ADVISORY COMMITTEE
ON
CIVIL RULES

April 9, 2024

AGENDA
Meeting of the Advisory Committee on Civil Rules
April 9, 2024

OPENING BUSINESS

ACTION ITEMS

AGENDA
Meeting of the Advisory Committee on Civil Rules
April 9, 2024

INFORMATION ITEMS

Subcommittee Reports

Intercommittee Reports

Other Information Items

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
Wayne State University Law School
Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robin L. Rosenberg United States District Court West Palm Beach, FL	Professor Richard L. Marcus University of California Hastings College of the Law San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON CIVIL RULES

Chair	Reporter
Honorable Robin L. Rosenberg United States District Court West Palm Beach, FL	Professor Richard L. Marcus University of California Hastings College of the Law San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Members

Honorable Cathy Bissoon United States District Court Pittsburgh, PA	Honorable Jane Bland Supreme Court of Texas Austin, Texas
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
Ariana J. Tadler, Esq. Tadler Law LLP Manhasset, NY	Helen E. Witt, Esq. Kirkland & Ellis LLP Chicago, IL

Liaisons	
Honorable D. Brooks Smith (*Standing*) United States Court of Appeals Duncansville, PA	Honorable Catherine P. McEwen (*Bankruptcy*) United States Bankruptcy Court Tampa, FL

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
Zachary D. Clopton	ACAD	Illinois	2023	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
Ariana J. Tadler	ESQ	New York	2017	2023
Helen E. Witt	ESQ	Illinois	2018	2024
Richard Marcus Reporter	ACAD	California	2023	2028
Andrew Bradt Associate Reporter	ACAD	California	2023	2028

* Ex-officio - Acting Assistant Attorney General, Civil Division

ADVISORY COMMITTEE ON CIVIL RULES
SUBCOMMITTEES
(2023–2024)

Cross-Border Discovery Subcommittee Judge Manish S. Shah, Chair Judge Jennifer C. Boal Professor Zachary Clopton Joshua Gardner, Esq. (DOJ) Judge Catherine P. McEwen (Liaison)	**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
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 7.1 Subcommittee** Justice Jane N. Bland, Chair Judge Manish S. Shah David Burman, Esq.
Rule 41 Subcommittee Judge Cathy Bissoon, Chair Professor Zachary Clopton Ariana Tadler, Esq. 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

Updated March 15, 2024

RULES COMMITTEES – LIAISON MEMBERS

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	TBD (*Criminal*) Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*)

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(Civil)

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Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2024

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in Austin, Texas, on January 4, 2024. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge William J. Kayatta, Jr.
Justice Edward M. Mansfield
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

Others who provided support to the Standing Committee, in person or remotely, included Judge J. Paul Oetken, Chair of the Joint Subcommittee on Attorney Admission; Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, Professor Joseph Kimble, and Joseph F. Spaniol, Jr., Esq., consultants to the Standing Committee; H. Thomas Byron III, Esq., 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; Zachary Hawari, Law Clerk to the Standing

* 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.

Committee; Hon. John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order. He welcomed attendees and members of the public, including those who were attending remotely. He also welcomed new Standing Committee members Justice Edward M. Mansfield and Louis A. Chaiten, Esq. Judge Bates recognized Professor Joseph Kimble for his selection by the Michigan State Bar to receive the Roberts P. Hudson Award for his service to the Bar and legal profession. He also noted that Professors Kimble and Garner deserve a lot of credit for their work on restyling the federal rules.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee approved the minutes of the June 6, 2023, meeting.**

Mr. Thomas Byron, Secretary to the Standing Committee, noted that the latest set of proposed rule amendments had been submitted to the Supreme Court for review and, if all goes smoothly, will be transmitted to Congress in the spring to take effect on December 1, 2024.

Judge Bates remarked that it is good for the Standing Committee to be aware of the projects underway by the FJC and that a short memorandum regarding that work begins on page 94 of the agenda book. Dr. Reagan explained that the FJC assigns liaisons to various Judicial Conference committees and conducts empirical research for the committees. The FJC's role, he explained, is to contribute methodological expertise and objective research capacity without taking policy positions. Judge Bates thanked the FJC for the continuing support and superb research done on behalf of the Rules Committees.

JOINT COMMITTEE BUSINESS

Joint Subcommittee on Attorney Admission

Judge J. Paul Oetken, chair of the Joint Subcommittee on Attorney Admission and a member of the Bankruptcy Rules Committee, and Professors Struve and Bradt reported on this item. A written report starts on page 101 of the agenda book. The joint subcommittee is considering a proposal from Dean Alan Morrison and others to make admission to the bars of the federal district courts more uniform.

Professor Struve noted the joint subcommittee was in the early stages of its work and thanked its members, who represent the Bankruptcy, Civil, and Criminal Rules Committees. She explained that the Morrison proposal highlights the variation in the criteria for admission to the bars of district courts. It notes that many federal districts require membership in the bar of the state in which the district is located, and in four states this in effect requires that lawyers pass the local state bar exam in order to be admitted to the district court bar. The proponents point out that the admission requirements can be time consuming and expensive and that seeking admission pro hac vice can also be burdensome given varying local counsel requirements and fees. They argue there is no reason for a district court to require in-state bar admission. Their petitions for various restrictive districts to change their local provisions have been unsuccessful.

The proposal contains three options. Option One is to centralize attorney admission and discipline within the Administrative Office of the United States Courts (AO), allowing attorneys in good standing in any state bar to be admitted to practice in any federal district court. Option Two provides that admission in any district court would entitle an attorney to practice in all other districts but would not centralize the process within the AO. Option Three bars district courts from having a local rule that would require in-state bar admission as a condition of admission to practice in the district court.

Professor Struve explained that there have been periodic discussions about attorney admission criteria over the last 90 years. An attorney proposed a nationwide rule for the district courts in 2002, but it did not garner much rulemaking interest or discussion. In the early 2000s, Professor Coquillette examined the adjacent, but separate, topic of centralizing federal rules on attorney conduct, which received a lot of pushback. Professor Coquillette added that the DOJ was the moving party for the unified rules of attorney conduct, but every bar association was against it.

Professor Struve noted that Appellate Rule 46 is one model that already exists in the national rules. It provides for admission to the courts of appeals based on an attorney being of good moral and professional character and being admitted to practice in the United States Supreme Court, a state high court, or another federal court.

The joint subcommittee held its first meeting in October 2023. There was no interest in adopting Option One. There were questions of feasibility and concerns that a centralized office within the AO would lack the local knowledge and contacts required for effective attorney discipline proceedings.

There was some interest in Options Two and Three. In-state admission requirements are particularly burdensome, especially in states that require taking the bar exam for admission. But members were mindful of the local courts' interests in protecting the quality of law practice. Additionally, courts use admission fees for funding important work, and there could be revenue effects. The subcommittee was inclined to consider models with elements of Options Two and Three. There would likely still be separate applications to each district in which one wishes to practice and perhaps fees as well.

The subcommittee also recognized the need to be mindful of rulemaking authority and 28 U.S.C. § 1654, which refers to the rules of courts that permit attorney admission. However, the existence of Appellate Rule 46 suggests rulemaking on attorney admissions has not been foreclosed. Professor Coquillette recalled that some senators had offered to pass legislation giving the Rules Committees power to make rules involving attorney conduct. Going forward, the subcommittee plans to look further into these issues.

