1989). John Frank, a former member of the Advisory Committee, called the 1983 amendment "the most unfortunate exercise in rulemaking at least of the last 20 years." John Frank, The Rules of Civil Procedure – Agenda for Reform, 137 U. Pa. L. Rev. 1883, 1886 (1989). Judge Schwarzer wrote in 1988 that "Rule 11 has become a significant factor in civil litigation, with an impact that has likely exceeded its drafters' expectations." William Schwarzer, Rule 11 Revisited, 101 Harv. L. Rev. 1013 (1988).

In 1990, the Advisory Committee issued an unprecedented "call" for comments on whether the rule should be amended. *See* Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, 131 F.R.D. 335 (1990). The FJC did an extensive study of the operation of the rule in five districts. *See* Elizabeth Wiggins, et al., The Federal Judicial Center's Study of Rule 11, FJC Directions, Nov. 1991. After those comments were received, the Advisory Committee recommended revising the rule but still providing that the court "shall" impose sanctions for a violation of Rule 11(b). But the Judicial Conference changed "shall" to "may". *See* Richard Marcus, Of Babies and Bathwater, 59 Brooklyn L. Rev. 761, 799 n.161. Justice Scalia dissented, stating that the amendments to the rule rendered it "toothless." *See* 146 F.R.D. 401, 507 (1993).

Some, at least, seemed satisfied to have some of the rule's teeth drawn. *See*, *e.g.*, *Stove Builder International, Inc. v. GHP Group, Inc.*, 280 F.R.D. 402, 403 (N.D. Ill. 2012) (referring to the "fang-drawing 1993 amendments"). Others have not applauded. From time to time, bills are introduced in Congress to undo some of the changes made to the rule in 1993. See, e.g., Lawsuit Abuse Reduction Act of 2017) (acronym LARA – not an invocation of Dr. Zhivago) (passed by the House in March, 2017, but not passed by the Senate).

This proposal does not seek to change the rule generally, but only in a specific way – by requiring district courts to impose sanctions when "Congress has mandated by statute that Rule 11 sanctions be impose[d] for violations of Rule 11(b) which occur in actions brought under Federal statutes." The submission invokes Public Law 117-362 (Jan. 5, 2023), but that seems off point – it is the Bill Emerson Good Samaritan Food Donation Act.

An example that does seem on point is the Private Securities Litigation Reform Act, as illustrated by *Scott v. Vantage Corp.*, 64 F.4th 462 (3d Cir. 2023). In the PSLRA, Congress sought to "curb frivolous, lawyer-driven litigation" in part by modifying how the courts should apply Rule 11. *Id.* at 467. Thus, it directs the courts to include specific findings regarding compliance with Rule 11(b) and directs that if it finds a violation the court "shall impose [Rule 11] sanctions." It also creates a presumption that an appropriate sanction is imposing on the offending party a reasonable award of attorneys' fees, but only if the court finds that the violation of the rule was a "substantial failure" to comply with the rule. *Id.* at 467-68.

In *Scott*, the district court granted defendants' motion for summary judgment, and plaintiff appealed, but the district court held in abeyance defendants' Rule 11 motion. After the court of appeals affirmed the grant of summary judgment, the district court determined that plaintiffs did not violate Rule 11(b) in connection with their Rule 10b-5 claim, which was the "heart of the complaint," but that they had violated the rule in making claims about forbidden trading in unregistered securities. Given that the 10b-5 claim was central, the district court declined to impose sanctions on the ground that the rule violation was not "a substantial violation under the PSLRA." *Id.* at 471.

After considering the analysis of the PSLRA adopted by the Second and Fourth Circuits, the Third Circuit concluded that the district court did not abuse its discretion in declining to make an award of attorney's fees as a sanction. *Id.* at 475-76. But the court also held that the district court did abuse its discretion in declining to impose any sanction "[b]ecause the text of the PSLRA makes the imposition of sanctions mandatory after a court determines that a party violated Rule 11." *Id.* at 476. Thus (*id.* at 477):

> On remand, the District Court is instructed to impose, in its discretion, some form of sanction against Plaintiffs in accordance with Rule 11. We take no position on what a proper sanction would be here, acknowledging as we must that the District Court is better situated to make that determination. We do note that the available options run the gamut from an award of attorneys' fees – as [defendant] initially requested – to "a written order admonishing by name the individual lawyers responsible for the Rule 11(b) violations the district court identified in [Plaintiff's] complaint."

The submission emphasizes the separation of powers underlying our governmental structure. It seems that the case cited and described above adheres to that structure. Congress included special provisions about Rule 11 in the PSLRA, and the court of appeals in this case (and seemingly in the Second and Fourth Circuit cases discussed by the Third Circuit) has adhered to that structure. So the illustrative case seems to show that the proposed amendment is not needed.

And the submission does not suggest what other statutes than PSLRA would qualify as mandating that Rule 11 sanctions be imposed. There may be none. The one bill that has arisen on occasion – LARA – has not been limited (as the proposed amendment is limited) to claims based on federal statutes.

It is recommended that this submission be dropped from the agenda.

Letter Requesting a Change to Rule 11

To: H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
From: Joseph Leckenby
Date: May 10, 2023
Re: Proposed change to USCS Fed Rules Civ Proc R 11(c)(1)

Dear Secretary H. Thomas Byron III,

I, a private citizen of the United States of America, am submitting a proposed change to USCS Fed Rules Civ Proc R 11(c)(1). *See* Appendix A.

The United States of America is a nation built upon checks and balances, with each of three branches of government working hard to ensure that its two sister branches do not wield undue control over the government. The idea of checks and balances has been cited in several court cases. *See Bond v. U.S.*, 564 U.S. 211, 223 (2011) (noting that individuals, too, are protected by the operations of separation of powers and checks and balances); *Carrick v. Locke*, 125 Wash. 2d 129, 135 (1994) (stating "The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government."); and *Ralston v. State*, 522 P.3d 95, 101 (Wash. Ct. App. 2022) (stating "good government is better assured by allowing the branches to check each other's exercise of powers in certain circumstances in order to stop a single branch from overreaching.")

As one of the three branches of government, Congress has tried to prevent frivolous lawsuits. Attempting to curb abusive class action lawsuits, in 1995, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA). The PSLRA mandates that Rule 11 sanctions be issued for violations that occur in actions brought under the statute. *See* 15 U.S.C. § 78u-4-(c)(2) (LexisNexis, Lexis Advance through Public Law 117-362, approved January 5, 2023) (stating in part "If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b)… the court **shall** impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure.") (emphasis added). In the case of *Scott v. Vantage Corp.*, 64 F.4th 462 (3d Cir. 2023), the court held that a court must impose Rule 11 sanctions if a statute requires it to do so. *Id.* (Holding that a district court abused its discretion when it did not impose sanctions as the PSLRA required it to do).

However, USCS Fed Rules Civ Proc R 11(c)(1) does not explicitly a court to impose Rule 11 sanctions if a statute requires it to do so. *See Id.* (using the permissive word "may"). My proposed amendment makes it clear that congress has the power to mandate Rule 11 sanctions in specific circumstances while also balancing judicial discretion in other circumstances.

Sincerely,
Joseph D. Leckenby

APPENDIX A – PROPOSED AMENDED RULE

The amended Fed. R. Civ. P. 11(c)(1) would read as follows, with the new proposed language in underscore:

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may in its discretion impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. However, if Congress has mandated by statute that Rule 11 sanctions be impose for violations of Rule 11 (b) which occur in suits brought under Federal statutes, then the court must impose sanctions. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

TAB 20

20. Rule 53 – 23-CV-O

Anthony Buonopane, seemingly a member of the New England Law Review and a student at that law school, has submitted what looks like a student Note or Comment about Rule 53. It should be included in this agenda book.

The thrust of the piece is that Rule 53 "should be amended so that special masters are held to a fiduciary duty standard type of relationship."

Rule 53 issues caused the Advisory Committee to create a Rule 53 Subcommittee chaired by Judge Shira Scheindlin, and it rewrote the rule to take account of modern conditions. The amended rule took effect in 2003. As the Committee Note introduced the amendment, the rule 'is revised extensively to reflect changing practices in using masters." It was based on in-depth FJC research. *See* Willging, Hooper, Leary, Miletich, Reagan & Shapard, Special Masters' Incidence and Activity (FJC 2000).

In order to ensure transparency, Rule 53(b) was amended to provide directions for the order appointing a master specifying, among other things, the master's duties, the circumstances in which masters may engage in ex parte communications, and the records the master must retain and file as a record of the activities undertaken.

As did the prior rule, the current rule prescribes that masters may hold trial proceedings or make recommended findings of fact only when there is "some exceptional condition" to justify that responsibility. Concerns on this score were recently raised by Senators Tillis and Leahy about a judge who supposedly had been enlisting masters with science backgrounds to handle a large docket of patent infringement cases. As the senators recognized, this judge's practice seemed difficult to square with what the rule said.

It is less clear what problem Mr. Buonopane is addressing, or how he proposes that it be solved by a rule amendment. His title statues his purpose:

> SPECIAL MASTERS NEED TO BE REIGNED IN: WHY RULE FIFTY-THREE OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE AMENDED SO THAT SPECIAL MASTERS ARE HELD TO A FIDUCIARY STANDARD TYPE OF RELATIONSHIP AND RECOMMENDATIONS ON HOW TO DO SO

Largely using contemporary media sources, he offers a number of notable instances in which masters have been used in recent years, including the appointment of a special master to review documents seized at Mar-a-Lago. As he notes, the court of appeals held that the judge should not have appointed the master in that situation.

The notion of a "fiduciary duty" can pose challenges in some contexts, such as with regard to investment advisors. Although Rule 53 prescribes the method for appointing masters and the responsibilities they are to have, it does not use this term.

The problem the paper addresses is "how to address what happens when a special master abuses their limited (but potentially great) power, and what remedies could be available for any such violations." Seemingly disregarding the comprehensive 2003 amendments to the rule, the

author cites a 1986 article by Magistrate Judge Wayne Brazil for the proposition that there are "virtually no procedural safeguards" under the rule. But the 2003 amendment were designed to provide such safeguards and focus the court, the parties, and the master on the important concerns.

The piece does cite instances of misbehavior by a master. For example, in *Cardoza v. Pacific States Steel Corp.*, 320 F.3d 989 (9th Cir. 2003), the master had misappropriated more than $1 million, and engaged in other self-dealing. The article urges cites a news website for the proposition that financial incentives can trigger unethical behavior.

The solution, the submission says, is to use the fiduciary duty standard "that reaches multiple areas of law." As an example, the author cites the famous Cardozo opinion in *Meinhard v. Salmon*, 249 N.Y. 458 (1928). It does not appear that the examples given are about procedural rules. And the author also notes that Rule 52 "might already itself subtly endorse this idea with its language."

Turning to the proposed fiduciary standard, the author invokes the Restatement of Agency and the Uniform Partnership Act.

But nowhere does it say what amendment should be adopted, or how a Civil Rule could more effectively prescribe the sort of duty the SEC has introduced for some investment advisors. There is no question that appointment of masters is important, but there is no indication that the 2003 amendments have failed to provide the needed procedural guidance.

It is recommended that this submission be removed from the agenda.

SPECIAL MASTERS NEED TO BE REIGNED IN: WHY RULE FIFTY-THREE OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE AMENDED SO THAT SPECIAL MASTERS ARE HELD TO A FIDUCIARY STANDARD TYPE OF RELATIONSHP AND RECOMMENDATIONS ON HOW TO DO SO.

By: Anthony Buonopane

Abstract:

Special masters can play vital roles in the litigation process, whether it be in assisting with aspects of discovery, the awarding of damages, or any other area of litigation where it might be difficult for a court to case-manage a complex issue on its own. However, a problem arises when special masters go beyond their limited scope of power, and in determining how courts and litigants can and should sanction that behavior. This paper dives into this history of special masters, this exact concern, and proposes using federal rulemaking to add a fiduciary relationship—a standard that exists in other areas of law— to Rule 53's issue when it comes to discipling special masters and holding them accountable.

Introduction:

Why do courts use special masters? Their origin, like most of this country's legal foundation, dates back to old-England. King Edward I was overwhelmed with petitions, and asked his lord chancellors to help sort through them. In turn, those same lord chancellors used clerks, called 'masters,' to assist them in dividing petitions.[1] Quite simply, King Edward couldn't manage the insurmountable task and his chancellors used what we would call 'special masters' as a form of delegating responsibilities. Today, the United States carries on the idea of special masters under Federal Rule of Civil Procedure. Rule 53 allows the court to appoint special masters to (a) perform duties that the parties to litigation consent to, (b) make findings of facts under certain conditions, and (c) address pretrial and posttrial matters that would be difficult for the judge to do.[2] Essentially, the special master is someone who serves a limited purpose for the court to do things the parties want it to do, to make some difficult findings of facts, or do things that would be impractical for a judge to do or administer. In this function, like the clerks that King Edward's chancellors were, special masters are necessary as a matter of efficiency and delegation.

There are many famous examples of special masters serving this exact purpose. Following the tragedy of the September 11th, 2001 terrorist attacks, Congress created the 9/11 Victim's Compensation Fund (originally) as a method to pay the victims' families in lieu of filing lawsuits against the airlines and other potentially liable entities.[3] Given the nature of potential

[1] Timothy Noah, The Special Master Problem Didn't Start With Judge Cannon, The Soapbox, Sept. 8th, 2022, https://newrepublic.com/article/167682/special-master-cannon-kenneth-feinberg
[2] Fed. R. Civ. P. 53
[3] Susanna Kim, *9/11 Families, Except One, Receive Over $7 Billion*, August 23, 2011, ABC News, https://abcnews.go.com/Business/september-11-victims-family-seeks-justice/story?id=14364251

number of claimants (thousands), and the sheer amount of money involved, it is easy to see why the judiciary itself might struggle with administering funds and determining how much money each family could get. Thus, Attorney General John Ashcroft appointed mediation attorney Kenneth Feinberg to be the special master tasked with doing exactly this. Feinberg, who also administered funds for victims of the BP oil disaster and the Boston Marathon bombing, spent 33 months administering over $7 billion to victims' families.[4]

Another famous example is the appointment of John Cooper as special master in the *Waymo v. Uber* suit to determine if Uber had purposely withheld a letter in discovery.[5] Or even more recently, former President Trump filed a lawsuit over classified documents that were seized from his Mar-a-Lago resort and District Judge Cannon appointed retired judge Raymond Dearie to review if any of the documents were privileged (the lawsuit was subsequently dismissed, holding the special master appointment to be an improper exercise of jurisdiction since it blocked a government investigation after execution of a warrant).[6] Thus, whether it be distributing damages, investigating a potential discovery violation, reviewing a series of documents for

[4] Elaine McArdle, *Kenneth R. Feinberg: 'I'm very proud of what we did'*, September 9th, 2021, Harvard Law Today, https://hls.harvard.edu/today/kenneth-r-feinberg-im-very-proud-of-what-we-did/

[5] Carolyn Said, *Uber erred by not sharing 'inflammatory' letter with Waymo, court says*, December 15th, 2017, Stamford Advocate, https://www.stamfordadvocate.com/business/article/Uber-erred-by-not-sharing-inflammatory-12434602.php

[6] Alan Feuer, *Judge Raymond Dearie Takes On Fraught Role in Trump Documents Case,* September 16th, 2022, New York Times, https://www.nytimes.com/2022/09/16/us/politics/judge-raymond-dearie-special-master.html; Kevin Breuninger, *Judge dismisses Trump's case challenging Mar-a-Lago document seizure after appeals court ends special master review*, December 12th, 2022, CNBC, https://www.cnbc.com/2022/12/12/trumps-mar-a-lago-case-dismissed-after-special-master-review-ended.html

potential privileges, or any of the other functions that a special master could serve, they play an integral role in our court systems.

The problem this paper outlines then, is how to address what happens when a special master abuses their limited (but potentially great) power, and what remedies could be available for any such violations. Part 1 of this paper will address the problems with special masters, including instances where they have or could violate their duties. Part 2 will explain the history of the fiduciary relationship, how it works in other contexts, and what it means for people held to such a standard. Part 3 finally, will explain why federal rulemaking is the best avenue for this potential change and what a potential amendment to Rule 53 could look like and the reasons as to why.

Part 1: The Problem with Special Masters

It is very clear that special masters can and have been quite useful in many high-profile cases and legal situations. But they also have plenty of concerns and issues in their use. Generally speaking, one concern is that special masters could end up doing the opposite of what we think they do; rather than make trials cheaper and more efficient, they could actually make them more costly and delay them.[7] In the context of fact finding investigations, if a special master's fact finding is extensive and lengthy, it could prove costly to the parties whom not only have to wait for the special master's report to the judge, but then reargue the report in front of the judge who reviews the master's report *de novo*.[8] It is also important to note that special masters

[7] *See* Josh Hartman & Rachel Krevans, *Counsel Courts Keep: Judicial Reliance on Special Masters, Court-Appointed Experts, and Technical Advisors in Patent Cases*, 14 Sedona Conference Journal, 61, (2013).
[8] *Id*. at 71

also have virtually no procedural safeguards attached to their roles, a concern especially apparent when they conduct out-of-court investigations or similar work. Unlike a court appointed expert, they are not deposed, don't often testify at trial, and aren't subject to cross examination.[9] These concerns all raise questions as to how parties to litigation can hold special masters accountable, especially when one or both parties are usually responsible for paying for the special master.[10]

Those same concerns speak to a different issue: how much discretion a special master should have in the context of what they do. Two approaches exist to this. The first, says that master should have lots of discretion since they'll know the parties more intimately that the judge could, and their needs will likely evolve as their task goes on, meaning informality is the most efficient way to proceed.[11] The other theory says judge's should reign tight control over special masters and force them to file reports frequently or else the judge may learn too little about the case and be unable to verify the master's work effectively or control the parties (and thus, likely to give extreme deference).[12] Without a standard of liability on a special master, both approaches could have dangerous consequences.

A relaxed approach means that special masters have complete control. They essentially become the judge or arbitrator for certain aspects of litigation—taking the parties farther away from judicial review and from the judge themselves. A party could have great concerns with this approach given the fact that the judge is ultimately the one who decides the important legal questions, yet is left out of what could be particularly important or complex parts of the

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[9] Wayne D. Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication, 53 U. Chi. L. Rev. 394 (1986).
[10] Andrew C. McCarthy, *Latest Mar-a-Lago Farce: Who Pays For the Special Master,* National Review, September 10th, 2022, https://www.nationalreview.com/corner/latest-mar-a-lago-farce-who-pays-for-the-special-master/
[11] Brazil *Supra* Note 11 at 417.
[12] *Id* at 417-18.

litigation. Parties would want to do everything in their power to ensure that a special master's recommendations, reports, etc. are favorable to them then, and thus will focus their attention on the special master's work. This will add time, cost (especially to the client), and energy that may ultimately take away from the litigation. And with no real way to hold these special master's accountable after the judge makes a *de novo* ruling of a special master's reports, or check the special master's work themselves, a party who loses at the special master stage (that is to say whatever the special master finds, reports, etc. is unfavorable to them) under this broad theory of power could face an insurmountable hurdle to overcome throughout the remainder of the litigation.

On the other hand, a stricter theory could be seen as unfavorable to the parties too. If a judge manages every aspect of the special master's work, the judge could be seen as stepping in-between the parties more so than they normally do. For example, most judges strongly dislike discovery disputes and would rather see the parties themselves deal with things civilly (especially since its usually the costliest part of trial).[13] If a judge hires a special master to oversee a discovery issue and micromanages that special master's work, the judge could be getting a glimpse into an area of the litigation that departs from the judicial norm in which they normally stay away from. And while it may be true that this way of managing special master's might subdue the accountability issues of the other extreme, this theory itself has its own flaws. An example such as this would force attorneys themselves to depart from the informal, casual nature of an area of litigation like discovery—potentially impacting their litigation strategy, the cost of trial for their clients (if they must adhere to proper formalities and spend more time

[13] Carol E. Heckman, *Streamlining Discovery Motions: What Judges Want to See*, NY Law Journal, July 23rd, 2012, https://www.hselaw.com/files/070071229_Harter_Secrest.pdf

formulating more official discovery requests or production), any potential amicable relationships they had previously with opposing counsel, and other traditional litigation norms that they must now depart from. Plainly then, both extremes cause problems in their own respect, and both exist because parties don't have access rigid rules that can hold special masters accountable.

Another related issue with special masters that arises is their neutrality. As a matter of common sense, it would seem obvious that special masters should remain neutral in whatever aspect of the litigation they are tasked with working on since they essentially are filling the roles of a judge, the ultimate symbol of neutrality in litigation, in complicated parts of a case. That however, may not always be the case which presents another problem for parties. David Cohen, an attorney who has been a special master for many federal cases, described that remaining neutral "isn't easy."[14] And there is a serious question as to why this glorified judge's assistant, as Cohen described special masters to be, couldn't be neutral.[15] One potential reason is that a special master might not always be a lawyer, and thus is not aware of, or bound to, the same ethical considerations of neutrality that judges and lawyers might be. This happens more often in patent cases when a judge might need someone with the technological expertise related to the patent.[16] Lawyers in these situations might become particularly weary of a special master's ability to remain neutral or ability to understand what neutrality means—thus potentially prejudicing their client.