Professor Struve also reported that, in response to the agenda book materials, Dean Morrison and others explained that their primary goal is to eliminate barriers that prevent lawyers who are admitted to practice in one district from practicing in another. While not wedded to centralizing admission, they would suggest addressing district variation in how often attorneys must renew their licenses and how much the court charges. They have no interest in removing authority from individual districts to discipline attorneys.

Judge Bates explained that he populated the joint subcommittee with people from jurisdictions with different approaches so there will be a thorough examination through the subcommittee process. There are a lot of issues, and it is a pretty important matter for many courts across the country and for the Bar.

An academic member commented that Option Three has the most promise as there is no good reason today to require in-state bar admission. A practitioner member echoed that Option Three has the best chance of progressing. He acknowledged that there may be something to be served by requiring membership in the local bar but offered three points in support of something like Option Three. First, he noted that in-state bar admission is not a great proxy for experience. For example, he practiced in a particular district for years as an Assistant United States Attorney but was not able to be admitted as a private attorney because he was not barred in that state. Second, the concern around pro hac vice fees can be dwarfed by fees paid to local counsel. Third, reciprocity is not a full solution because defense attorneys must go wherever the case is.

A judge member made the point that spouses of military service members face extraordinary barriers when trying to maintain legal careers while moving around the country every few years. She emphasized the considerable difficulty and cost of admission to state bars and noted that many states already make exceptions to their bar requirements for military spouses. There is also a need to reduce the variable expenses, or possibly make an exception, for military spouses and others who cannot afford these expenses. Option Three should be the bare minimum and would show respect for military service members and their spouses.

Judge Bybee agreed that this project is well worth the effort to study. He noted, however, that diversity cases are an area in which attorneys need to know the state law. The state bar might object to an out-of-state attorney taking a matter from state court directly to federal court. That argument is less compelling for other forms of jurisdiction, but it is not clear how the rules could distinguish between diversity jurisdiction cases as opposed to other or mixed jurisdiction cases.

Professor Struve noted that the subcommittee had not yet considered the issue, but Dean Morrison's proposal attempted to rebut the diversity case argument in his submission.

Another judge member asked what it would cost to initiate Option One at the AO. She also asked about the range of fees across the country for admission pro hac vice, noting that such fees were a substantial source of court income in her district. She suggested that it might be desirable to encourage parity among those fees.

Professor Struve indicated the subcommittee had not conducted its own systematic study yet, but they had been informed that pro hac vice admission fees can reach $500 in some districts.

Another judge member questioned the aptness of the analogy between appellate and district practice given how circumscribed the responsibilities of counsel are on appeal as compared to litigation in the district court. Additionally, he would be cautious about making changes that would make cases less likely to feature repeat players; in his experience, the involvement of attorneys who are known to the court tends to increase the quality of practice.

Another judge member observed that there are many concerns wrapped up in this issue and many ways those concerns could be addressed. Option Three is the most promising. But it is

important to involve state bars in some respect because it is important for district courts and state bars to work together to monitor attorney practice and discipline. Option One is less preferable because it could lead to lower standards. She also noted that it has become more common for attorneys to practice remotely or in another close-proximity jurisdiction. Her district had an issue with attorneys who were living and practicing in the state but applying pro hac vice in every case, seemingly to get around the in-state bar requirement. If the rulemakers were to adopt an approach that mandates reciprocity, it may be that an attorney who lives in a particular jurisdiction for a certain amount of time should be required to be admitted to that bar, possibly with an exception for military spouses.

A practitioner member expressed sympathy for this proposal as someone who spends a great deal of time and money getting admitted pro hac vice in federal courts across the country. But he asked whether districts that require in-state bar admission justify that requirement based on better behavior from repeat, in-state attorneys. He also asked if the subcommittee had looked at whether it would be unauthorized practice of law for an attorney to litigate a lengthy diversity case in federal court without being admitted to that state's bar.

Professor Struve responded that the subcommittee had not yet looked into that issue but that it can.

A judge member noted that these issues are not limited to diversity cases. A federal case often has a federal claim with numerous state law claims under supplemental jurisdiction. There is a concern that, despite soliciting clients within a state, a national practitioner who can only represent clients in federal court might be less familiar with state law that can, at times, afford the plaintiff greater relief than federal law.

Judge Bates thanked the subcommittee for its work so far. He noted that the authority question is particularly important with respect to Option One but is not necessarily eliminated with respect to the other approaches. More examination needs to be done.

Judge Oetken thanked the members of the Standing Committee for their helpful comments.

Service and Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which appears on page 182 of the agenda book, and invited Professor Struve to provide an update.

Professor Struve reported that the pro se electronic filing and service working group is studying two topics: (1) whether to take steps to increase electronic access to the court for self-represented litigants by CM/ECF or otherwise and (2) whether self-represented litigants need to traditionally serve their papers on litigants who will receive a notice of electronic filings anyway. The report in the agenda book summarizes spring 2023 interviews that Professor Struve and Dr. Reagan conducted with officials in district courts. She expressed gratitude to Dr. Reagan and his colleagues for their work.

The working group hopes to develop concrete proposals on both issues for the advisory committees in their spring meetings. One potential proposal discussed in concept at the fall meetings, without eliciting immediate expressions of concern, was a rule that would set a baseline

requirement that districts that disallow CM/ECF access for self-represented litigants would need to make reasonable exceptions to that policy.

Electronic-Filing Deadlines Joint Subcommittee

Professor Struve reported on this topic. In 2019, Judge Michael Chagares proposed a study on whether the national rules on computing time should be amended to set the presumptive deadline for electronic filing earlier than midnight. In 2023, the Third Circuit adopted a local rule moving the filing deadline back in that court of appeals from midnight to 5:00 p.m. The E-Filing Deadlines Joint Subcommittee met in August 2023 and voted unanimously to recommend that no action be taken and that the subcommittee be disbanded. The Advisory Committees endorsed this recommendation at their fall meetings and removed the topic from their agendas.

Judge Bates asked if the Standing Committee had any objection to disbanding the joint subcommittee and putting this issue to rest for the moment. Hearing no objection, Judge Bates disbanded the joint subcommittee and removed the matter from the agenda. The Committee will monitor how things play out in the Third Circuit.

Redaction of Social Security Numbers

Mr. Byron reported that the advisory committee reporters have begun to discuss Senator Ron Wyden's proposal to require complete redaction of Social Security numbers in court filings, instead of the current requirement in the privacy rules of redacting all but the last four digits of those numbers. The reporters' discussions are still in the early stages.

Professor Marcus noted the likelihood that this project, and thus the Standing Committee, will need to confront the question of whether the various sets of rules should continue to take a uniform approach to this topic.

Mr. Byron elaborated that a desire for uniformity was one historical motivation for the current rules. The Bankruptcy Rules Committee had identified the last four digits of a Social Security number as being extremely valuable in bankruptcy cases for creditors and other participants. The other committees essentially deferred to the Bankruptcy Rules Committee on this issue and also required redaction of all but the last four digits. The working group is currently reconsidering whether uniformity is still a predominant concern that should overrule other concerns such as privacy or identity theft. There are also already some variations among the rule sets. One issue is whether the Criminal, Civil, and Appellate Rules Committees want to consider requiring full redaction.

Privacy Report

Judge Bates asked Mr. Byron to report on the status of the 2024 report to Congress.

Mr. Byron explained that the Judiciary has an ongoing statutory obligation to study and report to Congress every two years on the adequacy of the privacy rules. Rules Committee Staff has been working with staff from the Committee on Court Administration and Case Management (CACM) on the privacy report. CACM has requested some FJC research projects that are relevant

to this question, but those projects likely will not be completed in time to fully report their results to Congress this year.

Ideally, a draft report will be ready in time for the Standing Committee to consider and approve at the June meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 19, 2023, in Washington, D.C. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 219.

Judge Bybee updated the Standing Committee on two proposals out for public comment. The Advisory Committee has received one comment on the proposed amendment to Rule 39. It has received no comments on the proposed amendment to Rule 6, which involves some very complicated changes dealing with direct appeals in bankruptcy cases. Judge Bybee thanked the Bankruptcy Rules Committee and others who commented on those changes prior to publication. The Advisory Committee will not hold hearings on Rules 6 and 36 due to a lack of requests to testify and expects to seek final approval from the Standing Committee in June 2024.

Information Items

Amicus Disclosures. Judge Bybee and Professor Hartnett reported on this item. The Advisory Committee hopes to have a proposal before the Standing Committee in June 2024.

Professor Hartnett provided background on the proposal. The Advisory Committee reviewed proposed legislation, the AMICUS Act, which would have treated repeat amicus curiae filers like lobbyists, requiring them to register and to disclose contributors who had provided 3% or more of their revenue. That approach was rejected by the Advisory Committee because there is a difference between lobbying and submitting a public amicus brief to which there is an opportunity to respond. On the other hand, sometimes judges care not only about the contents of an amicus's arguments but also who the amicus is.

The Advisory Committee has tried to balance disclosure with free speech and free association rights. The current draft recognizes the distinctions (a) between contributions by a party and by a nonparty and (b) between contributions earmarked for the preparation of a brief and contributions to the organization generally. For example, the 25% threshold for disclosure is meant to avoid discouraging speech and association while recognizing that this level of contribution could give the contributor real influence on the speech. Striking this balance also informed how to set a de minimis threshold amount for disclosure of earmarked contributions by a nonparty.

The Advisory Committee has narrowed down the questions at issue, and Judge Bybee reported on three recent developments.

First, as to the appropriate lookback period for determining contributions by a party, the Advisory Committee had considered whether the proposed rule should use a fiscal year or the 12-

month period preceding the brief's filing. Neither was perfect, but the Advisory Committee has arrived at an elegant solution and would welcome feedback. To determine the threshold contribution amount that would require disclosure, this approach would multiply the amicus's prior fiscal year revenue by 25% and see whether a party had contributed more than that dollar amount within the last 12 months. This effectively combines the two periods into a single, easily calculable figure and closes a potential loophole.

Second, the proposed amendment had incorporated language from the AMICUS Act that would have excluded from disclosure certain amounts received in the "ordinary course of business." But no one was sure what that language meant, and it did not seem essential. To simplify matters, the Advisory Committee has deleted that phrase from the proposed amendment.

Third, the current rule broadly requires disclosure of any contribution earmarked for a particular brief, but it exempts contributions by members of the amicus. That was seen by some as a loophole because it allowed someone to join an amicus at the last minute and avoid disclosure. The Advisory Committee proposed setting a de minimis contribution amount of $1,000 that would not be reportable even when earmarked for the preparation of a brief. This avoids problems arising with a GoFundMe-style amicus brief. For any contribution over $1,000, it must be disclosed unless it comes from someone who has been a member for at least 12 months. Anyone who has been a member for less than 12 months is treated like a nonmember.

Judge Bybee welcomed any input from the Standing Committee.

Judge Bates thanked Judge Bybee, Professor Hartnett, and the Advisory Committee for their work. This important project began with communications from members of Congress to the Supreme Court. The matter was referred to the Standing Committee and then to the Advisory Committee. It has a lot of ramifications and has drawn public and congressional interest.

A judge member agreed that these are elegant solutions and commended the Advisory Committee for its work. Regarding the last sentence of subdivision (d), she recalled the concern expressed about individuals joining an amicus for the purpose of contributing toward a brief. She inquired whether that is a problem, and, if so, whether such individuals would now get around having to disclose that they are funding a brief by creating a new amicus, rather than joining an existing one.

Judge Bybee explained the Advisory Committee's sense that there are people who are willing to form an amicus organization with a name that completely obscures who is behind it. To address this issue, under subdivision (d), while the amicus need not disclose the contributing members if the amicus has existed for fewer than 12 months, it must disclose the date of creation. There is also a new provision in Rule 29(a)(4)(D), requiring a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will be helpful to the court.

A practitioner member commented that, unsurprisingly, there are people that see a case and would like to influence it without filing briefs in their own names, so they form organizations to do so. The disclosure of the date of creation is a check on this. It will flag to the reader that this is

an organization that does not have a long-standing interest or was formed for the purpose of filing an amicus brief if, for example, it was formed after the case was filed.

Another practitioner member added that nothing is perfect, but this solution does address the issue and provides relevant disclosure.

Another judge member also thought that the solution in subdivision (b) was elegant. However, the concern addressed in that subdivision (the relationship between the amicus and a party) was probably not the concern motivating the legislators who submitted the suggestion. It is more of a judicial-looking concern about the adversarial process. He expressed ambivalence on that issue because he was not sure how he would make better, or different, use of amicus briefs if he knew more about who was behind them beyond what they say and who the lawyers are.

Instead, subdivision (d) is directly responsive to the legislators' concerns, and some additions may be needed to guard against engineering to circumvent subdivision (d). For example, if someone funded an organization up front and it does the amicus briefing, would the amicus need to say anyone contributed funds for the brief? The Advisory Committee may want to consider something like submitting or drafting "briefs"—rather than "the brief," that is a particular brief—to capture an organization that is funded generally to file amicus briefs in a certain type of litigation.

A practitioner member wondered whether the $1,000 threshold is too high. It would not require that many like-minded payers each contributing $999 to fund a brief. If the focus is on GoFundMe campaigns, an amount in the $100 range might be more appropriate and make it much more difficult for a group of wealthy people to fund a brief through $999 contributions.

Judge Bates observed that a perfect product is not achievable here. He asked Judge Bybee to address another issue regarding whether to follow the Supreme Court in its recent change to permit amicus briefs without requiring leave of court or consent of the parties.

Judge Bybee explained that the current proposal follows the Supreme Court Rules in not requiring leave of court or consent of the parties. However, the Supreme Court recently issued its own ethics guidelines noting that it has different concerns from lower appellate courts due to the dynamics of disqualification. There is a rule of necessity at the Supreme Court under which the Justices will not regularly recuse due to amici, but that has not been the practice in courts of appeals. Large courts with sophisticated systems for identifying possible conflicts can fairly easily work around an amicus brief if it requires a judge's recusal at the panel stage. But it can be more complicated when the appeal progresses to en banc proceedings where an amicus could strategically file a brief to ensure the disqualification of a judge. The Advisory Committee is still thinking about these issues and would welcome thoughts on whether the rule should revert to the motion requirement to forestall the problem of a strategic en banc amicus filing.

Judge Bates remarked that he hoped that this discussion had been beneficial to the Advisory Committee's continuing efforts and that the Standing Committee would look forward to the next step.

In forma pauperis. Judge Bybee reported that the Advisory Committee has been working diligently and conducting surveys on in forma pauperis status and expected to have a proposal before the Standing Committee in June 2024.