More apparent though when thinking about the issue of neutrality amongst special masters might come into play when discussing their compensation on matters, especially if it is

[14] Rachel Treisman, *What a special master does, as told by a special master*, NPR, September 5th, 2022, https://www.gpb.org/news/2022/09/05/what-special-master-does-told-by-special-master
[15] *Id*.
[16] *Id*.

tied to the litigation itself. This was exactly the issue in *Cordoza v. Pacific States Steel Corporation*. Here, the defendant had left the medical plan for their retired steelworkers bankrupt, prompting an Employee Retirement Income Security Act (hereafter "ERISA") claim against them.[17] After finding an ERISA violation, the judge in the matter ordered the defendant to keep paying the medical benefits. The problem was that the defendant didn't have enough money to do so. Thus, the court hired Bruce Train and his associates to develop a contaminated plant site owned by the defendants as the means of paying the medical benefits.[18] One of the unique issues here though is that part of Bruce Train's compensation was tied to an interest in the land. While Train had begun to do what he was tasked with, negotiations to develop part of the plant site stalled because Train had sought more compensation.[19] A final investigation proved that Train: "had (1) rejected valid offers from the RDA in order to hold out for more compensation for himself, (2) misappropriated creditors' funds by forming a $1 million litigation war chest, (3) paid for personal tax advice with PSSC funds, and (4) overbilled for a legal assistant."[20]

Train was eventually forced to disgorge some of his wages, sanctioned, and had his earnings capped—all of which was upheld by the 9th Circuit.[21] While there was an amicable solution to the special master's clear abuse of neutrality here, it only happened after years and extensive judicial investigation—all of which cost the court time, money, and effort, and likely caused unease amongst the plaintiffs who wanted to secure their medical benefits. This more broadly speaks to the issue of potential earnings eroding a special master's ability to remain

[17] Cordoza v. Pacific States Steel Corp. 320 F.3d 989 (2003).
[18] *Id*.
[19] *Id*.
[20] *Id* at 994.
[21] *Id.*

neutral. Psychology backs this up. One study found a link between money and corruption, seeing that a controlled group exposed to money-related activities were more likely to be unethical as compared to a controlled group that was not exposed to money.[22] Other studies also linked dishonesty and deception with an ability to earn money.[23] Special masters, like Train, would be no different. Even if a black-and-white rule were to exist that no special master fees can have any tie to the litigation, special masters could still do things that contribute to this unethical behavior (such as bill more hours than what is required and prolong their work to make more money if paid on an hourly rate). And while a court itself may sanction special masters for doing such acts, the litigants themselves are without a standard to base any appeal themselves on.

Thus, whether it be the length of a special master's work, the amount of intervention a judge exercises in a special master's work, or a special master's ability to remain neutral, being without a standard exposes the use of special master's to several potential problems. The parties themselves have no way to hold special master's accountable, potentially putting them in a detrimental position in the litigation. Special masters are designed to make the court's life easier in complex cases and situations, but in turn, it might be doing the opposite. *Cordoza* was an example of why, and there is likely plenty more that we do (and perhaps do not) know about. The only way to fix that issue, is to develop a fiduciary standard to Rule 53 and give parties a basis to appeal special master's decisions through the Federal Rules of Civil Procedure.

Part 2: The Fiduciary Standard:

[22] University of Utah, *Study shows money cues can trigger unethical behavior*, PhysOrg, June 21st, 2013, https://phys.org/news/2013-06-money-cues-trigger-unethical-behavior.html
[23] *Id*.

A fiduciary duty is a legal concept that reaches multiple areas of law: businesses, lawyer-client, other confidential types of relationships, etc. and requires that a person acting within this relationship to only act in ways that will benefit the other person—in other words, act in the other person's best interest.[24] The fiduciary is the person who owes the duty to act towards the benefit of the other person, and the beneficiary (sometimes called principal) is the person who benefits in this relationship.[25] Generally speaking this idea exists as a tool to protect interests of a beneficiary when someone represents them in some kind of capacity.[26] This duty even dates back as early as 1790 B.C. under the Code of Hammurabi, creating rules surrounding persons entrusted with the property of others for business.[27]

There are many famous examples of which this duty has been spelled out in litigation. In the business context, *Meinhard v. Salmon* is the most prominent case. In *Meinhard*, the court found the duty of loyalty breached by one co-adventurer (partner named Salmon) of a leasing business to another. Salmon created a new leasing deal for the property that would take place following the close of his current leasing deal with his co-adventurer, and did not disclose this business opportunity to his co-adventurer (essentially going behind his partner's back). Justice

[24] Cornell Law School, Legal Information Institute: Fiduciary Duty, https://www.law.cornell.edu/wex/fiduciary_duty

[25] Cornell Law School, Legal Information Institute: Principal, https://www.law.cornell.edu/wex/principal; Cornell Law School, Legal Information Institute: fiduciary, https://www.law.cornell.edu/wex/fiduciary; Cornell Law School, Legal Information Institute: beneficiary, https://www.law.cornell.edu/wex/beneficiary

[26] Adam Barone, *What Is a Fiduciary Duty? Examples and Types Explained, Investopedia,* August 19th, 2022, https://www.investopedia.com/ask/answers/042915/what-are-some-examples-fiduciary-duty.asp

[27] Atherton, Susan C.; Blodgett, Mark S.; and Atherton, Charles A. (2011) "Fiduciary Principles: Corporate Responsibilities to Stakeholders," Journal of Religion and Business Ethics: Vol. 2, Article 5.

Cardozo, writing the opinion for the New York Court of Appeals just a few years before he would enter the Supreme Court, said:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[28]

Justice Cardozo is essentially spelling out the difference here. That even if in a normal context (here a business undertaking), the conduct undertaken by the fiduciary was permissible, the mere existence of the fiduciary relationship transcends normal conduct and forces one to act with the "finest loyalty." Likewise, in *Graphic Directions, Inc. v. Bush*, the Colorado Court of Appeals said that an employee-agent (fiduciary) who solicits their employers cliental as they prepare to depart the business to start their own also violates that duty of loyalty, the same transcending type of commitment that Justice Cardozo discussed in the *Meinhard* case.[29]

Aside from this duty, the duty of care was illustrated most prominently in *Smith v. Van Gorkum*. Here, the CEO of a company negotiated a merger (to which senior management disapproved) and the board of directors voted to approve after a two-hour meeting, based on an oral presentation with no merger document review. The Delaware Supreme Court found this to violate the duty of care. Justice Horsey explained that being a fiduciary is more than just abstaining from bad faith and fraud, but rather forces a director to have an affirmative duty to protect the beneficiary's interest—meaning they must examine information with a "critical eye," (care).[30] Again, this is another instance in which a court is recognizing that a fiduciary duty

[28] Meinhard v. Salmon, 249 N.Y. 458, 463-464 (1928).
[29] Graphic Directions, Inc. v. Bush, 862 P.2d 1020 (1993).
[30] Smith v. Van Gorkom, 488 A.2d 858, 872 (1985).

transcends normal activities. It wasn't enough that the board of directors weren't approving the merger with malice or bad intent (against the shareholders), but rather they had to take care and exercise reasoned decision in the choices they made because of the special relationship they hold with the shareholders of a company.

As these examples illustrate, in modern application, fiduciary duties require more from the fiduciary than what is asked of a normal layperson because of the special nature of the relationship itself and the overarching goal of protecting the beneficiary's interest. There are many different kinds of duties that could be placed on a fiduciary including the duties of: loyalty, care, good faith, prudence, etc., all of which could be relevant to special masters.[31] What they mean generally, are values that should be undertaken in any adaptation of a fiduciary relationship for special masters.

At its core, the duty of loyalty is the duty that speaks to preventing a fiduciary from violating conflicts of interest. This includes both personal interests of the fiduciary that are conflicting with the beneficiary's interests and duties the fiduciary owes to someone else conflicting with the beneficiary's.[32] Some also say that the duty of loyalty encompasses a duty to not profit off of the beneficiary's interest when completing their fiduciary duties.[33] Plainly this duty is exactly what a layman would think it means, being loyal to whomever is owed the loyalty—the beneficiary. In the special master context, the duty of loyalty could prove to be very important. The idea of not profiting off of the work would have been a principle that special master Train would have directly violated in *Cordoza* and subject him to discipline. Further, it gives a blanket standard for lawyers to examine special masters within litigation. If their primary

[31] *See* Barone, *Supra* Note 26.
[32] Paul Miller (2013). *Justifying Fiduciary Duties*. McGill Law Journal 58(4), 969.
[33] *Id.*

duty of loyalty is to the court (as explained in Part 3), then any concerns about neutrality, the influence of money, and potential biases becomes moot.

The duty of care encapsulates the duty of good faith and the duty of prudence inside of it. Generally, exercising a duty of care means to purse the beneficiary's interests with reasonable diligence and prudence.[34] Further, some standards require a standard of good faith (i.e., acting in reasonable manner towards the beneficiary's interest, similar to negligence).[35] Essentially, if the duty of loyalty speaks to who's interest should be kept in mind when completing work, the duty of care speaks to the how that work must be accomplished. The main goals are essentially competence and diligence. This standard subdues many of the potential problems a standardless use of special masters endures. If a special master is forced to exercise this kind of care, a judge will not need to worry about micromanaging a special master's work since it will be done diligently and with good faith. The parties themselves will not need to worry about overdue costs or delays of trial since the special master must be zealous and do their work in good faith.

As such, the fiduciary duties of care and loyalty, which encapsulate many other important principles and duties in a fiduciary relationship, could protect against all the earlier raised concerns. The Federal Rule of Civil Procedure on special masters, Rule 53, might already itself subtly endorse this idea with its language. For example, the subsection on the authority of a special master says they may "take all appropriate measures to perform the assigned duties fairly and efficiently."[36] The specific diction here of "appropriate," or "fairly and efficiently," sound eerily similar what a duty of care statute might say about diligence and reasonableness. Further,

[34] Cornell Law School, Legal Information Institute: Duty of Care, https://www.law.cornell.edu/wex/duty_of_care
[35] *Id.*
[36] Fed. R. Civ. P. 53 (C)(1)(B)

another area of the rule states that the master can't have relationships with the parties or the parties' attorneys (unless consented to with court approval.[37] This vaguely mirrors the concept of the duty of loyalty and its overarching goal of preventing potential conflicts from existing. Thus, a fiduciary rule change is the best way to proceed.

Part 3: Why a Fiduciary Standard Should be Proposed and What it Might Look Like:

Before deciphering what potential fiduciary standards could look like, or should consider, it is important to determine why federal rulemaking is the appropriate method for change. Federal Rulemaking begins with the Advisory Committee, who scrutinizes proposals and eventually proposes some as amendments to the Standing Committee. The Standing Committee reviews the changes themselves and sends them to the Judicial Conference if they choose to do so. The Judicial Conference does the same and sends them to the final stop, the Supreme Court. If the Supreme Court is satisfied with the change, they'll officially promulgate the rule before May 1st, with effect taking place usually around December 1st (but not before) of that same year. Congress may themselves step in and enact legislation if they aren't satisfied with the Supreme Court's decision, but this rarely happens.[38]

This elongated measure of rulemaking is the best method to create a special master fiduciary standard. Firstly, the composition of the decision makers in this process proves why. The Advisory Committee consists of a diverse group of legal professionals: judges, lawyers, state chief justices, government lawyers, etc., meaning most of these members either litigate or have exposure to the concept of fiduciary duties (unlike members of Congress) and do so in different

[37] Fed. R. Civ. P. 53 (A)(2)
[38] United States Courts, *How the rulemaking Process Works*, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works; 28 U.S.C. § 2071-2077.

ways.[39] Generally it also seems wise to let the people who will engage with these concepts the most be the ones who adopt the rules around them. While Congress could itself step in as warranted by the rulemaking process, it would be unwise since the judiciary itself is best equipped to "alter rules more deftly and with greater precision than could Congress."[40] Thus, the decision makers have the greatest ability to develop these rules in a meaningful way.

When thinking about what the amendment to Rule 53 itself should look like, the rule itself should consist of two core elements: (1) the fiduciary relationship defined, and the duties therein and (2) the review process and remedies for a breach of fiduciary duties by a special master. It is critical not only to define who is the beneficiary and who is the fiduciary and why, but explain how to sanction any violations of this rule. Otherwise, the standard itself would be deficient and useless. It would also be wise to look upon fiduciary restatements in other contexts as a guide for how to formulate or draft these fiduciary standards.

The fiduciary duty itself should consist of a duty of care and loyalty by special masters to the courts (the judge in the litigation) themselves. The special master is an extension of the judge, and is doing tasks difficult for the judge themselves to oversee. Thus, the duties belong to the judge as the beneficiary. What might need to be unique about this defined duty however, is that it should also explicitly give standing to the litigants as third parties as well (i.e., for the parties to be able to appeal to the court that the special master is not conforming to its fiduciary duty). This is because ultimately whatever the special master is tasked with doing will affect the

[39] United States Courts, *Committee Membership Selection*, https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection
[40] Jordan M. Singer, *The Federal Courts' Rulemaking Buffer*, 60 Wm. & Mary L. Rev. 2239, 2265, (2019), https://scholarship.law.wm.edu/wmlr/vol60/iss6/5

litigation to some degree, and the parties should have rights then in the same way they'd have rights against the judge to a trial.

Specifically, when thinking of the duty of care within this standard, business law provides the best guidance. The Restatement 3rd of Agency Law describes that agents need to act with care, competence, and diligence that is normally exercised by other agents in a similar circumstance.[41] Further, other provisions require the agent to act within the scope of their actual (directly stated) authority and refrain from conduct that is likely to damage the principle's enterprise (good faith).[42] Similarly, a special master should be diligent, competent, and careful in their handling of matters within a case, they should only act within the scope of what a judge hired them to do, and they should refrain from undertaking acts that damage the court's reputation or ability administer justice fairly. What this Restatement doesn't include that a duty of care element might want to would be to explicitly say that diligence or prudence should include not prolonging their duties if not necessary (to protect the parties from paying more than necessary). All of this will alleviate parties' concerns about the time and effort expended by the use of special masters and allow judges to trust the discretion of a special master.

When discussing the duty of loyalty, the Revised Uniform Partnership Act (hereafter "RUPA") and Restatement 3rd of Agency provide guidance. RUPA outlines that a partner can't compete with the partnership, deal with someone who has an adverse interest to the partnership, and must hold all profit for the partnership itself.[43] Meanwhile, The Restatement 3rd, which has a much more expansive duty of loyalty, outlines that an agent can't acquire a material benefit from the fiduciary relationship, act on behalf of an adverse party, compete with the principal, or use

[41] Re(3) of Agency §8.08
[42] Re(3) of Agency §8.09-8.10
[43] RUPA § 409.

the principal's information for their own benefit.[44] Likewise any loyalty provision for special masters should encompass many of these values: they should not profit in any way from the duties encompassed to them as special master (i.e. elongate their duties for more money, or hold out on transactions for more contingent payment like in *Cardozo*). Further, special masters should only act on behalf of the court and not advocate for, or give special treatment to, one of the parties since the special master is an extension of the judge themselves. It might be wise however to also include a provision under this duty defining neutrality. Black's Law dictionary defines a neutral party as a party who is impartial, and has no financial or personal interest in a controversy or dispute.[45] Something like this would be an adequate definition, put special masters on notice of the fact they must be neutral against the parties, and further reinforce the idea that they cannot seek financial personal gain from their employment as special master. Thus, the duty of loyalty here would be sufficient.

Lastly, it is important to think about remedies when a special master breaks their fiduciary relationship. The duty itself creates personal liability upon the fiduciary, thus giving them a reason to want to adhere to these standards.[46] The potential rule should state that the parties themselves could bring a claim of breach of fiduciary duty at any time before a jury verdict under Rule 53, or the judge themselves if they find the special master's conduct to be improper. This will allow everyone who plays a role in the litigation, that is to say everyone who could be impacted by the special master's decisions, to have a say if the special master does something wrong. A policy like that only seems fair. Further, if the parties bring a violation under

[44] Re(3) of Agency §8.02-8.05
[45] *Neutral Party*, Black's Law Dictionary, https://thelawdictionary.org/neutral-party/
[46] Law Offices of Stimmel, Stimmel, and Roeser, *The Fiduciary Duty*, https://www.stimmel-law.com/en/articles/fiduciary-duty

Rule 53, there should be a hearing where the party must prove the breach by a preponderance of the evidence (to keep it consistent with the trial standard). If the judge finds a violation themselves, they should just have to state the reasons why in writing, and dictate why it meets the preponderance of the evidence. Lastly, the provision itself should give the special master or the other party to the case, the right to appeal a decision on the breach of fiduciary duty simply as a matter of due process.

When thinking about the penalties themselves, outside of the expected penalties: fines, suspension or firing from the role, recommendation of discipline to the Bar, etc., it is important to consider remedial solutions to the work the special master did on the trial itself. One idea might be to give the judge broad discretion, take any measure as necessary to return the trial to a position it was before the special master breached their fiduciary duty, or to return the trial to a position where it is if the special master never breached their fiduciary duty. This, as one could imagine, could give the judge the power to do a lot of creative things to return the trial to normal. This should be seen as desirable since the goal is to remediate the failures of someone who was meant to be loyal to the court, be an extension of the judge themselves, and help solve a complicated part of litigation. Along with this broad standard though, some specific penalties, as guidance, might be wise to include such as: holding the special master responsible for one or both parties' attorney fees from trial, order a new trial (if necessary), delay trial, give the parties an extended number of discovery requests (such as interrogatories), etc. These solutions all remediate this problem effectively. While this recommendation is not perfect, it shows that a fiduciary standard can solve all the problems a special master presents and create a way to return trial to a normal position as if the violation never occurred.

Conclusion:

Special masters are an important piece of civil litigation. They do however, present many problems that could hamper the fairness of trial for the parties and make special masters themselves self-interested parties. A fiduciary relationship, an area of law famous for keeping representatives of one party in line with the interests of that beneficiary, could be the solution. Forcing the special master to adhered to duties of loyalty and care, and creating sensible remedies to violations of those duties, can help special masters continue to be the useful tool they are in assisting with complicated areas of litigation.

TAB 21

21. Rule 10 – 23-CV-Q

Submission 23-CV-Q, from Richie Muniak, recommends that Rule 10 be amended to add a new requirement for pleadings that there be a "Document of Direction of Claims" [DoDoC), designed to "create a visual method of showing claims against different parties in a suit that contains multiple plaintiffs or defendants." Such a requirement would "make things easier for all parties and the court [by] creating a visual attachment to pleadings" to illustrate the various claims and parties involved. Indeed, "documents like this are already being made internally by judges and clerks."

The submission includes two attachments, seemingly modeled on a DoDoC used in a case in the N.D. Ohio, reportedly taking three hours to create by "working backwards" in the middle of the case. The suggestion is that each party could "amend" its DoDoC as the case moved forward to take account of changes in the party structure or the claims made.

It is also suggested that "a legal tech company could produce a website to generate this diagram rather quickly." Indeed, Mr. Muniak says that "I have created the start of a software that would allow lawyers and clerks to do this easily."

The submission does not propose specific amended rule language, but does urge that rule 10 be amended to require such a diagram that "shall visually indicate all parties and the number and types of claims between each." There is a suggestion that this requirement might apply only in actions with a certain number of claims or of parties.

Rule 10 is not a rule that has received much Advisory Committee attention since it was adopted in 1938. Indeed, except for restyling in 2007, it has not been amended at all. Rule 10(a) provides directions about the format of pleadings; perhaps the DoDoC idea could be added there. Rule 10(b) exhorts parties to set forth claims and defenses in "numbered paragraphs, each limited as far as practicable to a single set of circumstances." rule 10(c) provides that any exhibit to a pleading is a part of the pleading for all purposes, including Rule 12(b) motions. This provision has sometimes generated litigation when a moving party seeks to put before the court materials relied upon but not actually attached as an exhibit to the challenged pleading, leading to disputes about whether under Rule 12(d) the court may consider the document in ruling on a Rule 12(b)(6) or Rule 12(c) motion.

The Advisory Committee has put considerable energy into pleading rules in recent decades. After the Supreme Court ruled in *Leatherman v. Tarrant County Narcotics and Coordination Unit*, 507 U.S. 163 (1993), that Rule 9(b) requirement of particularity could not be imposed outside the fraud context (*expressio unius est exclusio alterius*, as Chief Justice Rehnquist said), but suggested that a rule amendment could expand the particularity requirement, the Committee spent considerable time during the 1990s considering whether such an amendment should be seriously considered.

Then, after the Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), much energy was spent on whether an amendment to the rules would be helpful. Many argued that the "*Twiqbal*" decisions in effect expanded particularized pleading requirements like those embedded in Rule 9(b) beyond the fraud context.

Much effort was expended on these possibilities, including the preparation by the current Rules Law Clerk of a 700-page memorandum detailing the actual experience of the lower courts in applying these two Supreme Court decisions. Eventually it was decided not to pursue amendments.

This submission does not directly address these past episodes of possible pleading amendments, and it does not specifically raise questions about whether claims are sufficient to survive a motion to dismiss for failure to state a claim.

Nonetheless, if this is a new pleading requirement (as proposed), one must ask how that requirement is to be enforced. Can a party move to strike another party's pleading for failure to have a DoDoC? Can a party unsatisfied with a part's DoDoC move for a more definite statement of the DoDoC? Must a DoDoC be amended every time there is change the claims or party structure? Does that mean the plaintiff must file a new pleading because a defendant has filed a counterclaim adding parties under Rule 20 (see Rule 13(h)) or has asserted a third-party claim under Rule 14? How would this requirement apply in mass tort MDL proceedings? If it is true that parties will refine/revise their DoDoCs to reflect changes in the case as it moves forward, should permission to amend under Rule 15(a) be required? If so, should the court be more exacting in permitting such amendment after the cutoff point for amending pleadings under Rule 16(b)(3)(A)?

There are surely other questions that would arise were this proposal to be pursued as a rule amendment. As the submission points out, judges and lawyers have in appropriate cases begun making diagrams of this sort to assist them in keeping track of sprawling cases. Under Rule 16, a court could as a matter of case management direct the parties to devise such a chart. But trying to define what exactly satisfies this new requirement, and what triggers the requirement (unless it applies to one-on-one cases with only one claim), could raise serious doubts about whether the game is worth the candle.

It is recommended that this submission be removed from the agenda.

RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES

I am writing to respectfully suggest the addition of a new requirement for pleadings called a Document of Direction of Claims (or DoDoC) which has the purpose to create a visual method of showing claims against different parties in a suit that contains multiple plaintiffs or defendants. In today's complex Civil landscape there is a need to make things easier for all parties and the court and creating a visual attachment to pleadings will help secure a speedy determination. With modern technology the creation of the DoDoC will not be an expensive burden to plaintiffs or defendants in the creation of their filings. Lastly, during the process as the case moves through the system, documents like this are already being made internally by judges and clerks and this brings them out of the shadows.

To describe what a DoDoC is, an example will be the best start. In court case 3:19-cv-02854-JRK in the Northern District of Ohio was a case that got so complex in their claims that the unwinding of it through various motions took significant effort[1]. Attachment A would be an example of a DoDoC that would have been submitted with Document 161 showing the status of all claims of the suit. I started with Document 161 and worked backwards to get a current DoDoC, and it took approximately three hours of research. If each party was amending their DoDoC with the status as the suit progressed it would not haven taken as many hours in total as each new DoDoC can build off the previous ones. By putting this visually it helps unwind the web that is caused in the current complex legal environment.