Intervention on appeal. Judge Bybee reported that there is a subcommittee considering intervention on appeal. Although there is not yet a working draft, the subcommittee would appreciate getting a sense of where the Standing Committee stands on this issue. It is a controversial issue that has been studied by the Advisory Committee before, and it came up recently in the Supreme Court.

An academic member thought it would be a worthwhile undertaking to consider what a rule on intervention on appeal might look like. In teaching the relevant cases, he was surprised to learn about the system in the courts of appeals for handling intervention on appeal. They have tried to borrow Civil Rule 24, which itself has ambiguities and difficulties, to fit in the appellate structure. That might be fine because intervention on appeal should not be common. But he would encourage the Advisory Committee to think through this issue, which has come up so frequently in the last few years.

Judge Bybee thanked the Standing Committee for its comments, and Judge Bates thanked Judge Bybee and Professor Hartnett for their report.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 14, 2023, in Washington, D.C. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 249.

Judge Connelly reported that the Advisory Committee has been active, engaged, and productive. She thanked the reporters for the terrific job they have done.

Action Items

Proposed amendment to Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed). Judge Connelly reported on this item. The text of the proposed amendment appears on page 256 of the agenda book.

Generally, everything a debtor owns becomes part of the bankruptcy estate. Rule 1007 sets a timeline for the debtor to file schedules of the estate's property. It also provides a deadline and mechanism for filing a supplemental schedule for certain types of property interests listed in Bankruptcy Code Section 541(a)(5) that the debtor acquires within 180 days after filing the petition.

However, bankruptcy cases under Chapters 11, 12, and 13 of the Code can take three to five years or longer to resolve, and property the debtor acquires during this period is also property of the estate. The proposal would amend Rule 1007 to account for supplemental schedules to list

those other postpetition property interests that the debtor acquires and that become property of the estate under Bankruptcy Code Section 1115, 1207, or 1306.

Courts have been managing this issue through local rules and administrative orders, and this rule would dispel any concern about whether local courts have the authority to do so. Local management is important because courts have different interpretations about whether a debtor has an ongoing obligation to report postpetition acquisitions other than what is currently required under Rule 1007(h). The Advisory Committee did not want to adopt a particular position on those questions. The proposal also serves to put the debtor and counsel on notice that the court might require the filing of a supplemental schedule.

An academic member commented that this seems like an opportunity to fill a gap in the rules. He recalled researching cases where, for example, a debtor has a valuable cause of action, seeks to pursue it post-bankruptcy, and could be estopped from asserting it later for failure to disclose it. However, given that case law has developed, he questioned whether there is a need for rulemaking. He does not object to publication but is nervous about unintended consequences.

Professor Bartell noted that this proposal does not address judicial estoppel for a cause of action that a debtor had at the time of filing the petition and failed to disclose. It only addresses postpetition assets. It is a weaker version of the original proposal, which would have created a mandatory rule for disclosure. That created problems with how to craft a test for what to disclose. Instead, this proposal empowers local courts to impose a disclosure requirement if they wish to do so.

Professor Gibson added that courts disagree about whether, in the absence of a request by a party, a U.S. trustee, or the court, a debtor in this situation has a continuing duty to reveal postpetition property. It would be helpful for courts that believe there is such a continuing duty to make that fact clear, because failure to satisfy that duty could lead to judicial estoppel.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 1007(h) for public comment.**

Proposed amendment to Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan). Judge Connelly reported on this item. The proposed amendment starts on page 258 of the agenda book.

Rule 3018 governs creditor acceptance or rejection of a Chapter 9 or Chapter 11 plan for reorganization. Although Chapter 9 municipal reorganizations are pretty rare, Chapter 11 reorganizations are very common. (Chapter 11 reorganizations ordinarily involve a business debtor but could involve an individual debtor.) Plan confirmation criteria will be different depending on whether creditors have accepted the plan.

Under Rule 3018, creditors have an opportunity to vote on a plan by indicating acceptance or rejection through a written ballot. The proposal would amend subdivisions (a) and (c) to permit courts to also consider an acceptance—or the change or withdrawal of a rejection—that is made

by a creditor's attorney or authorized agent and is part of the record. That can be done orally at the confirmation hearing or by stipulation.

This proposal addresses two common practices. First, parties are often heavily involved in negotiations leading up to the plan confirmation hearing. This proposal would facilitate effective negotiations by allowing the court to consider acceptances at the confirmation hearing reflecting those negotiations. Second, creditors are not required to vote, and some do not vote at all for a variety of reasons. Most, but not all jurisdictions, do not treat a nonvote as an acceptance. This proposal would reduce the practical difficulties of submitting a written ballot in a four-to-five-week period. While that turn-around time has not proven a challenge for the private sector, it may be a barrier for the government, which is the least likely creditor to vote. Among other reasons not to vote, getting authorization from the Secretary of the Treasury in that timeframe may present an issue for the IRS. This rule would create a potential opportunity for the IRS to participate by authorizing the DOJ to accept a plan.

This proposal is particularly important for small businesses. Subchapter V of Chapter 11 was enacted in 2020 to allow a special fast track for small businesses that cannot typically afford regular Chapter 11 practice. If a subchapter V plan is confirmed as consensual with sufficient acceptances, discharge occurs, the debtor may exit Chapter 11, and the subchapter V trustee's service ends. That means the small business is not burdened with continuing administrative expenses. In contrast, if there are not sufficient acceptances, the debtor does not get an immediate discharge and must remain under the court's purview throughout the plan period. The subchapter V trustee is also the disbursing agent throughout this process. So, there are administrative expenses, and remaining in Chapter 11 for multiple years may have an impact on the business.

Judge Connelly acknowledged that the government expressed concern about this proposal during the Advisory Committee's discussions. The Advisory Committee felt publishing the proposal would provide useful feedback and give the government more time to review it.

Ms. Shapiro explained that the government opposed the proposal in the Advisory Committee because it was concerned that the rule change would pressure the government to accept plans that it lacks the resources to fully review. There was also concern that the change from requiring written acceptances to permitting oral acceptances might result in judges pressuring Assistant United States Attorneys to accept a plan that was not able to go through the process for government review and approval. That said, the government will vote in favor of publication, and it intends to submit a letter to the Advisory Committee setting out its concerns.

A judge member expressed that, while he had no issue with the rule, he wondered whether its structure worked. Current Rule 3018(a)(3) seems to require cause for any change or withdrawal of acceptance or rejection. The proposed additional text in Rule 3018(a)(3)—"The court may also do so as provided in (c)(1)(B)"—appears to permit the court to permit the change or withdrawal of a rejection without cause. It seems the tail has grown much larger than the dog here.

Professor Gibson acknowledged the judge member's point. She noted that courts are already accepting settlements and changes from rejections to acceptances at the confirmation hearing even without the rule explicitly allowing it.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 3018(a) and (c) for public comment.**

Proposed amendment to Official Form 410S1 (Notice of Mortgage Payment Change). Judge Connelly reported on this item. The proposed revised form starts on page 260 of the agenda book.

Proposed amendments to Rule 3002.1, which require mortgage creditors in a Chapter 13 case to disclose payment changes and other details that occur over the course of the case were published for public comment in 2023. The proposal addresses home equity lines of credit (HELOCs), among other issues. There can be a lot of variation in HELOC payments, and the proposed rule would allow the notice of change to be made either at the time of the change or annually with a reconciliation amount.

One of the public comments to Rule 3002.1 noted a need to update the official form to implement this change. The forms subcommittee determined that Official Form 410S1 should be revised to provide space for an annual HELOC notice at Part 3. If the proposed amendment is published in 2024, the form will be on the same timeline to take effect as proposed Rule 3002.1.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Official Form 410S1 for public comment.**

Information Items

Judge Connelly stated that none of the information items mentioned in the Advisory Committee's report required approval or specific feedback at this time. She elaborated on two items.

Reconsideration of proposed Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). At the June 2023 Standing Committee meeting, Judge Connelly requested permission to publish extensive changes to Rule 3002.1, including amendments to the subdivision addressing noncompliance that would authorize the court to enforce the rule by awarding noncompensatory sanctions. There was a robust discussion at the meeting, and, at Judge Connelly's request, Rule 3002.1 was published for comment without the provision on noncompensatory sanctions so that the Advisory Committee could discuss the points raised by the Standing Committee.

The Advisory Committee will defer further discussion of that subdivision for now, pending consideration of the public comments on Rule 3002.1 and further development in the case law.

Remote testimony in contested matters. The Advisory Committee is considering a proposal to address the procedure for a bankruptcy judge to permit remote testimony in contested matters in bankruptcy cases. The proposed amendments were discussed in September, but the Advisory Committee deferred any recommendation so that certain Judicial Conference

committees, particularly CACM, could be informed and have an opportunity to provide input. The Advisory Committee plans to consider the proposal further at its meeting in April, and there will probably be an agenda item on this topic for the Standing Committee's meeting in June.

Professor Marcus observed that Civil Rule 43(a)'s strong presumption in favor of non-remote open-court testimony might in future be altered based in part on experience under the Bankruptcy Rules.

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on October 17, 2023, in Washington, D.C. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 288.

Judge Rosenberg updated the Standing Committee on proposals out for public comment. In August 2023, proposed amendments to Rules 16 and 26, dealing with privilege log issues, and a new Rule 16.1 on multidistrict litigation (MDL) proceedings were published for public comment. Public comments can be viewed on the regulations.gov website, and a summary of the comments will be provided in the Advisory Committee's spring agenda book. The Advisory Committee is holding three public hearings on these changes. Twenty-four witnesses testified at the first hearing, which was held in person in Washington, D.C., on October 16, 2023. The next two hearings are scheduled for January 16 and February 6, 2024, and will be conducted remotely. So far, there have been 16 written submissions for the January 16 hearing and 32 witnesses scheduled to testify. Another 24 witnesses are currently scheduled for the February hearing.

Information Items

Rule 41 Subcommittee. Judge Rosenberg and Professor Bradt reported on this item.

Judge Cathy Bissoon chairs the subcommittee considering Rule 41(a). There is a circuit split about the meaning of the word "action" in Rule 41(a)(1)(A), which allows the plaintiff to dismiss an action by filing a notice or stipulation of dismissal. Some courts only allow an entire action to be dismissed, not a claim or an action against a particular party. Those courts require an amendment under Rule 15 for dropping anything less than the entire action.

The subcommittee has engaged in outreach to several attorney groups since the last report to the Standing Committee, including Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. The subcommittee also sent a letter to federal judges through the Federal Judges Association. There were only eight responses, which were somewhat ambivalent and reflected different interpretations of the rule.

Judge Rosenberg reported that, to date, there have been sketches of possible rule amendments but no concrete proposals. There will be a subcommittee meeting before the April Advisory Committee meeting, and it is possible that the subcommittee may agree upon a proposal

to present to the full committee. An amended rule could clarify how much leeway a plaintiff has to dismiss something less than the entire action and whether that should extend to individual claims. Tangential considerations include the deadline by which a plaintiff can voluntarily dismiss without a stipulation or court order, who must sign a stipulation of dismissal, and which dismissals should be with or without prejudice.

Professor Bradt added that in the subcommittee's extensive outreach, the first question was whether there is a real-world problem for litigants. The answer seems to be yes, particularly in jurisdictions that interpret the rule to allow voluntary dismissal only of the entire action. That often leads to makeshift solutions, serial amendments to complaints, and follow-on motion practice and pleadings. The rough consensus of the members of the subcommittee seems to be that the rule ought to be more flexible than limiting dismissal to the entire action, but the degree of flexibility will be debated at upcoming meetings.

Discovery Subcommittee. Judge Rosenberg and Professor Marcus reported on this item. Chief Judge David Godbey chairs the Discovery Subcommittee. Judge Rosenberg noted that a number of issues were being considered by the subcommittee.

Serving subpoenas. The first issue is service of subpoenas under Rule 45(b)(1), and discussion begins on page 294 of the agenda book. There is some ambiguity on whether service is satisfied by something other than in-hand service. The prior Rules Law Clerk prepared an extensive memorandum on the requirements in state courts. There was no consistent thread to provide guidance, but the subcommittee has concluded that the rule's ambiguity has produced sufficient wasteful litigation activity to warrant an effort to clarify the rule.

The subcommittee's consensus was that requiring in-person service in every instance was not desirable. The proposed sketch at page 295 in the agenda book materials would permit subpoena service by any means of service authorized under Rule 4(d), (e), (f), (h), or (i), or authorized by court order or by local rule if reasonably calculated to give notice.

Professor Marcus noted that this is a work in progress. At the Advisory Committee meeting, the DOJ raised concerns about the inclusion of Rule 4(i), and the Advisory Committee expects to hear more.

Filing under seal. Judge Rosenberg reported that the next issue relates to filing under seal. The Advisory Committee has received a number of submissions urging that the rules explicitly recognize that a protective order under Rule 26(c) invokes a good cause standard, rather than the more demanding standards in the common law and First Amendment context for sealing court files. The subcommittee discussed making an explicit distinction between filing under seal and the issuance of a protective order for materials exchanged through discovery. It has developed a proposed sketch for Rule 26(c)(4) and Rule 5(d)(5), appearing on page 297 of the agenda book, and feedback would be welcome.

The Advisory Committee discussed that making it more difficult to file under seal could prove troublesome in litigation with highly confidential, technical, and competitive information. The attorney members stressed the variation across districts. There were also suggestions to consult with clerks' offices since they are essential to the day-to-day handling of these issues.

Professor Marcus observed that the aspect of the draft proposal that emphasizes that existing Rule 26(c) does itself not authorize filing under seal had been discussed in previous years. He suggested that the Standing Committee's input would be particularly useful on the further sketches presented in the agenda book at pages 300-03 concerning procedures for handling motions to seal. Such procedural questions include (1) whether the motion to seal must be filed openly, (2) whether materials can be filed under a tentative or preliminary seal to meet deadlines, (3) whether the party seeking to file under seal needs to give notice to anyone with a confidentiality interest, (4) what happens if the motion to seal is not granted, (5) when the seal will be removed, (6) whether a member of the public can intervene to seek to unseal sealed materials, and (7) whether a party can retrieve its sealed materials from the court's file after termination of the action (and how such a retrieval would affect the record in the event of an appeal).

A practitioner member commented that this is a complicated topic. While a lot of cases have confidential information, there is a lot of over-designation, and if parties are persistent about sealing, it can come down to how much the other party or the court wants to push back. Certain kinds of cases may also present various First Amendment issues, which should not be defined by rule. The member wondered whether the rule should set a floor while the Committee Note could recognize that First Amendment or other concerns could lead the court to be more aggressive in policing sealing.