The FRCP is meant to provide speedy and inexpensive determinations and this kind of document will help all courts with increasing their speed while not creating an expensive cost in either time or money. For speed, these documents are meant to help provide clarity to all parties and the court. Judges are already creating these kinds of diagrams internally and this shifts that burden to the parties, the true keeper of their claims. This burden should not be expensive either. If the committee even starts to consider this proposal a legal tech company could produce a website to generate this diagram rather quickly. Also, I can foresee the open-source community building one as I am a part of that community and have seen their work firsthand. After spending about five hours, I created the start of a software that would allow lawyers and clerks to do this easily. You can see the output and test it yourself with the link to the website on attachment B. The DoDoC would help the court, would not be expensive to create, and aligns perfectly with the rules of the FRCP.

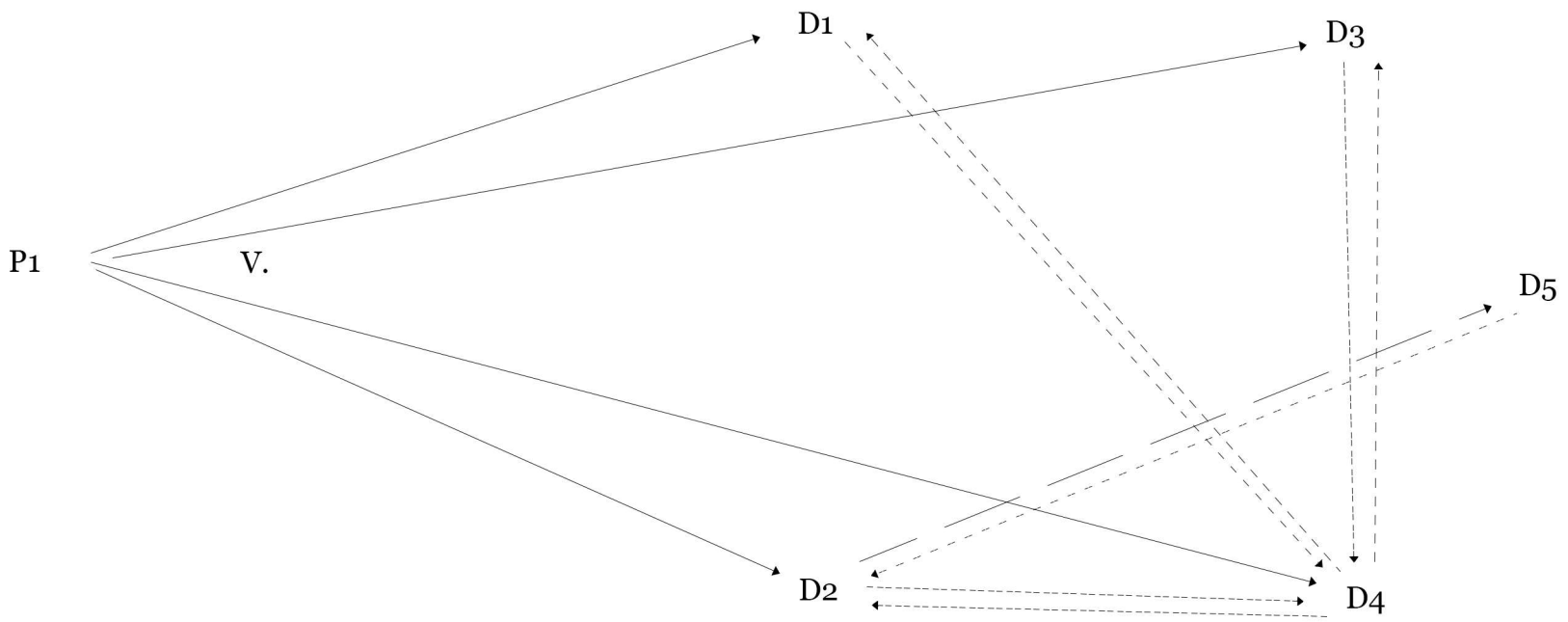
My suggestion is that Rule 10 to be amended to create the requirement of this document. The description of the diagram should be neutral and describe the function and not the form. It should describe what information should be in the diagram but not things like color, fonts, or other descriptive styles. It could be as simple as "[t]he Diagram shall visually indicate all parties and the number and types of claims between each." The rule should limit when the diagram would be included in the pleading, my thought is any time there is either multiple Plaintiffs or multiple Defendants. Other requirements could be the total number of claims or the total number of unique party interactions for claims.

[1] https://www.govinfo.gov/content/pkg/USCOURTS-ohnd-3_19-cv-02854/pdf/USCOURTS-ohnd-3_19-cv-02854-1.pdf

Thank you for your consideration of this rule and document that I believe would bring a positive impact to the legal world and show that our profession can evolve with technological tools to help speed up processing of claims.

Richie Muniak
Law Student
University of Akron

ATTACHMENT A

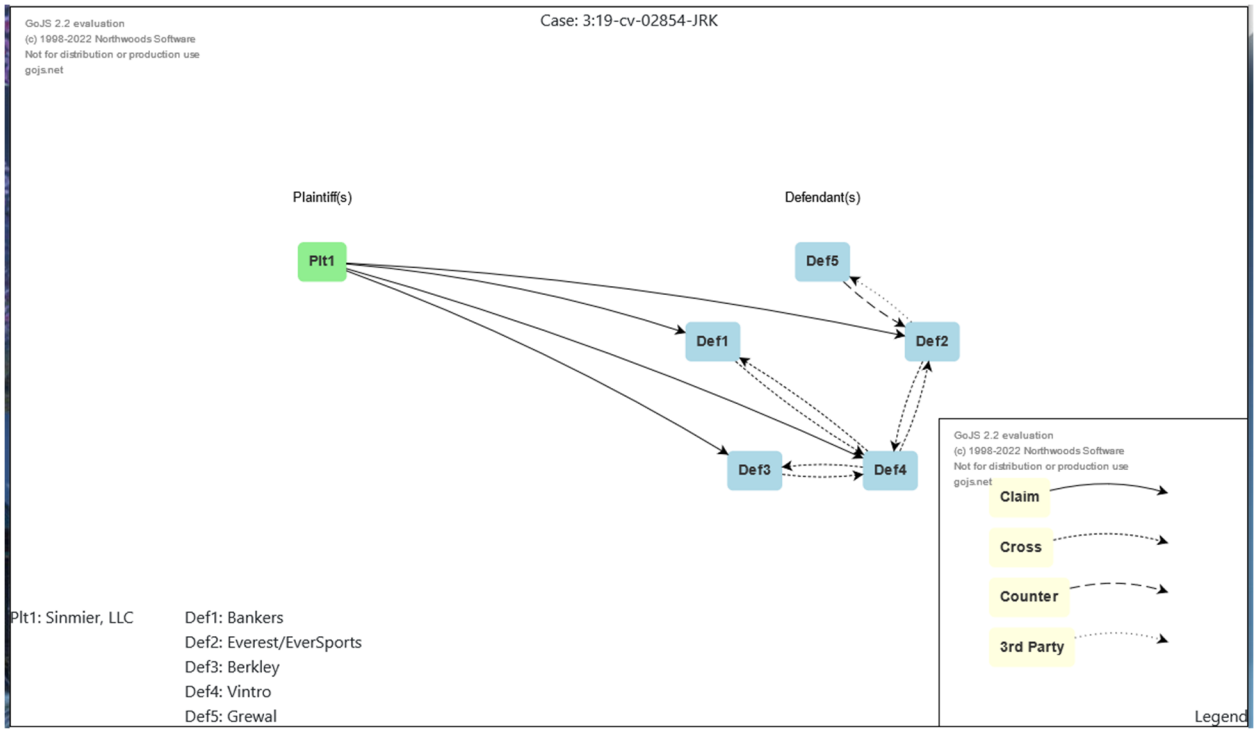


P1 = Sinmier, LLC
D1 = Bankers
D2 = Everest/EverSports
D3 = Berkley
D4 = Vintro
D5 = Gritt

Original Claims
Cross Claim
Counter Claim
3rd Party Claim

ATTACHMENT B

https://tiedyedguy.github.io/dodoc/



TAB 22

22. Contempt – 23-CV-K

Joshua Carback has submitted a proposal to adopt a new Civil Rule 42, and also to adopt new Appellate, Bankruptcy, Criminal, and Evidence rules. He submits also his recent article Contempt Power and the United States Courts, 44 Mitchell Hamline L.J. of Public Policy & Practice 105 (2023).

In his cover letter, Mr. Carback explains: "My proposal recommends, among other things, the creation of a civil analogue to Criminal Rule 42, the revision of Criminal Rule 42, the revision of 18 U.S.C. § 401, to accomplish the following objectives:

1. Define and distinguish criminal contempt and civil contempt;

2. Explain the scope of criminal contempt and civil contempt;

3. Create a formal process for parties to petition for contempt proceedings; and

4. Clarify the range of penalties and purge conditions for contempt proceedings.

He also says that "[t]he current morass of intertwined contempt statutes, regulations, and rules frustrates the ability of bench and bar alike to fulfill the values expressed in the Strategic Plan for the Federal Judiciary and Civil Rule 1."

Without noting that there is already a Civil Rule 42 (Consolidation, Separate Trials), Mr. Carback proposes the following (seemingly expecting that this rule will be a new Rule 42 and that all the rules with higher numbers would be renumbered, including some prominent ones like Rule 50, Rule 56, Rule 68, and Rule 72. This problem could be solved by redesignating such a new rule as 41.1 or something like that.):

New Fed. R. Civ. P. 42: Civil Contempt

(a) Definition.

(1) Civil contempt is disobedience out of the court's presence, such as

(i) A violation of a court order or decree;

(ii) A violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(iii) A violation of a statute constituting contempt per se.

(2) Civil contempt is coercive, not punitive.

(3) A purge condition is a condition that must be satisfied in order to avoid or lift a coercive measure imposed by the court to compel compliance with an order or decree.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend civil contempt sanctions and certify them for disposition by a court with the proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or tribunals who do not possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings, but are authorized to recommend them, may certify those recommendations for disposition under this rule.

(c) Procedure

(1) Civil contempt proceedings must be included in the same action where the alleged contempt occurred unless the matter is certified from a person or a tribunal that lacks authority to conduct the proceeding.

(2) The court may initiate a civil contempt proceeding sua sponte.

(3) A party to an action can request a civil contempt proceeding by filing a petition with the court against the alleged contemnor.

(4) An order issued sua sponte under (c)(2) or in response to a petition under (c)(3) must schedule a prehearing conference, a hearing, or both. Additionally, it must

(i) recite a short and plain basis for the civil contempt proceeding under (c)(2) or (c)(3);

(ii) schedule deadline for the filing of an answer by the alleged contemnor;

(iii) state the time and place of any prehearing conference or hearing; and

(iv) state the purge conditions requested, if any, under (c)(2) or contemplated by the court under (b)(3), including, fine and any period of incarceration.

(5) After a prehearing conference or hearing is concluded, the court must determine if the following elements are established by clear and convincing evidence:

(i) A valid order or decree of the court was in effect;

(ii) The alleged contemnor knew of that order or decree; and

(iii) The alleged contemnor breached that order or decree.

(6) If the court determines that the alleged contemnor was guilty of civil contempt, the court must issue an order that

(i) provides a short and concise explanation of its disposition;

(ii) lists the purge conditions imposed to enforce compliance with the breached order or decree; and

(iii) states the precise manner in which the purge conditions must be satisfied.

(7) If the court issues an order finding an alleged contemnor guilty of civil contempt and imposes incarceration as a purge condition, that order can be served and enforced in any district. All other orders issued in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

(d) Purge Conditions. Purge conditions for civil contempt must involve the least possible power adequate to the end proposed and must be possible to perform. Purge conditions may be imposed individually or in combination. Purge conditions may be imposed immediately upon a finding of civil contempt or contingently in the event that a contemnor does not comply with an order or decree of court by a specified deadline. The following is an inexhaustive list of purge conditions:

(1) Reprimand;

(2) Report to any state bar or equivalent professional body; and

(3) Fine;

(i) A fine may be payable to the court, a party prejudiced by the contempt as compensation, or some other recipient for the purpose of promoting compliance.

(ii) A fine must be calculated according to the character and magnitude of the harm or prejudice threatened by continued breach of the court's order or decree.

(e) Incarceration. The court may impose a period of incarceration on the contemnor immediately until they comply with the breached order or decree or contingently if another purge condition is not timely satisfied.

(f) Criminal Contempt. Nothing in this rule can be construed to detract from the court's authority to levy sanctions under Federal Rule of Civil Procedure 11, contempt under Federal Rule of Criminal Procedure 42, or any other relevant authorities as an alternative or in addition to civil contempt under this rule.

* * * * *

There can be little doubt that the courts have puzzled over some features of their contempt power. For one thing, the right to jury trial may depend on whether a proceeding seeks "civil" or "criminal" contempt. In *United States v. United Mine Workers*, 330 U.S. 258, 364 (1947), Justice Rutledge's dissent described contempt as "a civil-criminal hodgepodge." For a thorough 50-year-old report, see Dan Dobbs, Contempt of Court, A Survey, 56 Cornell L.Q. 183 (1971).

It is undeniable that there are some puzzling aspects of the contempt power. A famous example is *Walker v. City of Birmingham*, 388 U.S. 307 (1967), holding that the "collateral bar rule" prevented defendants (including Martin Luther King, Jr.) charged with contempt for holding a civil rights march on Easter Sunday even though a state court had enjoined it could not defend their contempt prosecution by contending that the Birmingham parade permit ordinance was unconstitutional. (King was incarcerated and wrote Letter From the Birmingham Jail while in that jail.) In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) the court held that the Birmingham parade permit ordinance King was incarcerated for violating itself violated the First Amendment and was invalid.

Clearly these are important issues. And clearly Mr. Carback has invested an incredible amount of energy into research on both the history of contempt and the history of rulemaking relevant to contempt. *See, e.g.*, his footnotes 18, 19, 20, 24, and 25 in his article, which is included in this agenda book. It even quotes from notes of subcommittee conference calls about the Rule 45 project more than a decade ago.

Despite the murky parameters of the contempt power, there has been no effort until this one to engage in rulemaking to address these questions. Specific references to contempt do appear in the rules (e.g., Rule 37(b)(2)(vii) regarding failure to comply with a court order to provide discovery – "treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.").

As a consequence, particularly given the broad array of situations in which a court may use its contempt power, it seems best to remove this proposal from this committee's agenda. If another committee (the proposal is directed to all five rules committees) chooses to pursue the contempt proposals, that might be reason to take another look.

If the Committee decides to proceed, the submitted draft raises myriad questions. For example, it refers not only to local rules under Rule 83, but also a "chambers policy." What is that?

It also says that courts with "inherent" authority to entertain contempt proceedings are governed by this rule. The question what constitutes an "inherent" power is limited by this rule. (On that note, there has been a history of getting away from the idea of "common law crimes," which seem to suffer from ex post facto features that raise due process issues.)

It says that masters may recommend a contempt sanction to a judge with authority to impose one, but Rule 53(c)(2) already says that.

It says the contempt proceedings "must be included in the same action." It is not entirely clear what that means.

It requires a "prehearing conference" or a hearing in all cases. Requiring a prehearing conference might interfere with the court's ability to enforce its orders in a timely fashion. And phrasing this in the alternative suggests that holding a prehearing conference could be a substitute for holding a hearing.

It adopts a "clear and convincing evidence" standard, which may be wise, but might in some circumstances unduly hamper the court in enforcing its orders.

It says that orders must be served only in the state where the court sits or within 100 miles of the courthouse. So if the contemnor absconds to the opposite coast the only sanction the court can impose is imprisonment? That seems odd.

It offers an "inexhaustive list" of purge conditions, but then states conditions for imposing a fine that make it appear that a fine may be imposed only on those grounds.

Not doubt many more issues would arise if this proposal were taken up, but it is not apparent that there is a need to do so. It is suggested that this matter be removed from the agenda unless another rules committee is proceeding to look at it.

J O S H U A T . C A R B A C K

[redacted]

April 1, 2023
H. Thomas Byron III, Esq., Secretary
ADMINISTRATIVE OFFICE OF THE U.S. COURTS
Office of the General Counsel, Rules Committee Staff
One Columbus Circle, N.E.
Washington, D.C. 20544

23-AP-D
23-BK-E
23-CV-K
23-CR-C
23-EV-A

Dear Secretary Byron,

I write to you to formally submit my proposal for reforming judicial rules governing contempt proceedings. The inherent power of the judiciary to initiate contempt proceedings is well established. The culmination of decades of rulemaking under the interbranch framework instituted by the Rules Enabling Act of 1934, unfortunately, transformed what was once a relatively simple exercise of discretion into a more onerous and complicated task than it needs to be. Federal contempt law, by my count, now consists of at least 178 opinions issued by the United States Supreme Court, 182 statutes in the United States Code, 95 regulations in the Code of Federal Regulations, 37 nationwide rules of federal practice and procedure, 10 circuit wide rules governing policy and procedure, and 151 local rules governing practice and procedure.

I attach to this letter a published law review article expressing my proposal for reforming federal contempt law, including my proposed revisions to federal statutes, rules, and regulations. I also attach a supplement containing proposed revisions that I updated since that article was published. My proposal is comprehensive and systematic. My proposed rule revisions, in particular, affect appellate procedure, bankruptcy procedure, civil procedure, criminal procedure, and evidence. I therefore request that you transmit my proposal to the Standing Committee on Rules of Practice and Procedure and its five advisory committees for their mutual consideration. My proposal recommends, among other things, the creation of a civil analogue to Criminal Rule 42; the revision of Criminal Rule 42; the revision of 18 U.S.C. §§ 401, 3484, and 3499; and the repeal of 18 U.S.C. §§ 1703, 1503, 1509, 1512–13, 1621–23, 3146–49. This proposal will thereby fulfill the following objectives:

1. Define and distinguish criminal contempt and civil contempt;
2. Explain the scope of criminal contempt and civil contempt;
3. Create a formal process for parties to petition for contempt proceedings;
4. Clarify the range of penalties and purge conditions for contempt proceedings;
5. Shift discretion for contempt prosecutions from the executive to the judiciary; and
6. Authorize bankruptcy courts to wield contempt power.

I believe that the adoption of my proposal will promote the clarity, simplicity, efficiency, and fairness of contempt proceedings.

Respectfully,

Joshua T. Carback

Joshua T. Carback, Esq.

SUPPLEMENTAL PROPOSED REVISIONS TO CONTEMPT AUTHORITIES

New Fed. R. Civ. P. 42: Civil Contempt

(a) Definition.

(1) Civil contempt is disobedience out of the court's presence, such as

(i) A violation of a court order or decree;

(ii) A violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(iii) A violation of a statute constituting contempt per se.

(2) Civil contempt is coercive, not punitive.

(3) A purge condition is a condition that must be satisfied in order to avoid or lift a coercive measure imposed by the court to compel compliance with an order or decree.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend civil contempt sanctions and certify them for disposition by a court with the proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or tribunals who do not possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings, but are authorized to recommend them, may certify those recommendations for disposition under this rule.

(c) Procedure

(1) Civil contempt proceedings must be included in the same action where the alleged contempt occurred unless the matter is certified from a person or a tribunal that lacks authority to conduct the proceeding.

(2) The court may initiate a civil contempt proceeding sua sponte.

(3) A party to an action can request a civil contempt proceeding by filing a petition with the court against the alleged contemnor.

(4) An order issued sua sponte under (c)(2) or in response to a petition under (c)(3) must schedule a prehearing conference, a hearing, or both. Additionally, it must

(i) recite a short and plain basis for the civil contempt proceeding under (c)(2) or (c)(3);

(ii) schedule deadline for the filing of an answer by the alleged contemnor;

(iii) state the time and place of any prehearing conference or hearing; and

(iv) state the purge conditions requested, if any, under (c)(2) or contemplated by the court under (b)(3), including, fine and any period of incarceration.

(5) After a prehearing conference or hearing is concluded, the court must determine if the following elements are established by clear and convincing evidence:

(i) A valid order or decree of the court was in effect;

(ii) The alleged contemnor knew of that order or decree; and

(iii) The alleged contemnor breached that order or decree.

(6) If the court determines that the alleged contemnor was guilty of civil contempt, the court must issue an order that

(i) provides a short and concise explanation of its disposition;

(ii) lists the purge conditions imposed to enforce compliance with the breached order or decree; and

(iii) states the precise manner in which the purge conditions must be satisfied.

(7) If the court issues an order finding an alleged contemnor guilty of civil contempt and imposes incarceration as a purge condition, that order can be served and enforced in any district. All other orders issued in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

(d) Purge Conditions. Purge conditions for civil contempt must involve the least possible power adequate to the end proposed and must be possible to perform. Purge conditions may be imposed individually or in combination. Purge conditions may be imposed immediately upon a finding of civil contempt or contingently in the event that a contemnor does not comply with an order or decree of court by a specified deadline. The following is an inexhaustive list of purge conditions:

(1) Reprimand;

(2) Report to any state bar or equivalent professional body; and

(3) Fine;

(i) A fine may be payable to the court, a party prejudiced by the contempt as compensation, or some other recipient for the purpose of promoting compliance.

(ii) A fine must be calculated according to the character and magnitude of the harm or prejudice threatened by continued breach of the court's order or decree.

(e) Incarceration. The court may impose a period of incarceration on the contemnor immediately until they comply with the breached order or decree or contingently if another purge condition is not timely satisfied.

(f) Criminal Contempt. Nothing in this rule can be construed to detract from the court's authority to levy sanctions under Federal Rule of Civil Procedure 11, contempt under Federal Rule of Criminal Procedure 42, or any other relevant authorities as an alternative or in addition to civil contempt under this rule.

Revised Fed. R. Crim. P. 42: Criminal Contempt

(a) Definition.

(1) Any disrespect or violation of the court's dignity may be liable for criminal contempt.

(2) Criminal contempt is punitive, not coercive.

(3) Direct criminal contempt is misbehavior in the court's presence or so near to it as to obstruct the administration of justice.

(4) Constructive criminal contempt is disobedience to the court outside of the court's presence, and can involve the following:

(i) violation of a court order or decree;

(ii) interference with or obstruction of the administration of justice, including improper threats, tampering, or other undue influences directed toward grand jurors, petit jurors, witnesses, officers of the court, and other persons operating under court order or decree;

(iii) violation of bail or parole conditions;

(iv) material misrepresentation to the court, including perjury;

(v) violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(vi) violation of a statute constituting contempt per se.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend criminal contempt sanctions and certify them for disposition by a court with proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or tribunals that do not possess authority to adjudicate civil contempt proceedings but are authorized to recommend them may certify those recommendations for disposition under this rule.

(c) Direct Criminal Contempt Procedure

(1) Misbehavior committed in the court's presence can be adjudicated through summary proceedings if the presiding judge certifies that he saw or heard the misbehavior.

(2) Direct criminal contempts are sui generis and therefore have no elements, mens rea, or standard of proof.

(3) Following a summary proceeding, the presiding judge must promptly issue a signed order filed with the clerk providing a short and concise statement of facts and an explanation for his disposition.

(4) The court cannot enter a summary contempt judgment relating to misbehavior in its presence nunc pro tunc.

(5) A presiding judge who can lawfully preside over a summary proceeding for direct criminal contempt can nevertheless refer the matter for a constructive criminal contempt proceeding under section (d) of this rule if doing so is in the interest of justice.

(d) Constructive Criminal Contempt Procedure

(1) Constructive criminal contempts must be adjudicated through a separate proceeding with a separate caption from the action in which the contempt arose.

(2) The court may initiate a constructive criminal contempt proceeding sua sponte or by petition.

(3) The court must give the alleged contemnor notice in open court and issue a show cause order or an arrest order. The alleged contemnor must be released or detained as Federal Rule of Criminal Procedure 47 [former Rule 46] provides. The alleged contemnor is entitled to a trial by jury. The show cause order or arrest order must

(i) Recite a short and plain basis for the criminal contempt proceeding, including the essential facts constituting the criminal contempt charged;

(ii) Schedule the time and place of a trial;

(iii) Allow the alleged contemnor a reasonable time to prepare a defense; and

(iv) Expressly state any penalties requested under (d)(2) if offered.

(4) The court may request that the alleged criminal contempt be prosecuted by the government or, if interest of justice so requires, another attorney. If the government declines to prosecute, the court must appoint another attorney to prosecute.

(5) The prosecuting attorney must prove the following elements beyond a reasonable doubt:

(i) There was a lawful and reasonably specific order, decree, or proceeding;

(ii) The alleged contemnor violated that order or decree, or misbehaved in the court's presence; and

(iii) The alleged contemnor's conduct was willful.

(6) If the alleged criminal contempt involved disrespect or criticism towards a judge, that judge is disqualified from presiding over the trial or hearing unless the alleged contemnor consents.

(7) Upon a finding or verdict of guilty, the court may impose punishment.

(e) Punishment. Punishment for criminal contempt must involve the least possible power adequate to the end proposed. Penalties for direct and constructive criminal contempt can be imposed individually or in combination. The following is an inexhaustive list of potential penalties:

(1) Reprimand

(2) Fine

(i) The fine can be imposed on a per diem basis or consist of a single sum.

(ii) The fine may be payable to the court, to a party prejudiced by the contempt as compensation, or some other recipient for the purpose of atoning for any disrespect or indignity.

(iii) The fine must be calculated according to the character and magnitude of any disrespect or indignity.

(3) Incarceration

(i) Direct Criminal Contempt. If the alleged contemnor is found guilty of direct criminal contempt, he can be sentenced to a period of incarceration not exceeding six months for a single contemptuous act. He may, however, be sentenced to a period of incarceration exceeding six months for more than one

contemptuous act, provided that the increment of incarceration attributed to each act does not exceed six months.

(ii) Constructive Criminal Contempt. If the alleged contemnor is found guilty of constructive criminal contempt, he can be sentenced to a period of incarceration exceeding six months.

(f) Civil Contempt. Nothing in this rule can be construed to detract from the court's authority to correct defiance of its orders or decrees through civil contempt proceedings under Federal Rule of Civil Procedure 42 and any other relevant authorities.

Criminal Amendments and Federal Judgeship Act of [Year]

An Act

To amend Title 18 of the United States Code regarding the authority of federal courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Criminal Amendments and Federal Judgeship Act of [Year].

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

Sec. 401 of Title 18, United States Code, is amended to read as follows:

"§ 401. Power of Court

"(a) A court of the United States has power to punish and correct contempt of its authority and none other, sua sponte or by petition, including—

(1) Misbehavior or disobedience in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior or disobedience of any judicial officer in their official transactions; and

(3) Disobedience or resistance to their lawful writs, processes, orders, rules, decrees, or commands out of their presence.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

(1) Reprimand;

(2) Fine;

(3) Imprisonment.

Sec. 3484 of Title 18, United States Code, is amended to read as follows:

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Form, contents and issuance of subpoena, Rule 17(a).

Service in United States, Rule 17(d), (e,1)1.

Service in foreign country, Rule 17(d), (e,2)1.

Indigent defendants, Rule 17(b).

On taking depositions, Rule 17(f).

Papers and documents, Rule 17(c).

Disobedience of subpoena as contempt of court, Rule 42.

Sect. 3499 of Title 18, United States Code, is amended to read as follows:

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Disobedience of subpoena without excuse as contempt, Rule 42

Sec. 1073 of Title 18, United States Code is deleted.

Sec. 1503 of Title 18, United States Code is deleted.

Sec. 1509 of Title 18, United States Code is deleted.

Sec. 1512 of Title 18, United States Code is deleted.

Sec. 1513 of Title 18, United States Code is deleted.

Sec. 1621 of Title 18, United States Code is deleted.

Sec. 1622 of Title 18, United States Code is deleted.

Sec. 1623 of Title 18, United States Code is deleted.

Sec. 3146 of Title 18, United States Code is deleted.

Sec. 3147 of Title 18, United States Code is deleted.

Sec. 3148 of Title 18, United States Code is deleted.

Sec. 3149 of Title 18, United States Code is deleted.

18 U.S.C. § 401 – Power of Court

(a) A court of the United States ~~shall have~~ has power to punish ~~by fine or imprisonment, or both,~~ and correct contempt of its authority ~~and none other~~, sua sponte or by petition, ~~as~~ including—

(1) Misbehavior or disobedience of any person in its presence or so near ~~thereto~~ as to obstruct the administration of justice;

(2) Misbehavior or disobedience of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

(1) Reprimand;

(2) Report to any state bar or comparable ethics institution;

(3) Fine; and

(4) Imprisonment.

18 U.S.C. § 3484 Subpoenas—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Form, contents and issuance of subpoena, Rule 17(a).

Service in United States, Rule 17(d), (e,1)1.

Service in foreign country, Rule 17(d), (e,2)1.

Indigent defendants, Rule 17(b).

On taking depositions, Rule 17(f).

Papers and documents, Rule 17(c).

Disobedience of subpoena as contempt of court, ~~Rule 17(g)~~ Rule 42.

18 U.S.C. § 3499 Contempt of court by witness—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Disobedience of subpoena without excuse as contempt, ~~Rule 17(g)~~ Rule 42.

Bankruptcy Amendments and Federal Judgeship Act of [Year]

An Act

To amend Title 11 of the United States Code regarding the authority of bankruptcy courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Bankruptcy Amendments and Federal Judgeship Act of [Year].

TITLE I—BANKRUPTCY JURISDICTION AND PROCEDURE

Sec. 105(a) of Title 11, United States Code, is amended to read as follows:

"§ 105. Power of Court

"(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, including orders for civil and criminal contempt. No provision of this title providing for the raising of an issue by a party in interest shall be construed

to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105 – Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, including orders for civil and criminal contempt. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

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Contempt Power and the United States Courts

Joshua Carback

CONTEMPT POWER AND THE UNITED STATES COURTS

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[*]Joshua T. Carback© is an independent author and a civil litigator. He thanks the editors of the *Mitchell Hamline Law Journal of Public Policy and Practice* for their work on this manuscript. The opinions expressed in this article are strictly those of the author and should not be construed to reflect the views of any other person or institution.

I. INTRODUCTION

Federal law governing the contempt power of the United States Courts is disorganized, cluttered, and poorly drafted. The lack of consolidation within and between various sources of federal legal authority is a critical problem. Contempt provisions lie scattered in piecemeal form across the entire breadth of the United States Code. Contempt provisions comprising federal common law likewise lie scattered across five separate sets of judicial rules of practice and procedure, covering five separate subject areas, using five separate numerologies: these rules govern bankruptcy procedure, appellate procedure, civil procedure, criminal procedure, and evidence. The high volume and lack of coordination between these interrelated authorities needlessly complicate contempt litigation. The objectives of this article are therefore to comprehensively survey the authorities governing contempt power and rectify their defects.

A. *Overview of Contempt Law*

The power to punish disrespect and disobedience through contempt proceedings is inherent to the judicial power and implied under Article III of the United States Constitution. There are two important distinctions mediating this power. The first distinction is between criminal contempt and civil contempt. Criminal contempt is contempt of a court's dignity. Civil contempt is disobedience of a court's order, rule, or judgment. Criminal contempt and civil contempt are not mutually exclusive categories; they often overlap. An act of disobedience can insult a court's dignity; an insult against a court's dignity can arise from an act of disobedience.[1]

The second distinction is between direct contempt and constructive contempt. Direct contempt occurs within a court's presence, that is, within the proximity of the presiding tribunal. Constructive contempt occurs beyond the proximity of the

[1] *See generally* U.S. Const. art. III; *see also* SIR JOHN C. FOX, THE HISTORY OF CONTEMPT OF COURT: THE FORM OF TRIAL AND THE MODE OF PUNISHMENT 1 (1927).

courthouse. All direct contempt is criminal. Constructive contempt can be criminal, civil, or both.[2]

B. *Defects in Contempt Law*

The Strategic Plan for the Federal Judiciary declares seven core values: rule of law, equal justice, judicial independence, diversity and respect, accountability, excellence, and service.[3] Federal contempt law does not reflect these values. The scope of the contempt power of the United States Courts is not clearly expressed in federal contempt authorities for four reasons. First, there is no statute that comprehensively governs civil contempt.

Second, the principal statute governing criminal contempt, 18 U.S.C. § 401, is defective. It does not adequately declare, for example, the distinction between civil and criminal contempt procedures or what penalties are liable upon conviction for criminal contempt.

Third, there is a lack of clarity about whether bankruptcy judges possess contempt power.

Fourth, judicial rules governing contempt procedures are poorly organized. There are multiple sets of contempt rules governing different courts with different jurisdictions. There is a lack of coordination between contempt provisions *within* these sets of rules. There is also a lack of coordination *between* these different sets of rules. These defects undermine the uniformity, simplicity, and efficiency of federal practice and procedure as a whole.[4]

C. *Reforming Contempt Law*

I propose to systematically improve federal contempt law in three ways. First, I propose to improve the statutory regime for contempt procedures by eliminating redundancy between criminal contempt statutes and passing legislation that explicitly gives bankruptcy courts contempt power.

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[2] Fox, *supra* note 1, at 1.
[3] U.S. JUD. CONF., STRATEGIC PLAN FOR THE FED. JUDICIARY 2 (2020).
[4] *Cf.* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655, 1687–88 (1995).

Second, I propose new rules and rule amendments to streamline contempt procedures for the United States Supreme Court, United States Courts of Appeals, United States District Courts, specialty courts, territorial courts, and administrative courts.

Third, I propose to nationalize local contempt rules derived from specific courts with local contempt provisions that deserve to be replicated. Simplification of contempt provisions at one level of authority generates a cascade of improvements by eliminating the need for similar provisions at others. An improved nationwide rule can eliminate the need for needlessly complicating local derivations. If a nationwide rule says more, moreover, a statute should say less. Improvements to nationwide rules of practice and procedure, in other words, eliminate superfluous and needlessly complicating local derivations and statutory counterparts.

D. *Roadmap for this Article*

Part II of this article explains the interbranch process for generating federal judicial rules of practice and procedure. It recounts how the federal government created contempt provisions at the inception of the interbranch rulemaking process in order to provide historical perspective. It also explains in more detail how the four defects I identified in contemporary federal contempt law undermine the efficacy of contempt procedures in federal courts.[5] Part III of this article provides precise instructions for implementing my three overarching proposals for reforming federal contempt law.[6] Part IV concludes.[7] Parts V – IX are appendices containing strikethrough copies of authorities currently comprising federal contempt law along with my proposed reforms and revisions. Parts IX – XV are appendices containing clean copies of authorities comprising federal contempt law in its current form. The appendices in Parts V – XV serve both as specific references for my proposals in this article as well as general references for practitioners and judges engaged in contempt proceedings. I encourage the reader to turn back and forth

[5] *See infra*-Part II.
[6] *Compare supra*–Part I.C, *with* infra-Part III.
[7] *See infra*-Part IV.

between each proposal and the appendix containing its respective authority revised according to my proposed specifications. The footnotes in each section of each part of this article cross-reference the particular appendices relevant to each proposal.[8]

II. BACKGROUND

The Rules Enabling Act of 1934 created the modern interbranch framework for making rules of practice and procedure for the federal judiciary, including rules governing contempt proceedings. It was a landmark achievement in the annals of American institutional reform. But successive generations of incremental tinkering slowly spun a doctrinal web so intricate and dense that the authorities governing federal contempt law practically shun attorneys from seriously considering contempt power as an effective recourse for problems that arise in litigation. The needless complexity of the federal contempt law chills judges from understanding and applying contempt power on behalf of the courts as well.[9]

A. *Judicial Rulemaking Generally*

The Rules Enabling Act of 1934, now codified in Title 28, Chapter 31 of the United States Code, balances the competing interests and equities of each branch of the federal government in judicial rules of procedure by requiring cooperation, collaboration, and contribution from each branch in the judicial rulemaking process. Section 2071 specifically provides that rules promulgated by the Supreme Court "shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."[10] The ball for judicial rulemaking therefore starts in the judiciary's court, pun intended.[11] The Supreme Court, however, no longer bears the weight of that responsibility alone—the Supreme

[8] *See infra*–Part V–IV.
[9] U.S. CONST. ARTS. I–III; 28 U.S.C. §§ 2071 et seq.
[10] 28 U.S.C. § 2071.
[11] *See* 28 U.S.C. § 2072.

Court delegates its rulemaking responsibility through several layers of the federal judiciary's administrative hierarchy.

The United States Judicial Conference administers the federal judiciary at the national level by supervising the Administrative Office of the United States Courts, facilitating internal disciplinary actions, developing national policies, proposing federal legislation, and improving federal practice and procedure.[12] The Judicial Conference delegates its rulemaking responsibility to its Standing Committee on Rules of Practice and Procedure.[13]

The Standing Committee reviews and coordinates the rulemaking recommendations of five advisory committees, each dedicated to a different subject area: appellate procedure, bankruptcy procedure, civil procedure, criminal procedure, and evidence. The meetings of the advisory committees are open and recorded. Each advisory committee has sub-committees dedicated to different projects within their respective domains. The roster of each committee consists of a chair, several members, a reporter, a secretary, and independent "contributors"—subject matter experts such as practicing attorneys, law professors, and representatives from the United States Department of Justice.[14]

Proposals to reform federal rules of practice and procedure must survive a daunting seven-stage gauntlet of interbranch scrutiny. First, the advisory committees to the Standing Committee make recommended rule amendments predicated on study, discussions, and consultations with their respective subcommittees.

Second, upon the approval of the Standing Committee, the advisory committees publish proposed rule amendments and solicit public comment.

Third, at the conclusion of the public comment period, the advisory committees review public feedback and, if worthy, submit proposed rule amendments incorporating public comment to the Standing Committee.

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[12] 28 U.S.C. § 331; 28 U.S.C. § 604; 28 U.S.C. §§ 2071 et al.
[13] 28 U.S.C. § 2073(b).
[14] McCabe, *supra* note 4, at 1664–66; U.S. Cts., Rules Committees – Chairs and Reporters (July 28, 2020).

Fourth, the Standing Committee reviews proposed rule amendments by the advisory committees, typically at its June meeting, and, if deemed worthy, submits those proposed rule amendments to the Judicial Conference.

Fifth, the Judicial Conference reviews proposed rule amendments, typically at its September meeting, and, if worthy, submits those proposed rule amendments to the Supreme Court.[15]

Sixth, the Supreme Court reviews proposed rule amendments and, if worthy, transmits them to the United States Congress for review on May 1.[16]

Seventh, there is a congressional review period of seven months. During that period Congress may act on proposed rule amendments and reject, modify, or defer them. Unless Congress acts, proposed rule amendments become legally effective by on December 1.[17]

B. *Judicial Rulemaking and Contempt Rules*

Congress intended for judicial rules to govern contempt proceedings from the beginning.[18] The Standing Committee and its constituent advisory committees therefore spent a significant amount of time deliberating how to make contempt rules efficient and clear. The advisory committees identified several common issues in the course of their deliberations: the extent to which the civil contempt and criminal contempt provisions should mirror each other; the distinction between constructive contempt and direct contempt; the distinction between civil contempt and criminal contempt; the scope of what constitutes "the court's presence" for the purposes of

[15] 28 U.S.C. § 2073.
[16] 28 U.S.C. § 2074.
[17] 28 U.S.C. §§ 2074–2075; Fed. Judicial Ctr., How Rules of Procedure are Developed and Revised in the U.S. Courts (2020); McCabe, *supra* note 4, at 1656–57, 72–75; U.S. Courts, Governance & The Judicial Conference, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited Aug. 3, 2020; 3:45 p.m.).
[18] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 12 (Sept. 8, 1941) (statement of James J. Robinson, Dir., Inst. of Crim. L. & Criminology).

delimiting the boundaries of direct criminal contempt; whether conduct can be subject to both criminal contempt and civil contempt simultaneously; and whether corporations can be held in contempt.[19]

The advisory committees resolved these issues over time as follows. Contumacious conduct can be subject to both civil and criminal contempt proceedings simultaneously. Artificial persons, corporations, are liable for contempt like natural persons. The scope of conduct constituting direct criminal contempt subject to summary judgment includes conduct not only occurring in the courtroom during a proceeding, but also conduct in the judge's chambers, the clerk's office, other areas of a courthouse, and the courthouse's immediate surround. A court's "presence," for the purpose of contempt law, is not limited to the actual room where a presiding judge sits.[20]

Congress continued to tinker with contempt procedures but lacks a sufficiently comprehensive vision necessary to achieve true

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[19] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 697–703 (Jan. 14, 1942) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; George Z. Medalie, U.S. Att'y., S.D.N.Y; G. Aaron Youngquist, Assistant Att'y. Gen. U.S. Dep't of Just.; George F. Longsdorf, Att'y.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 457–58, 535–36 (May 19, 1942) (statements of George F. Longsdorf, Att'y; Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; Aaron Youngquist, Assistant Att'y. Gen. U.S. Dep't of Just.; James J. Robinson, Dir., Inst. of Crim. L. & Criminology; Herbert Wechsler, Assist. Att'y. Gen., U.S. Dep't of Just.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 87–90, 390, 569, 571, 573–74 (Feb. 19, 1943) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George F. Longsdorf, Atty; George H. Dession, Prof., Yale L. Sch.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 895–98 (Feb. 23, 1943).

[20] *See U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 8 (Aug. 2–3, 1973); *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book,* U.S. S. Ct. (Oct. 7–8, 1999); Dave Schlueter, Memorandum to Criminal Rules Advisory Committee re: Restyling Project – Rules 10 to 22 (Second Draft of Rules and First Draft of Notes 234 (Sept. 9, 1999), *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book*, U.S. S. Ct. (Oct. 7–8, 1999); *see also* 18 U.S.C. § 402 (noting that corporations and associations are liable for contempt).

progress.[21] The federal judiciary's advisory committees likewise strived to make contempt rules compatible with contempt statutes for years. But the fit was never flush. Although the legislature and judiciary worked to establish the groundwork for the federal contempt law, they failed to operationalize general principles through a system of interlocking statutes and rules that is sufficiently concise, compact, and clear.

The history of how the federal judiciary's advisory committees grappled with drafting contempt rules revealed two maladies afflicting the current regime governing contempt law: *first*, the selective articulation of contempt liability in the federal rules of practice, and procedure; and *second*, the dizzying array of external and internal cross-references between different contempt authorities.

1. Articulation of Contempt Liability.

A difficult question presented from the very beginning was how often to punctuate the conclusion of a rule with the fact that non-compliance is liable for contempt. Should every rule have a contempt clause? In discussing Criminal Rule 4 (summons) in 1941, for example, the criminal rules advisory committee pondered whether it should state that noncompliance may result in contempt proceedings. On one hand, they could insert a contempt clause for every rule to ensure clarity. On the other hand, they could leave a contempt clause out of every rule on the theory that contempt is an implicit sanction for all disobedience or disrespect; therefore, mentioning it in provision after provision would be overly redundant and needlessly take up space.

An excerpt from the committee's discussion in 1941 illustrates how the rule makers serving in the Judicial Conference in different capacities pondered this conundrum:

[21] Act of June 25, 1948, ch. 645, 62 Stat. 701 (codified as amended at 18 U.S.C. § 3285, §§ 3691–3692); Act of May 24, 1949, ch. 139, § 8(c), 63 Stat. 89, 90; Court Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended at 28 U.S.C. § 2077); Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended at 28 U.S.C. § 2072).

Murray Seasongood: Will people say, "Well, after all, the only penalty is for contempt, and I won't pay any attention to it."

Alexander Holztoff: Then he will issue a warrant if the defendant does not appear.

Murray Seasongood: Could anybody say that is a limitation, that the only penalty is the penalty for contempt of court for not obeying a summons?

James J. Robinson: I tried to save space, possibly at some cost.

Murray Seasongood: If he does not appear in response to the summons, then a warrant shall be issued. Perhaps that should be in.

George H. Dession: That could be done in any case. That does not have to go in.

Frederick E. Crane: I do not know, but any court process, if it is disobeyed, is subject to contempt. Do you have to add that to every order or process of the court? I did not think that you needed to emphasize it. I may be wrong, but I took for granted that any order or process, whether a summons or warrant or any order, civil or criminal, is subject to contempt.

Chairman Arthur T. Vanderbilt: That is true. This is the language so that the man who receives it will be apprised of that fact.