A judge member emphasized the great inconsistency in case law as to the difference between protective orders and sealing orders. She also noted that district courts will likely apply a different standard in criminal cases (for example, as to plea and sentencing issues) than they do in civil cases. There is a need for guidance concerning what a court ought to consider when thinking about a sealing order and whether it should be different in civil and criminal cases. She added that it can be a significant technical challenge for the clerk's office when a party requests for only part of a large filing to be sealed.

Alluding to the work (more than a decade previously) of the Standing Committee's Privacy Subcommittee, Professor Marcus recalled that there had been considerable concern over access to information in presentence reports; but this, he observed, is not the Civil Rules Committee's focus. The sketch also was not intended to alter the scope of First Amendment and common law rights to access court documents.

Another judge member commented that the motion should tell the court why the records need to be sealed. It would not be possible to set a hard-and-fast rule governing whether the motion to seal can itself be filed under seal. There should be no taking back of documents once filed on CM/ECF. If a motion is denied, the party can refile it in a manner consistent with what the court ordered. Otherwise, the material should remain inaccessible and effectively under seal but not able to be used in the case. That preserves the record for appeal. Professor Marcus asked if the bracketed language in the sketch that says "unless the court orders otherwise" (page 300, line 409 in the agenda book) would work. The judge member agreed that would make sense and the party can request that it be filed under seal and give a reason why.

Judge Bates observed that this is a very complex, large project for the Advisory Committee and its subcommittee. It is also a fairly difficult area because any rule would have tremendous

effects on the various districts and their local rules. Because of the inconsistency, it would require revision of local rules, as well.

Cross-border discovery. Judge Rosenberg and Professor Marcus reported that consideration of cross-border discovery is in the very early stages. The proposal comes from Judge Michael Baylson, who presented at the Advisory Committee's October meeting. He and Professor Gensler have prepared an article published in *Judicature* entitled "Should the Federal Rules Be Amended to Address Cross-Border Discovery?" They propose that the Advisory Committee should consider how the Civil Rules could better guide judges and attorneys in cases involving foreign discovery. The Sedona Conference submitted a letter in support.

The Advisory Committee recognized that this will be a major undertaking but felt it is worth pursuing. This topic may not be limited to discovery and evidence gathering and could implicate Rule 44.1, regarding proof of foreign law, and service of process. A new subcommittee chaired by Judge Manish Shah has been appointed to undertake this project. The first subcommittee meeting will be in January.

When, in the 1980s, the rulemakers sent to the Supreme Court a proposed amendment dealing with discovery for use in U.S. cases, the United Kingdom objected, the Court returned the proposal to the rulemakers, and no further action was taken. Professor Marcus observed that in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987), the Supreme Court refused to require first resort to the Hague Convention procedures for foreign discovery and allowed the federal courts to use the Federal Rules as to the parties before the American court. The proposed rule was criticized as following the view of the dissent in *Aerospatiale* rather than the view of the majority. However, things have changed significantly since the 1980s due to the increase in discovery of digital materials. Professor Marcus noted that, more recently, Judge David Campbell successfully used the Hague Convention procedures in a case before him.

Professor Marcus also observed that a separate statute, 28 U.S.C. § 1782, governs U.S. discovery for use in proceedings abroad. The subcommittee will also consider whether to address that topic.

Professor Marcus asked for suggestions about what to do and who might be an expert on this subject.

A judge member recalled listening to Judge Baylson and Judge Lee Rosenthal discussing this topic. Judge Baylson is very knowledgeable and has dedicated a great deal of considerable thought to it.

Ms. Shapiro noted that the DOJ has a great deal of experience with cross-border discovery and mutual legal assistance requests. It was noted that Joshua Gardner will represent the DOJ on the subcommittee.

Rule 7.1 Subcommittee. Judge Rosenberg reported that the subcommittee is considering suggestions from Judge Ralph Erickson and Magistrate Judge Patricia Barksdale, prompted by the concern that the recusal statute potentially covers significantly more situations than the disclosure requirement in Rule 7.1(a). The Rule 7.1 Subcommittee, chaired by Justice Jane N. Bland, was

created in March 2023 to consider whether a rule amendment is needed to better inform judges of the circumstances that might trigger the statutory duty to recuse.

Currently, Rule 7.1(a) provides for disclosure of any parent corporation of a party and any publicly held corporation owning 10% or more of a party's stock. In contrast, the recusal statute, 28 U.S.C. § 455(b)(4), provides that a judge shall recuse when he knows that he, individually or as a fiduciary, or his spouse or his minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding. 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.

To address this potential gap, Judge Erickson suggested requiring disclosure of grandparent corporations. Magistrate Judge Barksdale proposed requiring that parties check all the judge's publicly available financial disclosures and file a notice of any conflict.

The Advisory Committee has also considered the local rules from the 50 district courts that have rules on this subject, which are catalogued in a memorandum from a former Rules Law Clerk. There are a few options being considered.

The Judicial Conference's Codes of Conduct Committee has indicated that the Advisory Committee's consideration of a potential rule amendment would not conflict with its work. There is also relevant pending legislation, the Judicial Ethics and Anti-Corruption Act of 2023, which 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 subcommittee plans to meet before the full Advisory Committee meeting in April with the goal of presenting a proposed amendment, if any is deemed necessary, at the April meeting.

Professor Bradt explained that the drafting challenge—and where Standing Committee feedback would be helpful—is in figuring out language to sufficiently capture the full range of circumstances in which a judge might be required to recuse without making the disclosure requirement unduly burdensome. One problem with only requiring disclosure of a parent corporation is that there might still be a grandparent company or other related entity giving the judge a financial interest.

There have also been concerns that it would be difficult for a rule to capture the everchanging landscape of financial instruments and business associations. Local rules have taken a wide variety of approaches. Some local rules expand the general categories of entities to be disclosed beyond those in Rule 7.1(a), using words like "affiliation" or "entity." Others require disclosure of defined financial relationships, like an insurer or third-party litigation funder. Another option is to require disclosure of entities owning a percentage of stock smaller than 10%. The 10% ownership threshold in the current rule is thought to serve as a proxy for control. A lower percentage might better capture the financial interest requirement of the recusal statute.

Judge Bates observed that, while there was no feedback from the Standing Committee right now, there is more work to do, and that may engender some feedback in the future.

Random Case Assignment. Judge Rosenberg and Professor Bradt reported on this item. The Advisory Committee decided at the October meeting to accept the random assignment of cases as a project to explore. Attention on this issue has increased due to concerns that in high-profile cases, especially cases seeking nationwide injunctions against executive action, plaintiffs are engaged in a form of forum shopping, particularly in single-judge divisions of district courts.

The Brennan Center for Justice submitted a proposal urging the adoption of a rule to require the randomization of judicial assignment within districts for certain civil cases. Others have also expressed interest in this topic. In July 2023, nineteen United States senators sent a letter to Judge Rosenberg. The following month, the American Bar Association (ABA) adopted a resolution urging federal courts to implement district-wide random case assignment. The House and Senate Judiciary Committees have also held hearings on issues related to nationwide injunctions and forum shopping.

Judge Rosenberg noted that there are questions about whether a national rule can require reallocation of business among divisions of a district court or whether, under 28 U.S.C. § 137, such questions are beyond the scope of rulemaking. Since the October meeting, Professor Bradt has been researching the threshold consideration of whether this is an area for potential rulemaking.