Frederick E. Crane: That may be the answer, then.[22]

[22] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. (Sept. 8, 1941) (statements of Chairman Arthur T. Vanderbilt, Chief Justice, Sup. Ct. of N.J.; Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; Murray Seasongood, Partner, Warrington & Paxton; James J. Robinson, Dir., Inst. of Crim. L. & Criminology; Hon. Frederick E. Crane, N.Y. Ct. of App.) (discussing

The less rigid approach prevailed over time. As criminal rules advisory committee member George Medalie noted in 1943, "There are some things we had better leave to the courts, to their experience and practical judgment. You cannot cover everything."[23]

The advisory committees did not incorporate contempt power into federal rules in a coordinated, systematic matter. Instead, they opted to gradually reform rules implicating contempt power on a case-by-case basis. They employed four different approaches to amendments to contempt rules over time.

First, there were cases when the advisory committees intentionally added contempt provisions to rules because they were certain that contempt power was available, and that availability was worthy of emphasis.[24]

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a former version of FED. R. CRIM. P. 4); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 63–64 (Sept. 8, 1941) (statements of James J. Robinson, Dir., Inst. of Crim. L. & Criminology; Assoc. J., N.Y. Ct. of App.) (discussing a former version of FED. R. CRIM. P. 4); *see also U.S. Jud Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 345 (Sept. 9, 1941) (statement of Murray Seasongood, Partner, Warrington & Paxton) (discussing a draft of former Fed. R. Crim. P. 9).

[23] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 87–90 (Feb. 19, 1943) (statement of George Z. Medalie, U.S. Att'y., S.D.N.Y).

[24] FED. R. BANKR. P. 9014; FED. R. BANKR. P. 9020; FED. R. CIV. P. 4 & 1963 Amend. Comm. note on subdivision (f); FED. R. CIV. P. 4.1(b) & 1993 Amend. Comm. note on subdivision (b); FED. R. CIV. P. 11 & 1983 Amendment Comm. note; FED. R. CIV. P. 37(b) & 1937 Comm. note; FED. R. CIV. P. 45(g) & 1937 Comm. note subdivision (e), 1991 Amend. Comm. note subdivisions (a) and (f), 2013 Amend. Comm. note subdivisions (c), (f), & (g); FED. R. CIV. P. 53(c)(2); FED. R. CIV. P. 56(h); FED. R. CIV. P. 73 & 1983 Comm. note subdivision (a); FED. R. CRIM. P. 6(e)(5),(7) & Comm. note 1977 Proposed Amends., 1983 Amend. Comm. note, 2002 Amend. Comm. note; FED. R. CRIM. P. 7(a)(1) & 2002 Amend. Comm. note; FED. R. CRIM. P. 17(g) & 2002 Amend. note; FED. R. CRIM. P. 42; Notes of Conference Call with the Discovery Subcomm. of the Advisory Comm. on Civ. Rules 2–4 (July 23, 2012), *reprinted in U.S. Jud. Conf. Advisory Comm. on Civ. Rules, Agenda Book*, U.S. S. Ct. 183 (Nov. 1–2, 2012) (removing a bracketed limitation excluding contempt from the list of available sanctions listed in FED. R. CIV. P. 37(b)(2)(A)); *U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. (Apr. 4–5, 2011) ("The Committee unanimously approved the suggested addition to Rule 45(g), described above, adding at line 272,

Second, there were cases when the advisory committees were certain that contempt should not be available as an enforcement mechanism. They effectuated this intent in one of two ways: by deliberately omitting reference to the contempt power, such as in Civil Rule 35 (medical examination) and Bankruptcy Rule 2005

page 102, these words: 'may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order relating to the subpoena."); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. (Jan. 14, 1942) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; George F. Longsdorf, Att'y) (discussing drafts of former Fed. R. Crim. P. 45 and 107); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim Proc., Meeting Minutes,* U.S. S. Ct. 326–330 (May 19, 1942) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Atty. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George F. Longsdorf, Att'y; George H. Dession, Prof., Yale L. Sch.; Hugh D. McLellan, J., U.S. Dist. Ct. D. Mass.) (discussing whether an explicit contempt clause in a rule governing summons was necessary); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim Proc., Meeting Minutes,* U.S. S. Ct., 457–58 (May 19, 1942) (statements of George F. Longsdorf, Att'y; Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; Aaron Youngquist, Assistant U.S. Att'y. Gen.; James J. Robinson, Dir., Inst. of Crim. L. & Criminology); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. 87–90, 390, 569, 571 (Feb. 19, 1943) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Atty. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George F. Longsdorf, Att'y; George H. Dession, Prof., Yale L. Sch.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Draft Minutes*, U.S. S. Ct. 4, 223–24 (June 21–22, 1999) (statements of J. Smith, Kate Stith, Prof., Yale L. Sch.; Fern M. Smith, U.S. Dist. J. for N.D.C.A.), *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Boo*k, U.S. S. Ct. (Oct. 7–8, 1999); *see also U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes,* U.S. S. Ct. 12–13 (Apr. 20–21, 2009) (editing the text in Fed. R. CIV. P. 45(h) regarding the availability of sanctions in such a manner as not to detract from the availability of contempt as an enforcement mechanism).

(apprehension);[25] or by affirmatively disclaiming that contempt was unavailable, such as in Criminal Rule 4 (summons).[26]

Third, there were cases when advisory committees were divided or agnostic on the availability of contempt as an enforcement mechanism for a particular rule. The criminal advisory committee, for example, deliberated the scope of contempt liability for unauthorized release of grand jury materials under Criminal Rule 6(e) in 1999. It ultimately decided to defer the resolution of that issue to judicial interpretation (case law) or congressional action. This anecdote illustrates the troublesome fact that while the Standing Committee was generally zealous to conserve its rulemaking prerogatives, its constituent organs, like any bureaucratic entity, tended to "punt the football" on difficult questions.[27] This anecdote also reveals the tradeoff for delegating rulemaking responsibility across multiple levels of review involving a larger group of people. When power is diffuse, the reins are loose.

Fourth, there were cases when the advisory committees were certain that contempt power was available as an enforcement mechanism but decided not to insert an explicit textual affirmation of

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[25] FED. R. CIV. P. 35; FED. BANKR. R. 2005; *U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. 1568–69, 1572 (Nov. 18, 1935) (statements of Chairman William DeWitt Mitchell, Att'y.; Edson R. Sunderland, Prof., U. Mich. L. Sch.) (discussing the availability of contempt in former Rule 65 governing medical examinations); *U.S. Jud. Conf. Advisory Comm. on Bankr. Rules, Meeting Minutes*, U.S. S. Ct. 16–17 (Feb. 15, 18, 1967) (statements of Edward T. Gignoux, U.S. Dist. Ct. D. Me.; Frank R. Kennedy, Prof., U. Mich. L. Sch.) (noting that J. Edward Gignoux withdrew his suggestion that Bankruptcy Rule 2005—then Bankruptcy Rule 2.21—cross-reference Criminal Rule 42—then Criminal Rule 40—because there was unanimity that the criminal contempt rule had content that ought not be in the bankruptcy rule).

[26] FED. R. CRIM. P. 4 & 1944 Comm. note (a)(4); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 63–64 (Sept. 8, 1941) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att'y. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George H. Dession, Prof., Yale L. Sch.; Hon. Frederick E. Crane, N.Y. Ct. of App.).

[27] FED. R. CRIM. P. 6(e)(5),(7); U.S. Jud. Conf., Advisory Comm. on Rules of Crim. Proc., Rule 1–31 Preliminary Draft of the Proposed Revision of the Federal Rules of Criminal Procedure Using Guidelines for Drafting and Editing Court Rules 30, 63 (2000), *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book,* U.S. S. Ct. (Jan. 10–11, 2000).

that fact. Given that contempt power is inherent to the judicial power, the advisory committees often wanted to avoid emphasizing the availability of contempt as an enforcement mechanism when they believed it was clearly implied. They left out any explicit reference to contempt power in some rules, in other words, not because they were agnostic or even had negative views about the availability of contempt proceedings, but rather because they thought it was more economical to keep silent or because the availability of contempt power was deemed unworthy of emphasis. The banality of contempt liability for disrespect or disobedience therefore bears some blame for why federal rules of practice and procedure are so inconsistent in explaining if and to what extent contempt power applies to any given situation.[28]

The history of advisory committee deliberations about how to incorporate contempt power into the federal rules of practice and procedure reveals an institutional tendency to prefer flexibility over systemization. It is a general principle of law that anyone who disobeys the authority or denies the dignity of an Article III court is liable for contempt whether or not a particular rule explicitly says so. The particular rules where the Standing Committee intentionally omitted any reference to contempt power or affirmatively prohibited the applicability of contempt power consequently were quite few. When the Standing Committee explicitly disclaimed contempt liability in particular rules, it was for emphasis, not as a matter of course. The fact that the Standing Committee did treat silence as a prohibition on a few occasions, however, created some uncertainty in the rules: silence did not always mean the same thing. The negative

[28] Memorandum to the Chairman and Members of the Committee on the Administration of the Bankruptcy System: Proposals to Reduce Certain Costs of the Bankruptcy Process 4–5 (Jan. 7–8, 1993), *reprinted in U.S. Jud. Conf. Advisory Comm. on Bankr. Rules, Agenda Book,* U.S. S. Ct. (Feb. 18–19, 1993) (weighing the merits of adding a contempt provision to Bankruptcy Rule 4004(g)); *cf. U.S. Jud. Conf. Advisory Comm. on Rules Crim. Proc., Meeting Minutes*, U.S. S. Ct. 63–64 (Sept. 8, 1941) (James J. Robinson, Dir., Inst. of Crim. L. & Criminology) (stating that he left certain language out of Criminal Rule 4 to save space).

implication canon does not apply consistently across the board. Sometimes silence meant "Yes." Sometimes silence meant "No." [29]

The history of contempt power yields an interesting paradox: the advisory committees were intentional in creating, yet they were not always clear about what their intentions created. They recognized from the beginning that there was a cost to taking a flexible approach by sprinkling textual references to contempt power here and there, rather than systematically confirming in every rule whether contempt power was available or not. In the end, that decision cost them in terms of clarity and consistency.

The use of four different approaches rather than one created confusion. The tradeoff of having three levels of rules committees—the Standing Committee, advisory committees, and advisory subcommittees—was injecting more expertise *into* the rules at the cost of creating more "noise" *between* the rules. There are therefore now too many cooks in the kitchen. For the justice system to become more efficient, systematization, not flexibility, must be the prime

[29] *See, e.g.*, Notes of Conference Call with Discovery Subcomm. of the Advisory Comm. on Civil Rules (July 5, 2012), *reprinted in U.S. Jud. Conf. Advisory Comm. on Civ. Rules, Agenda Book*, U.S. S. Ct. (Nov. 1–2, 2012) ("The focus is on whether the failure to preserve [under FED. CIV. R. 37(g)(2)] has had a severe impact on the truth-seeking process. This discussion prompted a question: What happens if there was unquestioned bad faith, but no prejudice? For example, the most outrageous effort to destroy the evidence might be bungled. Is there nothing the judge can do in the face of such conduct? One reaction was that the court surely has abundant inherent authority to respond to such behavior. Another was that there are cases that say prejudice can be presumed if there has been bad faith activity. A third was that the courts surely have inherent authority to punish outrageous conduct. This discussion prompted reference to the inherent authority question that hovers in the background of the discussions."); Mark D. Shapiro, Memorandum to Advisory Comm. on Civ. R., Fed. R. of Att'y. Conduct (FRAC) (March 28, 2000), *reprinted in U.S. Jud. Conf. Advisory Comm. on Civ. Rules, Agenda Books,* U.S. S. Ct. 6 (Apr. 10–11, 2000) ("A federal court may enforce procedural requirements by all appropriate sanctions. The sanctions may be those expressly provided in a rule of procedure, such as Appellate Rule 38, or Civ. R. 11, 26(g), and 37. The sanctions also may be contempt sanctions or other sanctions supported by inherent power."); *U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. 1544 (Nov. 18, 1935) (statement of Hon. George Donworth, U.S. Dist. Ct. W.D. Wash.) (in discussing former FED. R. CIV. P. 57 concerning interrogatories involving documents and tangible things, stating, "Does not the general law of contempt cover all these things about refusing to obey the order of the court?").

directive. Federal rulemaking requires a new paradigm: fewer hands, and more delicate fingers.

2. External & Internal Cross-References.

The Rules Enabling Act did not fully dredge the swamp of disparate authorities that stymied litigators during the nineteenth century. It simply provided enough drainage to allow for a more level playing field. But cross-references between judicial rules and statutes operationalizing federal procedures still needlessly complicated the game. Not every judicial rule has a statutory cross-reference, of course, but many do. Advisory committees recognized early on that zigzagging between disparate authorities to figure out how a particular contempt procedure works is not ideal.[30]

There are two types of cross-references in contempt law. The first type of cross-references are external cross-references: procedural rules that cross-reference procedural statutes. The Standing Committee took the view that it should keep authority for enforcement procedures, like contempt power, exclusively within the rules whenever possible. In 1953, the civil rules advisory committee noted that its draftsmanship of Civil Rule 45(e) was so good, it rendered its coordinate statute unnecessary, therefore, Congress abolished that statute outright.[31] In 1973, the criminal rules advisory committee voted to keep the punishment for unauthorized release of grand jury testimony set forth in Criminal Rule 6 (grand jury) strictly within the scope of the Federal Rules of Criminal Procedure, rather

[30] 28 U.S.C. § 1652; *cf. U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. 27 (Apr. 20–21, 2009) ("It is clear that Rule 45 is a long and complicated rule. 'You have to work hard to find what it means.' Many judges say that it is a perfectly fine rule, that the problem is that lawyers do not understand it. A fine rule that lawyers cannot understand may deserve some clarification.").

[31] *U.S. Jud. Conf. Advisory Comm. on Rules Civ. Proc., Meeting Minutes*, U.S. S. Ct. 442–43 (May 19, 1953) (statement of Hon. Charles Edward Clark, U.S. Ct. App. 2d Cir.) ("I just comment in passing that is one of the difficulties that occurred as to the poor admiralty people. [FED. R. CIV. P.] 45(e) is a very good rule of subpoena. It was so good that the revisers of Title 28 U.S. Code said it was lovely, and since it was so good[,] they didn't need any statute. They abolished the statute, and then we had the question what to do in admiralty.").

than requesting that Congress enact coordinate statutes in the United States Code to serve that purpose.[32]

We find a less stark example in 2000 when the criminal rules advisory committee considered inserting an external cross-reference to 28 U.S.C. § 1784. Section 1784 governs contempt proceedings against foreign residents who fail to respond to subpoenas. The committee minutes reveal that there was no consensus about whether the general rule governing criminal contempt—Criminal Rule 42 (then Criminal Rule 43)—even applied to Section 1784. The committee opted to omit a cross-reference. It was satisfied with only having a cross-reference to Section 1784 in Criminal Rule 1, which outlined the scope of the Federal Rules of Criminal Procedure as a whole.[33] In 2001, the criminal rules advisory committee accepted a subcommittee recommendation to amend Criminal Rule 42 (criminal contempt) to reflect the new authority of magistrate judges to preside over contempt proceedings. This amendment simply inserted a cross-reference to the relevant statute granting magistrate judges the contempt power.[34]

The second type of cross-references are cross-references *between* rules. One might wonder if it was ever possible to make each rule hermetically sealed and self-sufficient. The principle of autarky in, though academically interesting, never caught on. Not only did the advisory committees frequently draft rules *within* a given subject area that cross-referenced other subject areas—they occasionally even

[32] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 8 (August 2–3, 1973) ("A discussion of unauthorized release of grand jury testimony followed. Judge Gesell urged that this should be a statutory offense, noting that at present the only apparent means of enforcement is through the contempt power. Justice Cutter urged that solutions be kept within the framework of the Criminal Rules rather than statutes, if possible. It was VOTED to recommend no changes in the subpoena practice.").

[33] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. (Oct. 19–20, 2000).

[34] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes,* U.S. S. Ct. (Apr. 25–26, 2001).

drafted internal cross-references *between* subject areas. Bankruptcy Rule 9.11, for example, was drafted in the likeness of Civil Rule 11.[35]

Over time, advisory committees made case-by-case decisions as to whether cross-references in the body of a rule or its comments were appropriate. Some rules ended up being more self-sufficient than others. The criminal rules advisory committee opted in 2000 to not include an internal cross-reference in Criminal Rule 42 (criminal contempt) to Criminal Rule 32 (sentencing) for the purpose of clarifying whether a criminal contempt sentencing would require the production of a presentence report (it did not).[36]

The criminal rules advisory committee agreed with a subcommittee proposal in 2001 to insert an internal cross-reference in Criminal Rule 7 (indictment and information) clarifying that contempt charges under Criminal Rule 42 (criminal contempt) need not be initiated by indictment.[37] Suffice it to say that both internal and external cross-references made contempt law more convoluted than necessary. Anyone who needs to prepare for a contempt proceeding practically needs to wear a neck brace to mitigate the amount of

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[35] *U.S. Jud. Conf. Advisory Comm. on Bankr. Rules, Meeting Minutes*, U.S. S. Ct. 3 (Oct. 31 & Nov. 2, 1966) (statements of Frank R. Kenny, Prof., U. Mich. L. Sch.; Hon. Elmore Whitehurst, Assist. Dir., Admin. Off. U.S. Cts.) ("Judge Whitehurst referred to the last sentences of Rule 9.11(a) and said he wondered just what he should do, if, as a referee, he [was] [sic] confronted with a violation of the rule. Professor Kennedy stated that the sentences came right out of Rule 11 of the Federal Rules of Civil Procedure. He said that perhaps any sanction other than citation for contempt might be imposed by the referee. He suggested that unless Judge Whitehurst wished the Committee and reporter to pursue this matter further, the draft of Rule 9.11 should follow the corresponding Federal Civil Rule.").

[36] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 2 (Jan. 10–11, 2000).

[37] *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 5 (Apr. 25–26, 2001); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Draft Minutes*, U.S. S. Ct. 14 (Apr. 25–26, 2001), *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book*, U.S. S. Ct. (Apr. 25–26, 2002); Hon. Anthony J. Scirica, U.S. Jud. Conf., Comm. on R. Prac. & P., Memorandum to the Chief Justice of the United States [&] Associate Justices of the United States re: Summary of the Proposed Amendments to the Federal Rules 4 (Nov. 13, 2001), *reprinted in U.S. Jud. Conf., Advisory Comm. on Rules of Crim. Proc.,* U.S. S. Ct. (Apr. 25–26, 2002).

whiplash they will suffer from jerking back and forth between so many different interconnected contempt authorities.

III. ANALYSIS

The three branches of the federal government must work together to reform statutes, sentencing guidelines, and judicial rules governing the contempt power of the United States Courts. I provide specific recommendations for contempt reforms in the context of criminal, civil, bankruptcy, and administrative procedure below.

A. *Criminal Contempt Legislation*

I propose that the federal government amend 18 U.S.C. § 401 and Criminal Rule 42 to be more comprehensive in three ways. First, Congress should modify 18 U.S.C. § 401 to provide explicit notice of the three penalties or purge conditions that a court may prescribe for contempt: reprimand, fines, and imprisonment. The language for this amendment should be broad and permissive, not exhaustive. Courts should be allowed ample room for discretion and creativity in handling contempt matters.[38]

Second, Criminal Rule 42 should be amended to allow parties to file petitions out of court or move in court for civil and/or criminal contempt proceedings.[39]

Third, Criminal Rule 42 and 18 U.S.C. § 401 should also expressly declare the right of the court to initiate contempt proceedings sua sponte. These amendments will render criminal contempt statutes, especially statutes in the genre of obstruction of justice (perjury, witness tampering, violation of bail and probation orders, etc.) superfluous and justify their repeal.

One might argue that such a widespread effort to repeal criminal contempt statutes is unjustified. Criminal contempt statutes are normally merely declaratory of a court's right to punish an offense through its inherent power. But the purpose of the criminal contempt statutes at issue is not simply to express what the law is. By rendering

[38] *See infra*–Part V.A–B.
[39] *See infra*–Part V.K.

an offense that is sui generis by default into a crime as such, the discretion for prosecution and punishment shifts from the judiciary to the executive. That is the real purpose behind the criminal contempt statutes that saturate the federal criminal code. The criminalization of contempt forms a chokehold on judicial discretion. It represents a fear that judges will not adequately punish contempt if left to their own devices.

I maintain that if there is anywhere where judicial discretion in punishment should have priority, it is in the zone of the judiciary's inherent power to punish contempt. When the judicial power guaranteed under Article III is the greatest "victim" of an offense, the judicial power should have the greatest prerogative in vindicating that offense. I believe that the judiciary is capable of using its broad sentencing discretion to adequately punish conduct contemplated by criminal contempt statutes. For hundreds of years, common law courts punished indignities against them under their inherent power, not as crimes as such, without any problems. I do not see any justification for departing from this tradition.[40] Criminal contempt statutes are, in my view, unnecessary.

In light of my proposed amendments to 18 U.S.C. § 401 and Criminal Rule 42, I propose that Congress repeal the following criminal statutes: 18 U.S.C. §§ 1073, 1503, 1509, 1512, 1523, 1621–1623, 3484, 3498–3499, and 3146–3149.[41] These repeals will require amendments to the current model federal jury instruction for contempt under Section 401 as well. The federal criminal code is obese. This is a good place to trim fat. One cannot complain that this pattern of repeal will amplify the threat of impunity. Those liabilities once contemplated by criminal contempt statutes will simply collapse into 18 U.S.C. § 401 and Criminal Rule 42.[42]

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[40] *E.g.*, King v. Bellingham (1649) 82 K.B. 582, Style 126 (Eng.) (punishing perjury with a fine of ten pounds); Wingfield's Case (1633) 79 K.B. 819, Cro. Car. 251 (Eng.) (punishing men who assaulted a sheriff of Middlesex with fines ranging between 500 marks and 500 pounds); Royson's Case (1629) 79 K.B. 729, Cro. Car. 146 (Eng.) (punishing breach of bail with imprisonment and standing in the pillory with a paper proclaiming the contemnor's offense).

[41] *See infra*-Part V.A.

[42] *Compare* Leonard B. Sand et al., 1 Model Fed. Jury Instr.-Crim. P. 20.01–02 (Lexis Nexis Nov. 2022), *with infra*-Part VIII.A.

The reversion of criminal contempt of court from a class of statutory crime as such back into a sui generis offense will resolve separation of powers concerns triggered under the Appointments Clause when the judiciary appoints independent prosecutors under Rule 42. The proper way to achieve both a balance and separation of power between the coordinate branches of the federal government is to reduce the burden of each branches' involvement in vindicating each other's prerogatives to the greatest extent possible. The means and ends of criminal contempt proceedings, for example, is to vindicate judicial power that is both inherent and implied under Article III. The executive power under Article II therefore ought to be involved to the minimum extent possible in enforcing and upholding the dignity of the judicial power under Article III through contempt proceedings. To that end, it is perhaps appropriate that the default prosecutor for criminal contempt charges should be an independent prosecutor rather than a public prosecutor.[43]

B. *Bankruptcy Contempt Legislation*

I propose new legislation to settle the question of whether bankruptcy judges possess contempt power. The passage of the Bankruptcy Amendments and Federal Judgeship Act in 1984 did not clarify whether bankruptcy judges and magistrate judges had contempt power. The Federal Courts Improvement Act of 2000 clarified that magistrate judges do indeed possess contempt power, but the status of bankruptcy judges was left unresolved. I am not convinced that bankruptcy courts currently have contempt power. Such power cannot, in my mind, be granted to an Article I court sub silentio.[44] Since Congress gave contempt power to magistrate judges, I see no reason why bankruptcy judges should not possess it as well. But Congress must grant such power expressly, not by implication.[45]

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[43] *Cf.* Donziger v. United States, 38 F.4th 290 (2d Cir. 2022), *petition for cert. filed* (Sept. 20, 2022) (No. 22-__).
[44] Laura B. Bartell, *Contempt of the Bankruptcy Court – A New Look*, 1996 U. ILL. L. REV. 1, 56 (1996).
[45] *See infra*–Part V.C–D.

C. *Administrative State Legislation*

I propose two sets of statutory reforms affecting administrative entities within the executive branch. First, I propose that Congress harmonize laws regulating referrals of contempt matters by administrative courts, boards, agency panels, etc., to federal district courts. The specific administrative entities implicated by this proposal include United States Departments of Agriculture, Commerce, Health and Human Services, Interior, Labor, Justice, Defense, Homeland Security, Treasury, Transportation, as well as some independent agencies. The particular administrative law courts implicated by this proposal include agency tribunals such as the National Labor Relations Board, the Harbor Workers' Compensation Benefits Review Board, immigration courts, the Trademark Trial and Appeal Board, and the Patent Trial and Appeal Board. I drafted a model statute to fulfill this proposed administrative reform for all of these administrative entities. The draft language states that the certification of contempt matters arising before administrative law courts, bodies, boards, agency panels, etc., should be adjudicated by a federal court that can exercise jurisdiction over the underlying subject matter or the alleged contemnor. The proceedings should be governed by federal rules of practice and procedure (i.e., Criminal Rule 42) as if the contempt arose in proceedings before the federal court receiving the certification itself.[46]

Second, I propose that Congress harmonize one hundred and fifty or so statutes and regulations governing subpoena enforcement for the departments and independent agencies within the executive branch referred to above. I crafted model language to facilitate this objective. Congress can incorporate this language into a statute or regulation. This language states that the certification of a matter involving the enforcement of a subpoena issued by an administrative entity should be adjudicated under the relevant federal rules of practice and procedure governing the federal court that can exercise jurisdiction over the administrative process or the person accused of contempt of the subpoena. The federal court that has jurisdiction over the administrative proceeding requiring the enforcement of a

[46] *See infra*–Part V.E.

subpoena should then adjudicate a contempt of the relevant administrative entity as if it arose in proceedings before that court itself.[47]

D. *Criminal Contempt Sentencing Guidelines*

I am content with the current sentencing regime for criminal contempt statutes established by United States Guidelines 2J1.1 and 2X5.1. The United States Sentencing Commission should, however, amend these guidelines to reflect my proposed amendments to Title 18, Section 401 of the United States Code. Because the proposed amendments render most, if not all, criminal contempt statutes superfluous, the guidelines must reflect the repeal of those statutes. The Sentencing Commission should also modify the guidelines to reference statutes that sound in criminal contempt but are not eliminated by my proposed reforms.[48]

E. *Contempt Rules of Civil Procedure*

The Standing Committee should modify the Federal Rules of Civil Procedure by adopting a new rule comprehensively governing (constructive) civil contempt. The new rule should be an analogue to Criminal Rule 42 and styled as "Civil Rule 42." The numerology of the Civil Rules following New Civil Rule 42 should "bump down" to create as much symmetry as possible between the Civil Rules and Criminal Rules.

My inspiration for a comprehensive federal civil contempt rule arises in part from civil contempt provisions found in the local rules of the United States District Courts for the Northern, Southern, Eastern, and Western Districts of New York; the Eastern District of North Carolina; the Southern District of West Virginia; the rules of specialty courts like the United States Court of Claims, the United States Court of International Trade, the United States Foreign Intelligence Surveillance Court; and the rules of state courts with civil

[47] *See infra*–Part V.F.
[48] *See infra*-Part XV.

contempt rules like the State of Maryland.[49] A comprehensive civil contempt rule is practical because it improves the harmony between the various rules of practice and procedure. A comprehensive civil contempt rule is also justified for pedagogical reasons: it instructs the bench and bar how civil contempt processes work, what purge conditions are available, etc.

New Civil Rule 42 should be framed to achieve the following objectives:

(1) Define civil contempt and distinguish it from criminal contempt;

(2) Explain that the scope of the rule encompasses civil contempt under the Civil Rules, local rules, and statutes sounding in civil contempt;

(3) Articulate discrepancies in contempt authority between Article III judges and judicial officers, such as masters, magistrates, bankruptcy judges, etc.;

(4) Explain that an institution that cannot exercise inherent or statutory contempt power can certify a contempt in proceedings before them to an institution that can under this particular rule;

(5) Clarify the authority of the court to initiate civil (constructive) contempt proceedings sua sponte;

(6) Clarify that parties in interest to a case can petition for civil (constructive) contempt;

(7) List the requirements for a party-initiated petition for civil (constructive) contempt;

[49] *See* N.D.N.Y. L.R. 83.5; S.D.N.Y. L.R. Civ. 83.6; E.D.N.Y. L.R. Civ. 83.6; W.D.N.Y. L.R. Civ. 83.4; E.D.N.C. L.R. Civ. 100.3; S.D. W.Va. L.R. P. 4.1.1–3; Ct. Int'l Trade L.R. 37(b); Ct. Int'l Trade L.R. 45(f); Ct. Int'l Trade L.R. 53(c)(2); Ct. Int'l Trade L.R. 56(h); Ct. Int'l Trade L.R. 86.2; Ct. Fed. Claims R. 4.1; F.I.S.C. L.R. 19; Md. Rule 15-206; Md. Rule 15-207.

(8) List the requirements for a show cause order to be entered by the court upon granting a petition;

(9) List the requirements for service of process;

(10) Cross-reference other rules as necessary when special exemptions or applications are in order; Clarify the wide range of purge conditions that a court can impose; and

(11) Clarify that civil contempt proceedings do not foreclose concurrent or consecutive criminal contempt proceedings.

The committee note to New Civil Rule 42 should reference published federal appellate precedents exemplifying the variety of purge conditions available. These precedents should include cases when courts held parties in constructive civil and constructive criminal contempt simultaneously, provide guidance on how to proceed when such a finding is appropriate, and explain how such cases are treated on appeal.[50]

Contempt provisions in Old Civil Rules 4.1, 37(b), 53, 56, and 70 must be amended in light of the implementation of New Civil Rule 42. New Civil Rule 42 will supersede Old Civil Rule 4.1(b); therefore, the latter should be deleted. Civil Rule 4.1 should also be restyled to remove subsection (a) from the header because there is only one provision in the new version of the rule, not two. Old Civil Rule 37 should be amended. Section (b) of Old Civil Rule 37 should focus on non-contempt sanctions. This way there is no danger of surplusage in New Civil Rule 42. Subsections (b)(1) and (b)(2)(vii) of Old Civil Rule 37 should be simplified by incorporating an internal cross-reference to New Civil Rule 42 and revised Criminal Rule 42. Old Civil Rule 45 should be renumbered as New Civil Rule 46.[51]

The amendments to Civil Rule 42 will render Subsection (g) of Old Civil Rule 42 superfluous, therefore, Subsection (g) of Old Civil Rule 42 should be deleted. Old Civil Rule 53 should be renumbered as New Civil Rule 54. New Civil Rule 42 will render

[50] *See infra*-Part VI.C.
[51] *See infra*-Part VI.A–B, D–G.

Subsection (c)(2) of Old Civil Rule 42 superfluous, and therefore, Subsection (c)(2) of Old Civil Rule 42 should be deleted. Old Civil Rule 56 should be renumbered as New Civil Rule 57. The amendments to New Civil Rule 42 will render the contempt language in Section (h) of Old Civil Rule 42 superfluous, therefore, Section (h) of Old Civil Rule 42 should be deleted. New Civil Rule 42 should internally cross-reference New Civil Rule 42 and revised Criminal Rule 42 in lieu of Section (h) of Old Civil Rule 42. Old Civil Rule 70 should be renumbered as New Civil Rule 71. The amendments to New Civil Rule 42 will render Section (e) of Old Civil Rule 42 superfluous, therefore, Section (e) of Old Civil Rule 42 should be deleted.[52]

F. *Contempt Rules of Criminal Procedure*

The Standing Committee should revise Criminal Rule 42 to eliminate unnecessary criminal contempt statutes and trim unnecessary contempt provisions in other criminal rules. There is no need to "bump down" the numerology of subsequent rules in the Federal Rules of Criminal Procedure. The Standing Committee should amend other criminal rules with contempt provisions, however, in light of my proposed amendments revising Criminal Rule 42.

Revised Criminal Rule 42 does the following:

(1) Defines criminal contempt and distinguishes it from civil contempt;

(2) Explains that the scope of the rule encompasses criminal contempt under the Criminal Rules, local rules, and statutes sounding in criminal contempt;

(3) Articulates discrepancies between contempt power of Article III judges and judicial officers, such as masters, magistrates, bankruptcy judges, etc.;

[52] *Id*.

(4) Explains that authorities who cannot exercise inherent or statutory contempt power can certify contempt to federal courts that can specifically under this rule;

(5) Clarifies the authority of the court to initiate criminal (direct and constructive) contempt proceedings sua sponte;

(6) Clarifies that parties in interest to a case can petition for criminal (constructive) contempt;

(7) Lists the requirements for a party-initiated petition for criminal (constructive) contempt;

(8) Lists the requirements for a show cause order to be entered by the court upon granting a petition;

(9) Lists the requirements for service of process;

(10) Cross-references other rules as necessary when special exemptions or applications apply;

(11) Clarifies the wide range of penalties that can be imposed; and

(12) Clarifies that criminal contempt proceedings do not foreclose consecutive or concurrent civil contempt proceedings.

The committee note to revised Criminal Rule 42 should reference published federal appellate precedents exemplifying the variety of penalties and the relevant guidelines in the United States Sentencing Guidelines for executing them. These precedents should include cases when a party was held in constructive civil and constructive criminal contempt simultaneously and provide guidance on how to proceed when such a finding is appropriate.[53]

One might contend that prosecutors should have absolute discretion and the final word in criminal contempt matters, therefore, there should be no appointment of independent prosecutors if the

[53] *See infra*-Part VI.K.

executive does not wish to prosecute.[54] I disagree. The doctrine of separation of powers must not be left in a vacuum. The inherent authority of the federal judiciary, in my view, encompasses the ability to appoint independent counsel to represent and effectuate its institutional prerogatives, especially in proceedings initiated to vindicate those prerogatives.

The ultimate tool of the executive for balancing the power distributed between it and the judiciary in criminal contempt proceedings is not prosecutorial discretion by a "semi-autonomous" Department of Justice; it is the power of the President of the United States to grant pardons. The Standing Committee should therefore modify Old Criminal Rule 6(e) to internally cross-reference New Civil Rule 42 and revised Criminal Rule 42. Old Criminal Rule 7(a) should be modified to internally cross-reference revised Criminal Rule 42. Old Criminal Rule 17(g) is rendered superfluous by revised Criminal Rule 42(g); therefore, Old Criminal Rule 17(g) should be eliminated.[55]

G. *Contempt Rules of Bankruptcy Procedure*

I propose that the Federal Rules of Bankruptcy Procedure be modified in light of my proposed statutory reform officially conferring bankruptcy courts with contempt power. If and when bankruptcy courts are statutorily given contempt power, Bankruptcy Rule 9020 should be amended to simply state that New Civil Rule 42 and revised Criminal Rule 42 govern contempt matters in proceedings before bankruptcy courts. Bankruptcy Rule 9020's current internal cross-reference to Bankruptcy Rule 9014 should be eliminated.[56]

H. *Contempt Rules of Appellate Procedure*

I propose that the Standing Committee modify the Federal Rules of Appellate Procedure by adopting a new rule governing

[54] *See* Neal Devins & Steven J. Mulroy, *Judicial Vigilantism: Inherent Judicial Authority to Appoint Contempt Prosecutors in Young v. United States* ex rel *Vuitton et fils S.A.*, 76 KY. L.J. 861 (1988).
[55] *See infra*-Part VI.H–K.
[56] *See infra*-Part VI.L.

contempt in appellate proceedings that is designated as Federal Rule of Appellate Procedure 42. All rules subsequent to New Appellate Rule 42 should "bump down." New Appellate Rule 42 should simply state that New Civil Rule 42 and revised Criminal Rule 42 govern contempt matters in proceedings before federal appellate courts. Again, this will improve the harmony, efficiency, and clarity of the federal rules of practice and procedure as a whole.[57]

I. *Contempt Rules of Evidentiary Procedure*

The Standing Committee should modify Evidence Rule 1101 to internally cross-reference revised Criminal Rule 42(c).[58]

J. *Contempt Rules of Specialty Courts*

I propose that Article III specialty courts uniformly adopt a model contempt rule into their local rules. This model contempt rule will render all other contempt provisions unnecessary. This model contempt rule will simply state that contempt will be adjudicated under New Civil Rule 42 and revised Criminal Rule 42. My preference is that this model rule is uniformly styled as "Rule 42" to maintain the symmetry of contempt provisions between national and local rules of practice and procedure.[59]

I propose that Article I specialty courts uniformly adopt a model contempt rule. This model contempt rule will render all other local contempt provisions currently in force for such courts unnecessary. This model rule must have two different versions because not all Article I specialty courts are statutorily delegated the contempt power, and even if so, not necessarily to the same degree as Article III courts. My preference is that both versions of this model rule—whichever is applicable—be uniformly adopted and styled by the Article I specialty court in question as "Rule 42" to maintain the symmetry in contempt provisions between national rules of practice and procedure and local or jurisdictionally specific ones.[60]

[57] *See infra*-Part VI.M.
[58] *See infra*-Part VI.N.
[59] *See infra*-Part VII.B–C.
[60] *See infra*-Part VII.F–G.

The first version of this rule, applicable to Article I specialty courts that are statutorily delegated contempt power by Congress, should dictate that the rules of those courts are enforceable through civil and criminal contempt proceedings in the same manner as articulated in New Civil Rule 42 and revised Criminal Rule 42. This model rule applies to the United States Court of Federal Claims and the United States Tax Court.[61]

The second version of this rule, applicable to Article I specialty courts that are not statutorily delegated contempt power by Congress, should dictate that their rules are enforceable through certification of contempt matters to a federal district court that can exercise jurisdiction over the subject matter or over the alleged contemnor in the underlying proceeding. This model rule applies to the United States Trademark Trial and Appeal Board, the United States Patent Trial and Appeal Board, the Armed Services Board of Contract Appeals, the Civilian Board of Contract Appeals, the Postal Service Board of Contract Appeals, the United States Merit Systems Protection Board, and the United States International Trade Commission.[62]

K. *Contempt Rules and Secondary Sources*

The Federal Judicial Center should collaborate with the Standing Committee towards creating a manual on contempt power. This manual should include a concise history of the contempt power; a glossary referencing every contempt provision in federal rules, regulations, statutes; and a bibliography of helpful scholarly treatises, law review articles, and other secondary authorities explicating federal contempt law. The manual should gloss leading case law from every circuit on every facet of contempt law. The bench book for federal district judges and the manual on recurring problems in criminal trials contain some good material to start with. But the

[61] *See infra*-Part VII.F.
[62] *See infra*-Part VII.G.

manual I envision will be grander in scope so that it is helpful to every judge in every court.[63]

L. *Contempt Rules of Circuit Procedure*

I propose reforms for rules that govern at the regional level of the federal judiciary, that is, rules governing the United States Circuits Courts of Appeals and Judicial Councils. These reforms should go hand-in-hand with proposed statutory reforms. The Standing Committee should modify Judicial Conduct and Judicial Disability Rule 13(d) to explicitly state that contempt proceedings will be conducted in a manner that substantially conforms to New Civil Rule 42 and revised Criminal Rule 42. The current rule does not articulate how the contempt power of a special investigative committee interfaces, if at all, with contempt procedures outlined in the federal rules of practice and procedure. The processes I propose in New Civil Rule 42 and revised Criminal Rule 42 are sufficient to guide special investigative committees in enforcing the Judicial Conduct and Disability Act through contempt proceedings.[64]

I also propose that a model local rule be uniformly adopted and incorporated into regional rules affecting United States Circuits Courts of Appeals and other specialty appellate courts, such as the United States Court of Appeals for Veterans Claims. This model rule should dictate that the rules of the circuit or specialty appellate court in question are controlled by New Civil Rule 42 and revised Criminal Rule 42. My preference is that this model local rule be incorporated and styled as "Local Rule 42" to maintain the symmetry of all contempt provisions between the local rules of all circuit courts of appeals, the local rules of specialty appellate courts, and the federal rules of practice and procedure.[65]

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[63] *See infra*-Parts IX–XV; *cf.* FED. JUD. CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES §§ 7.01–.02 (6th ed. 2013); FED. JUD. CTR., MANUAL ON RECURRING PROBLEMS IN CRIMINAL TRIALS pt. 4 (6th ed. 2010).

[64] *See infra*-Part VI.O.

[65] *See infra*-Part VII.B.

M. *Contempt Rules of Local Procedure*

I propose revisions to the Rules for the Supreme Court of the United States and the local rules of United States District Courts, Bankruptcy Courts, and Territorial Courts. Though Supreme Court Rules are not "local rules" for the purposes of Civil Rule 83, I nevertheless address them here because they are effectively local rules specific to the Supreme Court as the court of last resort. To that end, I propose that the Supreme Court adopt a single rule governing its exercise of contempt power. Because the Supreme Court's rules are sui generis, however, I do not recommend that they merely replicate the contents of New Civil Rule 42 and revised Criminal Rule New 42 as I recommended for the local rules of the lower courts.

Less is more when it comes to the highest court in the land—the fountainhead for the judiciary's inherent power. I fear that words do more to constrict than to empower here. I therefore think it is sufficient for the Supreme Court to merely institute a rule declaring that the Court has both inherent and implied constitutional authority to correct disobedience and punish indignities against its prerogatives, including through civil and criminal contempt proceedings. No further details are required.[66]

Thanks to the language in New Civil Rule 42(a)(1)(ii) and revised Criminal Rule 42(a)(5)(iv), most if not all contempt provisions in local rules promulgated under Civil Rule 83 are rendered superfluous and should be eliminated.[67] Pending the implementation of my proposed modifications to the Civil Rules and Criminal Rules, however, I offer model local rules to be uniformly adopted by Article III district courts and Article IV territorial courts as well as Article I specialty courts.

These model local rules should simply state that the "local rules" in question are enforceable through civil and criminal contempt proceedings as articulated in New Civil Rule 42 and revised Criminal Rule 42. My preference is that this model local rule be incorporated

[66] *See infra*-Part VII.A.

[67] *Cf.* FED. JUD. CTR., UNIFORM NUMBERING SYSTEM FOR LOCAL BANKRUPTCY COURT RULES 1 (2012) ("Likewise, many national rules address matters about which there is no apparent need for local rules.").

and styled as "Local Rule 42" to maintain the symmetry in contempt provisions across all national and local rules of practice and procedure. Individual chambers should feel free to refer to these rules in their chambers-specific orders and guidelines.[68]

IV. CONCLUSION

The basic principles of contempt power under English common law are manifest in federal common law. The interbranch framework for judicial rulemaking instituted by the Rules Enabling Act generated the authorities governing contempt procedures today. But those procedures are deficient in multiple respects. The strategic plan of the federal judiciary emphasizes the importance of enhancing access to justice and the judicial process by ensuring that court rules, processes, and procedures meet the needs of lawyers. This article proposes three overarching reforms for fulfilling the objectives established by the federal judiciary's strategic plan in the context of federal contempt law.[69]

First, I propose making 18 U.S.C. § 401 and Criminal Rule 42 more comprehensive. This reform will lay the groundwork for eliminating most if not all criminal contempt statutes. It will therefore reduce unnecessary bulk in the federal code. It will also shift the burden of discretion for punishing contemptuous behavior from prosecutors back to the judiciary, a shift I think is both legally sound and normatively justified.

Second, I propose amendments streamlining contempt procedures for every federal adjudicative body, including Article I courts, Article III courts, and Article IV courts. I recommend, for example, that the Standing Committee draft a civil analogue to Rule 42 of the Federal Rules of Criminal Procedure. By implementing a comprehensive civil contempt rule, the Standing Committee will eliminate disparate contempt provisions found in other areas of the rules of practice and procedure, the rules of specialty courts, and local rules. All of these improvements will make federal procedural common law more concise, clear, and compact.

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[68] *See infra*-Part VII.C–G.
[69] *See supra* note 3, at 21.

Third, I propose model local contempt rules that nationalize best practices from district courts whose rules are exceptionally helpful. The standardization of rules at the local level across the country relieves the need for rules at the national level to be unnecessarily granular. Improvements at each level of the procedural hierarchy have a positive cascading effect in reinforcing the clarity and coherence of the whole system.

My hope is that all of these proposals will enhance the dignity and efficacy of the judicial system and therefore benefit the bench and bar alike.

V. APPENDIX A: PROPOSED STATUTORY REFORMS[70]

Below are proposed statutory amendments to Title 18 of the United States Code and two model statutes bearing on contempt power in administrative courts and regulating subpoena enforcement respectively.