Professor Bradt set out a sequence of relevant questions to consider. First, would a rule on this topic be a general rule of practice and procedure such that it falls within the Rules Enabling Act (REA)'s grant of rulemaking authority? Second, if so, should the supersession clause of the REA be invoked to override the provision in Section 137 giving districts local control over the division of their business? There are also statutory provisions governing the structure of district courts, including divisions, and, for prudential reasons, the Advisory Committee has avoided rulemaking in this area. There are further prudential questions of whether the Advisory Committee ought to act and, if so, what a rule might look like.

In tailoring any potential rule, it would be necessary to define the problem they would be seeking to solve. That is, in which kinds of cases should a rule impose a random case assignment requirement? The Brennan Center submission suggested that a rule should encompass any case in which a party seeks injunctive relief that may have an effect outside the district. The ABA suggested any case in which the United States is a party. Various local rules identify particular subject matters of cases.

Professor Bradt requested feedback from the Standing Committee about whether this is an appropriate subject for rulemaking.

Judge Bates commented that this is obviously an issue of great importance to the Judiciary. These initial issues of authority and prudential considerations of whether this is something that should be addressed through the rules process are very important and need to be thought about at the outset.

A judge member noted that there might be some benefit to working on this issue, even if it turns out not to be within the scope of authority of the Rules Committees. There might be a future legislative proposal on this topic at some point, and it would be nice to have had a committee like

this advance its thinking so that the Judiciary might be able to make suggestions to Congress. A practitioner member agreed. There is a need for objective analysis of what might be done. Although a little out of order, coming up with some ideas of what a solution might be, even if we ultimately do not act, could contribute to informing other actors who might be more able to do something directly. Judge Bates agreed that it can be illuminating to other possible actors that the Rules Committees are looking seriously at an issue and that they have some ideas as to how it can be approached.

Ms. Shapiro noted that the DOJ sent the Advisory Committee a letter in December formally taking the position that rulemaking on this subject is within the grant of authority in the REA. Judge Rosenberg commented that the DOJ's extensive and helpful letter came in after the agenda book materials were put together. Judge Bates agreed the letter was comprehensive and thoroughly addressed the authority question although it did not address the important prudential issues as much.

Professor Hartnett flagged a terminology issue. Although commentators often use the term "nationwide injunction," the problem is not an injunction's geographic scope. An injunction in a patent case barring one party from infringing the other's patent standardly does apply outside the district of the court that entered the injunction. The concern is that the injunction reaches beyond the parties. Using the terminology of "nonparty" injunction is more accurate and reduces the risk of a rule that does not address the real problem.

Another practitioner member echoed Professor Hartnett's observation that it is important to think carefully about the problem the Advisory Committee might target. But "nonparty" does not solve the issue of forum shopping to enjoin the United States.

Professor Hartnett clarified that the problem with injunctions against the United States arises when the injunction is read not only to enjoin the United States with regard to a particular plaintiff, but also with respect to nonparties.

Professor Coquillette commented that the prudential consideration is central. When Congress gets involved by making a rule directly, style and consistency can suffer, so it is a fundamental principle that the Rules Committees should be cautious about issues that Congress is considering.

Demands for Jury Trials in Removed Actions. Judge Rosenberg and Professor Marcus reported on this item. A 2015 suggestion focused on the 2007 restyling project's change in the tense of a verb in Rule 81(c). When this submission was initially presented to the Standing Committee in 2016, two members of the Standing Committee proposed a change to Rule 38 to change the default rule so that parties need not demand a jury trial. Such a change would have obviated the need to consider the underlying Rule 81(c) suggestion. After considerable research by the FJC, the Advisory Committee decided not to propose a change in Rule 38's default rule on jury demands, and that proposal was removed from the Advisory Committee's agenda. The Advisory Committee will consider the Rule 81(c) suggestion again at its April meeting, but the Standing Committee need not spend time on it right now.

Other topics. Judge Rosenberg and Professor Marcus reported on a few issues that the Advisory Committee lacked the capacity and resources to consider presently but that remained on its agenda.

The Advisory Committee has paused consideration on a Civil Rule 62(b) suggestion related to notice of premiums for supersedeas bonds. The proposal comes from the Appellate Rules Committee after it published a proposed change to Appellate Rule 39 in response to a Supreme Court decision. This issue is discussed in the agenda book starting on page 316. Judge Bates observed that the Appellate Rules Committee believes there is a possible need for a change to Civil Rule 62 but that the Civil Rules Committee was not as sure. He invited the advisory committees to continue discussing the subject outside the context of this meeting.

Another information item concerned a proposal about attorney's fee awards for Social Security appeals. Professor Marcus noted that the Supplemental Rules for Social Security cases only went into effect about a year ago. Moreover, one district is considering a local rule on this topic. Further experience could inform any later rulemaking efforts; in the meantime, the Advisory Committee does not recommend action on this proposal.

Professor Marcus directed the Committee's attention to the discussion in the agenda book (starting at page 328) of items to be removed from the Advisory Committee's agenda.

Judge Bates thanked Judge Rosenberg and the reporters for the thoroughness of their report on many important subjects.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met on October 26, 2023, in Minneapolis, Minnesota. The Advisory Committee presented three information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 367.

Information Items

Rule 17 and pretrial subpoena authority. Judge Dever reported that Judge Nguyen chairs the subcommittee examining potential changes to Rule 17 concerning subpoenas. There was a conference in October 2022 where the subcommittee gathered information about whether there is a problem with Rule 17, whether there are differences from court to court in the application of Rule 17, and how the *Nixon* standard of relevance, admissibility, and specificity is being applied. It has continued to gather information about this issue from experts and attorneys in industries associated with potentially relevant issues, such as the Stored Communications Act.

The subcommittee is now in the drafting process and has a meeting scheduled in February to discuss specific language. There are some basic principles outlined on page 369 of the agenda book. For example, there needs to be judicial supervision of any subpoena issued because it carries the authority of the court. The rule also needs to distinguish between personal or confidential information and other information. There should also be an option for an ex parte process.

Rule 23 and government consent to bench trials. Judge Dever reported on this item. To have a bench trial, Rule 23(a) currently requires a written request from the defendant, the consent of the United States, and the approval of the court. The Federal Criminal Procedure Committee of the American College of Trial Lawyers proposes removing the government from that process when the defendant can provide reasons sufficient to overcome the presumption in favor of a jury trial.

The Advisory Committee had questions about the proposal at its April 2023 meeting and gathered information from the DOJ and the defense community. The Advisory Committee discussed the findings at its meeting in October. The proposal initially suggested there might be a backlog of cases due to the pandemic, but that turned out not to be the case. Only eight of the 94 districts said there was something of a backlog. But any rule change would not happen soon enough to address it. The Advisory Committee also learned that there is not a uniform DOJ policy on whether the government consents to a bench trial, and it varies by United States Attorney. In some districts the United States Attorney's Office always prefers a jury trial.

The Advisory Committee also discussed the leading Supreme court case addressing Rule 23, *Singer v. United States*, 380 U.S. 24 (1965), which recognized that the court could order a bench trial over the government's objection where there were compelling reasons associated with a defendant's need to get a fair trial. There were also a couple of cases that arose during the pandemic in which a court invoked the *Singer* language. The Advisory Committee could not find sufficient space between the *Singer* standard and other reasons that would be sufficient to overcome the presumption in favor of a jury trial.

The Advisory Committee voted overwhelmingly, but not unanimously, to remove this item from its agenda.