A. *Criminal Amendments and Federal Judgeship Act of [Year]*

An Act

To amend Title 18 of the United States Code regarding the authority of federal courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Criminal Amendments and Federal Judgeship Act of [Year].

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

[70] I provide the boilerplate language for these reforms below. I offer proposed language for statutory reforms through draft revisions to both the relevant statute at large and its replicated form in the United States Code. Strikethrough text is language currently in force that recommend Congress eliminate. Underlined language is language not currently in force that I propose Congress add.

Sec. 401 of Title 18, United States Code, is amended to read as follows:

"§ 401. Power of Court

"(a) A court of the United States has power to punish and correct contempt of its authority and none other, sua sponte or by petition, including—

(1) Misbehavior or disobedience in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior or disobedience of any judicial officer in their official transactions; and

(3) Disobedience or resistance to their lawful writs, processes, orders, rules, decrees, or commands out of their presence.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

(1) Reprimand;

(2) Fine;

(3) Imprisonment.

Sec. 1073 of Title 18, United States Code is deleted.

Sec. 1503 of Title 18, United States Code is deleted.

Sec. 1509 of Title 18, United States Code is deleted.

Sec. 1512 of Title 18, United States Code is deleted.

Sec. 1513 of Title 18, United States Code is deleted.

Sec. 1346 of Title 18, United States Code is deleted.

Sec. 1347 of Title 18, United States Code is deleted.

Sec. 1348 of Title 18, United States Code is deleted.

Sec. 1349 of Title 18, United States Code is deleted.

Sec. 1523 of Title 18, United States Code is deleted.

Sec. 1621 of Title 18, United States Code is deleted.

Sec. 1622 of Title 18, United States Code is deleted.

Sec. 1623 of Title 18, United States Code is deleted.

Sec. 3484 of Title 18, United States Code is deleted.

Sec. 3498 of Title 18, United States Code is deleted.

Sec. 3499 of Title 18, United States Code is deleted.

B. *18 U.S.C. § 401 – Power of Court*

(a) A court of the United States ~~shall have~~ has power to punish ~~by fine or imprisonment, or both,~~ and correct contempt of its authority ~~and none other~~, sua sponte or by petition, ~~as~~ including—

(1) Misbehavior or disobedience of any person in its presence or so near ~~thereto~~ as to obstruct the administration of justice;

(2) Misbehavior or disobedience of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

(1) Reprimand;

(2) Report to any state bar or comparable ethics institution;

(3) Fine; and

(4) Imprisonment.

C. *Bankruptcy Amendments and Federal Judgeship Act of [Year]*

An Act

To amend Title 11 of the United States Code regarding the authority of bankruptcy courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Bankruptcy Amendments and Federal Judgeship Act of [Year].

TITLE I—BANKRUPTCY JURISDICTION AND PROCEDURE

Sec. 105(a) of Title 11, United States Code, is amended to read as follows:

"§ 105. Power of Court

"(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, including orders for civil and criminal contempt. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

D. *11 U.S.C. § 105 – Power of Court*

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, <u>including orders for civil and criminal contempt</u>. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

E. *Model Contempt Statute for Administrative Law Courts*

Enforcement. If a person is allegedly contemptuous of a [administrative law authority], that [administrative law authority] can, at its discretion, certify the facts underlying that allegation to any federal district court that can exercise jurisdiction over the matter or where the alleged contemnor resides or carries on business. The district court must adjudicate the certified contempt allegation under the federal rules of practice and procedure as if those facts arose in a proceeding before that same district court.

F. *Model Contempt Statute for Enforcing Agency Subpoenas*

The [department, agency, board, authority, etc.] can make such investigations as the [department, agency, board, authority, etc.] deems necessary for the effective administration of this chapter or to determine whether any person subject to this [title, chapter, subtitle, etc.] engaged or is about to engage in any act that constitutes or will constitute a violation of this [title, chapter, subtitle, etc.], an order issued to facilitate the execution of this [title, chapter, subtitle, etc.], or any rule or regulation issued under this [title, chapter, subtitle, etc.].

For the purpose of such investigation, the [department, agency, board, authority, etc.] can administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry. The [department, agency, board, authority, etc.] can require attendance of witnesses and the production of records from any place in the United States or abroad. In case of refusal to obey a subpoena, the [department, agency, board, authority, etc.] can certify the matter to any district court that can exercise jurisdiction over the investigation or where the alleged violator resides or carries on business. The federal district court can require the attendance and testimony of the alleged violator and the production of records. The federal district court may issue an order requiring the alleged violator to appear before the [department, agency, board, authority, etc.] to

produce records or to give testimony regarding the matter under investigation.

The district court can punish and correct any failure to obey its orders through any means permitted under the federal rules of practice and procedure, including through contempt proceedings governed by those rules. Service of process in these cases must occur in the judicial district where the person is an inhabitant or wherever the person can be found.

VI. APPENDIX B: PROPOSED AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

Below are proposed revisions to the Federal Rules of Civil Procedure, Criminal Procedure, Bankruptcy Procedure, Evidence, and Judicial Conduct and Disability.

A. *FED. R. CIV. P. 4.1: Serving Other Process*

~~(a)In General. Process~~ Other than a summons under Rule 4 or a subpoena under Rule 45—must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

~~(b)Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.~~

B. *FED. R. CIV. P. 37: Failure to Disclose or to Cooperate in Discovery; Sanctions*

(b) Failure to Comply with a Court Order.

(1) Sanctions Sought in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or ~~to~~ answer a question and the deponent fails to obey, the failure may be ~~treated as contempt of court~~ sanctioned. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be ~~treated as contempt of~~ sanctioned by either the court where the discovery is taken or the court where the action is pending.

(2) Sanctions Sought in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Federal Rules of Civil Procedure 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party;

(vii) initiating sanction proceedings under Federal Rule of Civil Procedure 11; or

(viii) ~~treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination~~ initiating contempt proceedings under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

C. *[New] Fed. R. Civ. P. 42: Civil Contempt*

(a) Definition.

(1) Civil contempt is disobedience out the court out of the court's presence, such as

(i) A violation of a court order or decree;

(ii) A violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(iii) A violation of a statute constituting contempt per se.

(2) Civil contempt is coercive, not punitive.

(3) A purge condition is a condition that must be satisfied in order to avoid or lift a coercive measure imposed by the court to coerce compliance with an order or decree.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend civil contempt sanctions and certify them for disposition by a court with the proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or courts who do not possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings, but are authorized to recommend them, may certify those recommendations for disposition under this rule.

(c) Procedure

(1) Civil contempt proceedings must be included in the same action where the alleged contempt occurred unless the matter is certified from a person or courts lacks authority to conduct the proceeding.

(2) The court may initiate a civil contempt proceeding sua sponte.

(3) A party to an action can initiate a civil contempt proceeding by filing a petition with the court against the alleged contemnor.

(4) An order issued sua sponte under (c)(2) or in response to a petition under (c)(3) must schedule a prehearing conference, a hearing, or both. Additionally, it must

(i) recite a short and plain basis for the civil contempt proceeding under (c)(2) or (c)(3);

(ii) schedule deadline for the filing of an answer by the alleged contemnor;

(iii) state the time and place of any prehearing conference or hearing; and

(iv) state the purge conditions requested, if any, under (c)(2) or contemplated by the court under (b)(3), including, fines and any period of incarceration.

(5) After a prehearing conference or hearing is concluded, the court must determine if the following elements are established by clear and convincing evidence:

(i) A valid order or decree of the court was in effect;

(ii) The alleged contemnor knew of that order or decree; and

(iii) The alleged contemnor breached it.

(6) If the court determines that the alleged contemnor was guilty of civil contempt, the court must issue an order that

(i) provides a short and concise explanation of its disposition;

(ii) lists the purge conditions imposed to enforce compliance with the breached order or decree; and

(iii) states the precise manner in which the purge conditions must be satisfied.

(7) If the court issues an order finding an alleged contemnor guilty of civil contempt and imposes incarceration as a purge condition, that order can be served and enforced in any district. All other orders issued in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

(d) Purge Conditions. Purge conditions for civil contempt must involve the least possible power adequate to the end proposed and must be possible to perform. They may be imposed individually or in combination. They may be imposed immediately upon a finding of civil contempt or as a contingent liability of the contemnor does not comply with an order of court by a specified deadline. The following is an inexhaustive list of purge conditions:

(1) Reprimand;

(2) Report to any state bar or equivalent professional body; and

(3) Fine;

(i) A fine may be payable to the court, to a party prejudiced by the contempt as compensation, or some other recipient for the purpose of promoting compliance.

(ii) A fine must be calculated according to the character and magnitude of the harm threatened by continued breach of the court's order or decree.

(e) Incarceration. The court may impose a period of incarceration on the contemnor immediately until they comply with the breached order or decree or until another purge condition is satisfied.

(f) Criminal Contempt. Nothing in this rule can be construed to detract from the court's authority to levy sanctions under Federal Rule of Civil Procedure 11, contempt under Federal Rule of Criminal Procedure 42, or any other relevant authorities as an alternative or in addition to civil contempt under this rule.

D. *FED. R. CIV. P. 45: Subpoena [Renumbered Civil Rule 46]*

~~(g)Contempt. The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.~~

E. *FED. R. CIV. P. 53: Masters (Renumbered Civil Rule 54)*

(a) Master's Authority

(1) In General. Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) Sanctions.

(A) The master may by order impose on a party any noncontempt sanction ~~provided by~~ under Federal Rules of Civil Procedure 37 or 45.~~, and may recommend a contempt sanction against a party and sanctions against a nonparty the master;~~

(B) The master may recommend a contempt sanction and certify it for disposition under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

F. *FED. R. CIV. P. 56: Summary Judgment [Renumbered Civil Rule 57]*

(g) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may sanction the imposing party. ~~may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.~~

G. *FED. R. CIV. P. 70: Enforcing a Judgment for a Specific Act [Renumbered Civil Rule 71]*

~~(e) Holding in Contempt. The court may also hold the disobedient party in contempt.~~

H. *Fed. R. Crim. P. 6: The Grand Jury*

(e) Recording and Disclosing the Proceedings.

***

(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) Contempt. ~~A knowing~~ ~~v~~ Violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

I. *FED. R. CRIM. P. 7: The Indictment and the Information*

(a) When Used.

(1) Felony. An offense (other than criminal contempt under Federal Rule of Criminal Procedure 42) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

J. *Fed. R. Crim. P. 17: Subpoenas*

~~(g) Contempt. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge~~

~~may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate as provided in 28 U.S.C. § 636(e).~~

K. *Fed. R. Crim. P. 42: Criminal Contempt*

(a) Definition.

(1) Any disrespect or violation of the court's dignity may be liable for criminal contempt.

(2) Criminal contempt is punitive, not coercive.

(3) Direct criminal contempt is misbehavior in the court's presence or so near to it as to obstruct the administration of justice.

(4) Constructive criminal contempt is disobedience to the court outside of the court's presence, and can involve the following:

(i) violation of a court order or decree;

(ii) interference with or obstruction of the administration of justice, including improper threats, tampering, or other undue influences directed toward grand jurors, petit jurors, witnesses, officers of the court, and other persons operating under court order or decree;

(iii) violation of bail or parole conditions;

(iv) material misrepresentation to the court, including perjury;

(v) violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

(vi) violation of a statute constituting contempt per se.

(b) Authority.

(1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.

(2) Masters can recommend criminal contempt sanctions and certify them for disposition by a court with proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].

(3) Other persons or courts that do not possess authority to adjudicate civil contempt proceedings but are authorized to recommend them may certify those recommendations for disposition under this rule.

(c) Direct Criminal Contempt Procedure

(1) Misbehavior committed in the court's presence can be adjudicated through summary proceedings if the presiding judge certifies that he saw or heard the misbehavior.

(2) Direct criminal contempts are sui generis and therefore have no elements, mens rea, or standard of proof.

(3) Following a summary proceeding, the presiding judge must promptly issue a signed order filed with the clerk providing a short and concise statement of facts and an explanation for his disposition.

(4) The court cannot enter a summary contempt judgment relating to misbehavior in its presence nunc pro tunc.

(5) A presiding judge who can lawfully preside over summary proceeding for direct criminal contempt can nevertheless refer the matter for constructive criminal contempt proceedings under section (d) of this rule if doing so is in the interest of justice.

(d) Constructive Criminal Contempt Procedure

(1) Constructive criminal contempts must be adjudicated through a separate proceeding with a separate caption from the action where the contempt arose.

(2) The court may initiate a constructive criminal contempt proceeding sua sponte or by petition.

(3) The court must give the alleged contemnor notice in open court and issue a show cause order or an arrest order. The alleged contemnor must be released or detained as Federal Rule of Criminal Procedure 47 [former Rule 46] provides. The alleged contemnor is entitled to a trial by jury. The show cause order or arrest order must

(i) Recite a short and plain basis for the criminal contempt proceeding, including the essential facts constituting the criminal contempt charged;

(ii) Schedule the time and place of a trial;

(iii) Allow the alleged contemnor a reasonable time to prepare a defense; and

(iv) Expressly state any penalties requested under (d)(2) if offered.

(4) The court may request that the alleged criminal contempt be prosecuted by the government or, if in interest of justice so requires, another attorney. If the government declines

to prosecute, the court must appoint another attorney to prosecute.

(5) The prosecuting attorney must prove the following elements beyond a reasonable doubt:

(i) There was a lawful and reasonably specific order, decree, or proceeding;

(ii) The alleged contemnor violated that order or decree, or misbehaved in the court's presence; and

(iii) The alleged contemnor's conduct was willful.

(6) If the alleged criminal contempt involved disrespect or criticism towards a judge, that judge is disqualified from presiding over the trial or hearing unless the alleged contemnor consents.

(7) Upon a finding or verdict of guilty, the court may impose punishment.

(e) Punishment. Punishment for criminal contempt must involve the least possible power adequate to the end proposed. Penalties for direct and constructive criminal contempt can be imposed individually or in combination. The following is an inexhaustive list of potential penalties:

(1) Reprimand

(2) Fines

(i) The fine can be imposed on a per diem basis or consist of a single sum.

(ii) The fine may be payable to the court, to a party prejudiced by the contempt as compensation,

or some other recipient for the purpose of promoting compliance.

(iii) The fine must be calculated according to the character and magnitude of the disrespect or dignity suffered by the court.

(3) Incarceration

(i) Direct Criminal Contempt. If the alleged contemnor is found guilty of direct criminal contempt, he can be sentenced to a period of incarceration not exceeding six months for a single contemptuous act. He may, however, be sentenced to a period of incarceration exceeding more than six months for more than one contemptuous acts, provided that the increment of incarceration attributed to each act does not exceed six months.

(ii) Constructive Criminal Contempt. If the alleged contemnor is found guilty of constructive criminal contempt, he can be sentenced to a period of incarceration exceeding six months.

(f) Civil Contempt. Nothing in this rule can be construed to detract from the court's authority to correct defiance with its orders or decrees through civil contempt proceedings under Federal Rule of Civil Procedure 42 and any other relevant authorities.

L. *Fed. R. Bankr. P. 9020: Contempt Proceedings*

~~Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest.~~ Enforcement of Local Rules. Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42 govern contempt proceedings.

M. *[New] FED. R. APP. P. 42: Contempt*

Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42 govern contempt proceedings.

N. *FED. R. EVID. 1101: Applicability of the Rules*

(b) To Cases and Proceedings. These rules apply in

(1) civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;

(2) criminal cases and proceedings; and

(3) contempt proceedings except ~~those in which the court may act summarily.~~ proceedings for direct criminal contempts governed by Federal Rule of Criminal Procedure 42(c).

O. *Judicial-Conduct and Judicial-Disability Rule 13(d)*

(a) Delegation of Subpoena Power; Contempt. The chief judge may delegate the authority to exercise the subpoena powers of the special committee. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena. Contempt proceedings under Section 332(d) are governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

VII. APPENDIX C: PROPOSED LOCAL RULES

Below are proposed model local rules for the United States Supreme Court, Article III circuit courts of appeal, Article III district courts, Article IV territorial courts, Article III, specialty courts, and Article I specialty courts.

A. *[New] Supreme Ct. L. R. 1: Scope; Enforcement*

(a) Scope. These rules govern procedure in all actions in the Supreme Court of the United States. They must be construed, administered, and employed by the Court and the parties to secure the just, speedy, and inexpensive determination of every action of proceeding.

(b) Enforcement. The Court possesses both inherent and implied constitutional authority to sanction disrespect and correct disobedience, such as through civil contempt and criminal contempt proceedings.

B. *Model Local Rule for United States Circuits Courts of Appeal*

Enforcement of Local Rules. The Court may enforce these local rules with sanctions, such as through civil or criminal contempt proceedings governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

C. *Model Local Rule for Article III United States District Courts*

Enforcement of Local Rules. The Court may enforce these local rules with sanctions, such as through civil or criminal contempt proceedings governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

D. *Model Local Rule for Article IV Territorial Courts*

Enforcement of Rules. The Court may enforce these local rules with sanctions, such as through civil or criminal contempt proceedings governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

E. *Model Rule for Article III Specialty Courts*

Enforcement of Rules. The Court may enforce these rules with sanctions, such as through sanctions under Federal Rule of Civil Procedure 11, Federal Rule of Civil Procedure 42, and Federal Rule of Criminal Procedure 42.

F. *Model Rule for Article I Specialty Courts Delegated the Contempt Power*

Enforcement of Rules. The Court may enforce these rules through contempt proceedings. Contempt proceedings will be governed in the same manner as that prescribed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

G. *Model Local Rule for Article I Specialty Courts Not-Delegated Contempt Power*

Enforcement of Rules. These rules are enforceable through certification to any district court with jurisdiction over this court or the alleged contemnor. Contempt proceedings before the federal district court are governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42. A certification must include a concise statement reciting the facts underlying the allegation of contempt and a recommendation for the district court's disposition.

VIII. APPENDIX D: PROPOSED JURY INSTRUCTIONS

Below are proposed jury instructions for Title 18, Sections 401 and 403 of the United States Code.

A. *1 Mod. Fed. Jury Instr.-Crim. P. 20.01; 20.02*

1. Instruction 20-10: The Indictment and the Statute

The indictment charges the defendant with contempt. The indictment reads as follows

[Read indictment]

The defendant has been charged with violating section 401(a)(1) of Title 18 of the United States Code. That subsection provides that:

A court of the United States ~~shall have~~ ~~has discretionary power~~ has power to punish . . . ~~such~~ contempt of its authority . . . ~~as~~ including— Misbehavior or disobedience of any person in its presence or so near thereto as to obstruct the administration of justice.

2. Instruction 20-10: The Indictment and the Statute

The indictment charges the defendant with the crime of [describe the offense]. The indictment reads as follows:

[Read indictment]

The defendant has been charged with violating section 401(a)(3) of Title 18 of the United States Code. That subsection provides that:

'A court of the United States ~~shall have~~ has ~~the~~ power to punish . . . ~~such~~ contempt of its authority, ~~as~~ including—. . . ~~[d]~~Disobedience or resistance to its lawful writ, process, rule, decree or command.

IX. APPENDIX E: SUPREME COURT CONTEMPT CASES

1. *Ex parte Bollman*, 8 U.S. 75 (1807)
2. *United States v. Hudson*, 11 U.S. 32 (1812)
3. *Anderson v. Dunn*, 19 U.S. 204 (1821)
4. *Ex parte Kearney*, 20 U.S. 38 (1822)
5. *Ex parte Tillinghast*, 4 Pet. 108 (1830)
6. *Ex parte Watkins*, 28 U.S. 193 (1830)
7. *Lord v. Veazie*, 49 U.S. 251 (1850)
8. *Wiswall v. Sampson*, 55 U.S. 52 (1852)
9. *Cleveland v. Chamberlain*, 66 U.S. 419 (1861)
10. *Ex parte Yerger*, 75 U.S. 85 (1868)
11. *In re Bradley*, 74 U.S. 364 (1868)
12. Davis v. Gray, 83 U.S. 203 (1872)
13. *Ex parte Robinson*, 86 U.S. 505 (1873)

14. *City of New Orleans v. N.Y. Mail S.S. Co.,* 87 U.S. 387 (1874)
15. *In re Chiles*, 89 U.S. 157 (1874)
16. *Hayes v. Fischer*, 102 U.S. 121 (1880)
17. *Kilbourn v. Thompson*, 103 U.S. 168 (1880)
18. *Barton v. Barbour*, 104 U.S. 126 (1881)
19. *Ex parte Rowland*, 104 U.S. 604 (1881)
20. *The Laura*, 114 U.S. 411 (1885)
21. *In re Terry*, 128 U.S. 289 (1888)
22. *Ex parte Cuddy*, 131 U.S. 280 (1889)
23. *Ex parte Savin*, 131 U.S. 267 (1889)
24. *Eilenbecker v. Dist. Ct. of Plymouth Cnty.*, 134 U.S. 31 (1890)
25. *Delgado v. Chavez*, 140 U.S. 586 (1891)
26. *Pettibone v. United States*, 148 U.S. 197 (1893)
27. *Ex parte Tyler*, 149 U.S. 164 (1893)
28. *In re Swan*, 150 U.S. 637 (1893)
29. *Interstate Comm. Comm'n v. Brimson*, 154 U.S. 447 (1894)
30. *In re Debs*, 158 U.S. 564 (1895)
31. *Ex parte Chetwood*, 165 U.S. 443 (1897)
32. *In re Chapman*, 166 U.S. 661 (1897)
33. *Hovey v. Elliott*, 167 U.S. 409 (1897)
34. *Tinsley v. Anderson*, 171 U.S. 101 (1898)
35. *Mueller v. Nugent*, 184 U.S. 1 (1902)
36. *In re Watts*, 190 U.S. 1 (1903)
37. *Bessette v. W.B. Conkey Co.*, 194 U.S. 324 (1904)
38. *In re Christensen Engineering Co.*, 194 U.S. 458 (1904)
39. *Alexander v. United States*, 201 U.S. 117 (1906)
40. *Nelson v. United States*, 201 U.S. 92 (1906)
41. *Doyle v. London Guar. & Accident Co.*, 204 U.S. 599 (1907)
42. *United States v. Shipp*, 214 U.S. 386 (1909)
43. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911)
44. *Merrimack River Sav. Bank v. City of Clay Ctr.*, 219 U.S. 527 (1911)
45. *Wilson v. United States*, 221 U.S. 361 (1911)
46. *Grant v. United States*, 227 U.S. 74 (1913)
47. *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918)
48. *Ex parte Hudgings*, 249 U.S. 378 (1919)
49. *Union Tool Co. v. Wilson*, 259 U.S. 107 (1922)
50. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923)

51. *Michaelson v. United States*, 266 U.S. 42 (1924)
52. *Myers v. United States*, 264 U.S. 95 (1924)
53. *Cooke v. United States*, 267 U.S. 517 (1925)
54. *Farmers' & Mech.'s Nat. Bank v. Wilkinson*, 266 U.S. 503 (1925)
55. *Ex parte Grossman*, 267 U.S. 87 (1925)
56. *United States v. Goldman*, 277 U.S. 229 (1928)
57. *Sinclair v. United States*, 279 U.S. 749 (1929)
58. *Blackmer v. United States*, 284 U.S. 421 (1932)
59. *Lamb v. Cramer*, 285 U.S. 217 (1932)
60. *Bevan v. Krieger*, 289 U.S. 459 (1933)
61. *Clark v. United States*, 289 U.S. 1 (1933)
62. *Fox v. Capital Co.*, 299 U.S. 105 (1936)
63. *Hill v. United States*, 300 U.S 105 (1937)
64. *McCrone v. United States*, 307 U.S. 61 (1939)
65. *Amalgamated Utility Workers v. Consol. Edison Co.*, 309 U.S. 261 (1940)
66. *Bridges v. State of Cal.*, 314 U.S. 252 (1941)
67. *Nye v. United States*, 313 U.S. 33 (1941)
68. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941)
69. *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426 (1941)
70. *Cudahy Packing Co. of La. v. Holland*, 315 U.S. 788 (1942)
71. *St. Pierre v. United States*, 319 U.S. 41 (1943)
72. *In re Bradley*, 318 U.S. 50 (1943)
73. *In re Michael*, 326 U.S. 224 (1945)
74. *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9 (1945)
75. *May Dept. Stores Co. v. N.L.R.B.*, 326 U.S. 376 (1945)
76. *Pennekamp v. State of Fla.*, 328 U.S. 331 (1946)
77. *Craig v. Harney*, 331 U.S. 367 (1947)
78. *Penfield Co. of Cal. v. S.E.C.*, 330 U.S. 585 (1947)
79. *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947)
80. *Maggio v. Zeitz*, 333 U.S. 56 (1948)
81. *In re Oliver*, 333 U.S. 257 (1948)
82. *Fisher v. Pace*, 336 U.S. 155 (1949)
83. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949)
84. *State of Md. v. Balt. Radio Show*, 338 U.S. 912 (1950)
85. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)
86. *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951)

87. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)
88. Sacher v. United States, 343 U.S. 1 (1952*)*
89. *Brown v. United States*, 348 U.S. 11 (1954)
90. *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954)
91. *N.L.R.B. v. Warren Co.*, 350 U.S. 107 (1955)
92. *In re Murchison*, 349 U.S. 133 (1955)
93. *Cammer v. United States*, 350 U.S. 399 (1956)
94. *Ullmann v. United States*, 350 U.S. 422 (1956)
95. *Nilva v. United States*, 352 U.S. 385 (1957)
96. *Watkins v. United States*, 354 U.S. 178 (1957)
97. *Yates v. United States*, 355 U.S. 66 (1957)
98. *Brown v. United States*, 356 U.S. 148 (1958)
99. *Knapp v. Schweitzer*, 357 U.S. 371 (1958)
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101. *N.A.A.C.P. v. State of Ala., ex rel. Patterson*, 357 U.S. 449 (1958)
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103. *Brown v. United States*, 359 U.S. 41 (1959)
104. *Scull v. Virginia*, 359 U.S. 344 (1959)
105. *Uphaus v. Wyman*, 360 U.S. 72 (1959)
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107. *Levine v. United States*, 362 U.S. 610 (1960)
108. *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398 (1960)
109. *Reina v. United States*, 364 U.S. 507 (1960)
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111. *Ex parte George*, 371 U.S. 72 (1962)
112. *Petition of Green*, 369 U.S. 689 (1962)
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115. *Wood v. Ga.*, 370 U.S. 375 (1962)
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117. *Johnson v. State of Va.*, 373 U.S. 61 (1963)
118. *Panico v. United States*, 375 U.S. 29 (1963)
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124. *Harris v. United States*, 382 U.S. 162 (1965)
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127. *State of S.C. v. Katzenbach*, 383 U.S. 301 (1966)
128. *Stevens v. Marks*, 383 U.S. 234 (1966)
129. *Shillitani v. United States*, 384 U.S. 364 (1966)
130. *Bitter v. United States*, 389 U.S. 15 (1967)
131. *I.L.A.C. 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64 (1967)
132. *Bloom v. Illinois*, 391 U.S. 194, 202 (1968)
133. *DeStefano v. Woods*, 392 U.S. 631 (1968)
134. *Brussel v. United States*, 396 U.S. 1229 (1969)
135. *In re Herndon*, 394 U.S. 399 (1969)
136. *Frank v. United States*, 395 U.S. 147 (1969)
137. *Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383 (1970)
138. *Rowan v. United States Post Office Dep't.*, 397 U.S. 728 (1970)
139. *Russo v. United States*, 404 U.S. 1209 (1971)
140. *Mayberry v. Penn.*, 400 U.S. 455 (1971)
141. *Johnson v. Miss.*, 403 U.S. 212 (1971)
142. *Donaldson v. United States*, 400 U.S. 517 (1971)
143. *United States v. Ryan*, 402 U.S. 530 (1971)
144. *Gelbard v. United States*, 408 U.S. 41 (1972)
145. *In re Little*, 404 U.S. 553 (1972)
146. *Colombo v. N.Y.*, 405 U.S. 9 (1972)
147. *Tierney v. United States*, 409 U.S. 1232 (1972)
148. *Lefkowitz v. Turley*, 414 U.S. 70 (1973)
149. *Farr v. Pitchess*, 409 U.S. 1243 (1973)
150. *Taylor v. Hayes*, 418 U.S. 488 (1974)
151. *Codispoti v. Penn.*, 418 U.S. 506 (1974)
152. *Eaton v. City of Tulsa*, 415 U.S. 697 (1974)
153. *Menna v. New York*, 423 U.S. 61 (1975)
154. *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947)
155. *Maness v. Meyers*, 419 U.S. 449 (1975)
156. *Withrow v. Larkin*, 421 U.S. 35 (1975)
157. *Muniz v. Hoffman*, 422 U.S. 454 (1975)

158. *Gruner v. Sup. Ct. of Cal. in and for Fresno Cnty.*, 429 U.S. 1314 (1976)
159. *United States v. Mandujano*, 425 U.S. 564 (1976)
160. *Juidice v. Vail*, 430 U.S. 327 (1977)
161. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)
162. *Dolman v. United States*, 439 U.S. 1395 (1978)
163. *N.Y.T. Co. v. Jascalevich*, 439 U.S. 1317 (1978)
164. *Orr v. Orr*, 440 U.S. 268 (1979)
165. *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375 (1980)
166. *In re Roche*, 448 U.S.1312 (1980)
167. *In re Snyder*, 472 U.S. 634 (1985)
168. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)
169. *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624 (1988)
170. *United States v. Providence J. Co.*, 485 U.S. 693 (1988)
171. *Morrison v. Olson*, 487 U.S. 654 (1988)
172. *Willy v. Coastal Corp.*, 503 U.S. 131 (1992)
173. *United States v. Dixon*, 509 U.S. 688 (1993)
174. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994)
175. *Pounders v. Watson*, 521 U.S. 982 (1997)
176. *United States v. Martinez-Salazar*, 528 U.S. 304 (2000)
177. *Multimedia Holdings Corp. v. Circuit Ct. of Fla.,* 544 U.S. 1301 (2005)
178. *Turner v. Rogers*, 564 U.S. 431 (2011)

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1. FED. R. CIV. P. 4.1
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19. Ct. Fed. Cl. L.R. 4.1
20. Ct. Fed. Cl. L.R. 37(b)
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29. TTAB L.R. 404.03(a)(2)
30. TTAB L.R. 411.05
31. TTAB L.R. 502.05
32. TTAB L.R. 527.01(a)
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35. 33 C.F.R. § 210.5 (1980)
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15. D. COLO. L.R. CIV. 83.2(a)
16. D. COLO. L.R. CRIM. 57.1(b)
17. D. COLO. L.R. CRIM. 57.3(c)
18. D. COLO. L.R. CRIM. 57.4
19. D. COLO. L.R. ATT'Y. 7(d)(2)
20. D. COLO. L.R. ATT'Y 10(a)(1)
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26. D.D.C. 83.13(b)
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28. D.D.C. L.R. 83.16(d)(5), (8)
29. D.D.C. L.R. CRIM. 6.1
30. D.D.C. L.R. CRIM. 57.15(b)
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32. D.D.C. L.R. CRIM. 57.26
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36. S.D. FLA. L.R. 11.1(b)
37. N.D. GA. L.R. CIV. 83.1(F)
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98. E.D.N.Y. L.R. CIV. 1.3(a)
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103. S.D.N.Y. L.R. CIV. 1.3(a)
104. S.D.N.Y. L.R. CIV. 83.6
105. W.D.N.Y. L.R. CIV. 83.4
106. E.D.N.C. L.R. CIV. 83.1(k)
107. E.D.N.C. L.R. CIV. 83.9

108. E.D.N.C. L.R. CIV. 100.1
109. E.D.N.C. L.R. 100.3
110. E.D.N.C. L.R. CRIM. 83.1(k)
111. E.D.N.C. L.R. CIV. 100.1
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113. M.D.N.C. L.R. CRIM. 32.2
114. W.D.N.C. L.R. 83.2(b)
115. W.D.N.C. L.R. 83.3(b)(2)
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117. N.D. OHIO L.R. CIV. 83.7(m)
118. E.D. OKLA. L.R. CIV. 83.6
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132. D. S.C. L.R. CIV. 83.I.08
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5. 5 U.S.C. § 1507 (1978)
6. 5 U.S.C. § 7132 (1978)
7. 5 U.S.C. § 8125 (1966)
8. 5 U.S.C. § 8480 (2009)
9. 7 U.S.C. § 9 (2010)
10. 7 U.S.C. § 87f (1994)
11. 7 U.S.C. § 499m (1978)
12. 7 U.S.C. § 1446 (1991)
13. 7 U.S.C. § 2115 (1970)
14. 7 U.S.C. § 2354 (1994)

15. 7 U.S.C. § 2622 (1990)
16. 7 U.S.C. § 2717 (1974)
17. 7 U.S.C. § 2909 (1985)
18. 7 U.S.C. § 3412 (1977)
19. 7 U.S.C. § 4317 (1981)
20. 7 U.S.C. § 4511 (1983)
21. 7 U.S.C. § 4610a (1991)
22. 7 U.S.C. § 4816 (1985)
23. 7 U.S.C. § 4911 (1993)
24. 7 U.S.C. § 6010 (1991)
25. 7 U.S.C. § 6108 (1991)
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27. 7 U.S.C. § 6809 (1993)
28. 7 U.S.C. § 7420 (1996)
29. 7 U.S.C. § 7449 (1996)
30. 7 U.S.C. § 7469 (1996)
31. 7 U.S.C. § 7488 (1996)
32. 7 U.S.C. § 7733 (2008)
33. 7 U.S.C. § 7808 (2000)
34. 7 U.S.C. § 8314 (2008)
35. 8 U.S.C. § 1225 (2009)
36. 8 U.S.C. § 1229a (2006)
37. 8 U.S.C. § 1324b (1996)
38. 8 U.S.C. § 1324c (1996)
39. 8 U.S.C. § 1451 (1994)
40. 8 U.S.C. § 1446 (1991)
41. 9 U.S.C. § 7 (1951)
42. 10 U.S.C. § 848 Art. 48 (2011)
43. 11 U.S.C. § 110 (2010)
44. 12 U.S.C. § 1784 (2006)
45. 12 U.S.C. § 1833a (2006)
46. 12 U.S.C. § 2404 (1974)
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48. 12 U.S.C. § 5562 (2010)
49. 15 U.S.C. § 49 (1975)
50. 15 U.S.C. § 57b-1 (1994)
51. 15 U.S.C. § 77v (2010)
52. 15 U.S.C. § 78dd-2 (1998)
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54. 15 U.S.C. § 78jjj (2010)
55. 15 U.S.C § 78u (2015)
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57. 15 U.S.C. § 155 (1970)
58. 15 U.S.C. § 330c (1971)
59. 15 U.S.C. § 634 (2018)
60. 15 U.S.C. § 687b (2000)
61. 15 U.S.C. § 717m (1970)
62. 15 U.S.C. § 771 (1974)
63. 15 U.S.C. § 772 (1976)
64. 15 U.S.C. § 796 (2004)
65. 15 U.S.C. § 1116 (2008)
66. 15 U.S.C. § 1267 (1960)
67. 15 U.S.C. § 1314 (1980)
68. 15 U.S.C. § 1714 (2011)
69. 15 U.S.C. § 2076 (2011)
70. 15 U.S.C. § 2610 (2016)
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72. 15 U.S.C. § 5408 (1999)
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74. 15 U.S.C. § 7304 (2002)
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82. 16 U.S.C. § 5507 (1995)
83. 17 U.S.C. § 502 (1976)
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87. 18 U.S.C. § 1507 (1994)
88. 18 U.S.C. § 3148 (1986)
89. 18 U.S.C. § 3285 (1948)
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94. 18 U.S.C. § 3511 (2015)
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100. 19 U.S.C. § 1333 (1990)
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102. 21 U.S.C. § 853 (2009)
103. 21 U.S.C. § 876 (1988)
104. 21 U.S.C. § 969 (1955)
105. 22 U.S.C. § 703 (1946)
106. 22 U.S.C. § 286f (1945)
107. 25 U.S.C. § 2715 (1988)
108. 26 U.S.C. § 7456 (2008)
109. 26 U.S.C. § 7604 (1990)
110. 28 U.S.C. § 332 (2002)
111. 28 U.S.C. § 1365 (1996)
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115. 28 U.S.C. § 3003 (1990)
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126. 31 U.S.C. § 716 (2017)
127. 31 U.S.C. § 3733 (2009)
128. 31 U.S.C. § 3804 (1986)
129. 31 U.S.C. § 5318 (2014)
130. 33 U.S.C. § 927 (1972)
131. 33 U.S.C. § 1319 (1990)
132. 33 U.S.C. § 1321 (2017)
133. 33 U.S.C. § 1322 (2008)
134. 33 U.S.C. § 1369 (1988)
135. 34 U.S.C. § 12391 (2017)
136. 34 U.S.C. § 20142 (2017)
137. 38 U.S.C. § 4323 (2008)
138. 38 U.S.C. § 5713 (1991)
139. 38 U.S.C. § 7265 (1991)
140. 39 U.S.C. § 504 (2006)
141. 39 U.S.C. § 3008 (1970)
142. 39 U.S.C. § 3016 (1999)
143. 41 U.S.C. § 7103 (2011)
144. 41 U.S.C. § 7105 (2011)
145. 42 U.S.C. § 405 (2018)
146. 42 U.S.C. § 2000h (1964)
147. 42 U.S.C. § 2000h-1 (1964)
148. 42 U.S.C. § 2281 (1992)
149. 42 U.S.C. § 2286b (2019)
150. 42 U.S.C. § 4915 (1972)
151. 42 U.S.C. § 5411 (1980)
152. 42 U.S.C. § 5413 (2000)
153. 42 U.S.C. § 6299 (1987)
154. 42 U.S.C. § 6384 (2004)
155. 42 U.S.C. § 7607 (1990)
156. 42 U.S.C. § 7617 (1978)
157. 42 U.S.C. § 7621 (1977)
158. 42 U.S.C. § 9622 (2002)
159. 42 U.S.C. § 9609 (1986)
160. 42 U.S.C. § 11045 (1986)
161. 43 U.S.C. § 1619 (1971)
162. 46 U.S.C. § 50306 (2006)
163. 46 U.S.C. § 6304 (1983)
164. 47 U.S.C. § 409 (1990)
165. 49 U.S.C. § 502 (1994)
166. 49 U.S.C. § 1113 (2011)

167. 49 U.S.C. § 1321 (2015)
168. 49 U.S.C. § 13301 (1995)
169. 49 U.S.C. § 32505 (1994)
170. 49 U.S.C. § 32706 (1997)
171. 49 U.S.C. § 32307 (1994)
172. 49 U.S.C. § 32910 (1994)
173. 49 U.S.C. § 33115 (1994)
174. 49 U.S.C. § 46104 (2001)
175. 49 U.S.C. § 60120 (2012)
176. 50 U.S.C. § 4101 (1980)
177. 50 U.S.C. § 4555 (2003)
178. 52 U.S.C. § 20504 (1993)
179. 52 U.S.C. § 10101 (1965)
180. 52 U.S.C. § 10310 (2006)
181. 52 U.S.C. § 30107 (1986)
182. 52 U.S.C. § 30109 (2013)

XIV. APPENDIX J: REGULATIONS

1. 5 C.F.R. § 5501.106 (2005)
2. 5 C.F.R. § 8301.105 (2020)
3. 8 C.F.R. § 1003.102 (2017)
4. 10 C.F.R. § 207.8 (1997)
5. 10 C.F.R. § 429.8 (2011)
6. 10 C.F.R. § 431.406 (2011)
7. 11 C.F.R. § 111.53 (2014)
8. 12 C.F.R. § 308.146 (2015)
9. 12 C.F.R. § 1080.10 (2012)
10. 14 C.F.R. § 13.205 (1990)
11. 14 C.F.R. § 406.109 (2007)
12. 15 C.F.R. Pt. 0, App. A
13. 15 C.F.R. § 270.315 (2003)
14. 15 C.F.R. § 280.211 (2000)
15. 15 C.F.R. § 719.11 (2006)
16. 15 C.F.R. § 785.9 (2008)
17. 16 C.F.R. § 2.13 (2012)
18. 16 C.F.R. § 3.42 (2015)
19. 18 C.F.R. § 1308.55 (1979)
20. 28 C.F.R. § 163.10 (2013)
21. 20 C.F.R. § 10.617 (2011)
22. 20 C.F.R. § 725.351 (2016)
23. 20 C.F.R. § 802.103 (2006)
24. 20 C.F.R. § 1002.289 (2006)
25. 20 C.F.R. § 1002.314 (2006)
26. 22 C.F.R. § 92.87 (1995)
27. 25 C.F.R. § 11.311 (2008)
28. 25 C.F.R. § 11.315 (2008)
29. 25 C.F.R. § 11.912 (2008)
30. 25 C.F.R. § 11.1206 (2008)
31. 25 C.F.R. § 11.1212 (2008)
32. 26 C.F.R. § 301.6503(j)-1 (2009)
33. 26 C.F.R. § 301.7604-1 (1973)
34. 27 C.F.R. § 70.24 (2006)
35. 27 C.F.R. § 478.103 (2014)
36. 28 C.F.R. § 0.45 (2008)
37. 28 C.F.R. § 2.10 (1982)
38. 28 C.F.R. § 2.20 (2003)
39. 28 C.F.R. § 2.51 (1998)
40. 28 C.F.R. § 2.104 (2002)
41. 28 C.F.R. § 2.217 (2003)
42. 28 C.F.R. § 522.10 (2010)
43. 28 C.F.R. § 522.11 (2005)
44. 28 C.F.R. § 522.12 (2005)
45. 28 C.F.R. § 522.13 (2005)
46. 28 C.F.R. § 522.14 (2005)
47. 28 C.F.R. § 522.15 (2005)
48. 28 C.F.R. § 523.17 (2005)
49. 28 C.F.R. § 551.101 (2004)
50. 28 C.F.R. § 802.27 (2017)

51. 29 C.F.R. Pt. 18, Subpt. B, App.
52. 29 C.F.R. § 101.9 (1988)
53. 29 C.F.R. § 101.15 (1988)
54. 29 C.F.R. § 102.31 (2017)
55. 29 C.F.R. § 102.119 (2020)
56. 29 C.F.R. § 580.18 (2019)
57. 31 C.F.R. § 212.10 (2011)
58. 31 C.F.R. § 1010.916 (2011)
59. 32 C.F.R. § 66.7 (2016)
60. 32 C.F.R. § 93.5 (2003)
61. 32 C.F.R. § 516.8 (1994)
62. 32 C.F.R. § 589.2 (1990)
63. 32 C.F.R. § 589.4 (1991)
64. 32 C.F.R. § 719.112 (1991)
65. 32 C.F.R. § 719.142 (1985)
66. 32 C.F.R. § 720.42 (1990)
67. 32 C.F.R. § 720.45 (1990)
68. 32 C.F.R. § 725.9 (1993)
69. 32 C.F.R. § 935.53 (2002)
70. 33 C.F.R. § 210.5 (1980)
71. 36 C.F.R. § 1220.30 (2009)
72. 36 C.F.R. § 1222.24 (2009)
73. 37 C.F.R. § 2.120 (2017)
74. 37 C.F.R. § 2.127 (2017)
75. 38 C.F.R. § 2.2 (1999)
76. 38 C.F.R. § 20.709 (2019)
77. 39 C.F.R. § 273.5 (1991)
78. 39 C.F.R. § 913.3 (2000)
79. 39 C.F.R. § 952.19 (2011)
80. 39 C.F.R. § 955.35 (2009)
81. 39 C.F.R. § 962.14 (2016)
82. 40 C.F.R. § 52.1470 (2019)
83. 40 C.F.R. § 282.86 (2019)
84. 42 C.F.R. § 51.42 (1997)
85. 42 C.F.R. § 430.86 (2012)
86. 45 C.F.R. § 99.23 (1998)
87. 45 C.F.R. § 213.23a (1975)
88. 45 C.F.R. § 303.6 (2017)
89. 45 C.F.R. § 304.20 (2017)
90. 45 C.F.R. § 702.12 (2002)
91. 45 C.F.R. § 1626.4 (2014)
92. 45 C.F.R. § 1326.103 (2016)
93. 45 C.F.R. § 1326.110 (2016)
94. 48 C.F.R. Ch. 2, App. A
95. 49 C.F.R. § 1503.607 (2009)

XV. APPENDIX K: SENTENCING GUIDELINES

1. USSG § 2J1.1 (2018)