Judge Dever explained that the Advisory Committee also discussed the defense bar's concern that defendants were not receiving an acceptance of responsibility credit when they only went to trial to preserve a suppression issue for appeal. It viewed this as a Sentencing Guidelines issue, rather than an issue with the Federal Rules of Criminal Procedure.

Professor Beale recalled that the Advisory Committee discussed notifying the United States Sentencing Commission about this issue, but there was a question about whether such communication should come from the Criminal Rules Committee or the Standing Committee.

Judge Bates remarked that the mechanism of a communication to the Sentencing Commission could be worked out if the Advisory Committee thought it was a good idea and the Standing Committee agreed. The question was whether the Standing Committee agreed that the Sentencing Commission should be informed that the Advisory Committee thought an issue exists with respect to the acceptance of responsibility credit.

Professor Beale noted that some judges already give an acceptance of responsibility credit in this circumstance, but defense counsel reported that they frequently cannot get the credit. The Advisory Committee does not believe there is a uniform practice. But the Advisory Committee did not conduct an in-depth study on the issue and preferred to ask the Sentencing Commission to examine it.

Judge Dever added that U.S.S.G. § 3E1.1 currently gives the judge discretion. It does not say that a defendant who goes to trial cannot get the credit. But in the Commentary to § 3E1.1, the Application Notes do not include an example for giving the defendant credit after going to trial to preserve an issue for appeal. The Advisory Committee was unsure if the Sentencing Commission could amend the Application Notes to add an explicit example of this.

Judge Bates commented that the Advisory Committee's observation was that it would be a good idea to communicate to the Sentencing Commission that this seems to be an issue that might merit some examination, but not to make any specific recommendation.

A judge member asked for clarification on what would be communicated as a good idea. Is it that, if anyone is going to look at this issue, it should be the Sentencing Commission as opposed to the Rules Committees? She noted that judges have a lot of discretion at sentencing, and it is important to present this as an issue for the Sentencing Commission without taking a position.

Another judge member asked if the proposition was to formally communicate a concern.

Judge Bates asked the Advisory Committee to word the proposition.

Professor Beale stated that concerns were raised at the Advisory Committee's meeting about this issue. The Advisory Committee felt it was not a Criminal Rules issue but wanted to communicate those concerns to the Sentencing Commission. The Advisory Committee would take no position on whether the Sentencing Commission should do something. Rather, it would transmit those concerns, saying that the issue is not properly addressed to the Rules Committees.

Judge Dever commented that the Advisory Committee would be happy to send a letter to the Sentencing Commission but that it did not want to get ahead of the Standing Committee.

Judge Bates thought it was important for the Standing Committee to know whether the concern came from the Advisory Committee or only some of its members.

Professor King responded that the concern was raised by several members of the Advisory Committee. At the end of the discussion, Judge Dever asked the Advisory Committee about sending something to the Sentencing Commission. There was committee-wide agreement that the appropriate place to resolve this concern was at the Sentencing Commission and that it was important enough that the Advisory Committee wanted it to be conveyed. At the end of the meeting, Judge Bates and Judge Dever had a conversation about who should do it.

Judge Bates clarified that the communication, which might come from the Standing Committee or the Advisory Committee, would be a factual recitation—namely, that these concerns were raised but the Advisory Committee felt that they were more appropriately addressed to the Sentencing Commission.

A judge member stated that he does not see the role of the Standing Committee as being a clearinghouse of concerns and suggestions. Usually, the Rules Committees do not refer things along. They tell the suggester when they have come to the wrong place. Consequently, when one of the Rules Committees formally refers something to another governmental body, that referral conveys that the committee has a serious concern that should require more attention than it might

have received otherwise. There might be occasions on which the Rules Committees would make such a referral, but they should only do so after employing the same sort of vetting process that they use when making recommendations on rules. There may be other sides to the issue. For example, he suspected some United States Attorneys might have a different perspective than the defense counsel who had voiced concerns.

In light of the last-mentioned comment, Judge Bates asked Ms. Shapiro whether she had any comments to contribute on behalf of the DOJ. She did not. Professor Struve commented that a DOJ representative at the Advisory Committee meeting had observed that this issue might belong with the Sentencing Commission.

Judge Bates commented that they may be making more out of this issue than was needed. In fairness to the Advisory Committee, it was doing the right thing by checking with the Standing Committee. Judge Bates asked if there were any other concerns with the Advisory Committee sending something to the Sentencing Commission indicating the issue had come up and that the view was that it should be referred to the Sentencing Commission for any further exploration.

The judge member with the prior concern cautioned against creating a precedent of the Advisory Committee referring matters even if it includes a referral statement that the committee was not taking any position. But he acknowledged that the disclaimers would ameliorate the concern that a referral would come with a recommendation.

Judge Bates observed that this was a little different from what typically happens when a Rules Committee, possibly through the Rules Committee Staff, coordinates with another Judicial Conference Committee, often CACM. Communications with the Sentencing Commission regarding potential changes to the Guidelines or commentary are more sensitive and require care. But it is not beyond the capacity of the Advisory Committee to take that into account when drafting a letter to the Sentencing Commission.

Judge Bates asked if there were any other concerns about the Advisory Committee taking that sort of modest communication. Aside from the judge member who spoke earlier, there were no objections.

Rule 53 and broadcasting court proceedings in the cases of United States v. Donald J. Trump. Judge Dever reported on this item. Thirty-eight members of Congress asked the Judicial Conference to authorize the broadcasting of court proceedings in the cases of *United States of America v. Donald J. Trump*. The Advisory Committee discussed the lack of Rules Enabling Act authority to promulgate a rule applying to a single defendant and noted that any rule would become effective, at the absolute earliest, in December 2026, which would likely be after a trial in the relevant cases. A coalition of media organizations later submitted a suggestion on this topic more generally, apart from the specific cases against Donald Trump.

In light of this, the Advisory Committee has formed a subcommittee to study whether to propose amendments to Rule 53. The subcommittee anticipates meeting in March, and the Advisory Committee plans to discuss this issue at its April meeting.

Judge Dever added that, for anyone who wanted to get a history of the issues, the AO has a terrific paper on its website titled *History of Cameras, Broadcasting, and Remote Public Access*

in Courts. Thirty years ago, the Advisory Committee, in a divided vote, recommended that Rule 53 be amended to permit broadcasting consistent with Judicial Conference policy. At the Standing Committee, the chair cast a tie-breaking vote, and the proposal went to the Judicial Conference where it was voted down. Rule 53 has not been substantively amended since it took effect in 1946.

Judge Dever also noted that some cross-committee projects are described in the Criminal Rules Committee's written report in the agenda book. Judge Bates observed that the Criminal Rules Committee was considering some important issues. The Rule 17 issue is a big one, and there is a lot of work yet to be done. There has been a lot going on recently regarding remote proceedings and broadcasting, and it may be the right time to look seriously at Rule 53.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz presented the report of the Advisory Committee on Evidence Rules, which last met on October 27, 2023, in Minneapolis, Minnesota. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 399.

Information Items

Judge Schiltz reported that at the last meeting, the Advisory Committee heard from two panels. The first panel, made up of five law professors, was invited to speak on any changes they would make to the Federal Rules of Evidence. A second panel featured two experts in artificial intelligence who educated the Advisory Committee about AI and its implications for litigation and the Evidence Rules. The focus was on deep fakes and the ability of AI to produce convincing, but fake, evidence that is hard to detect and will present a real problem for federal trials.

Following the presentations, the Advisory Committee discussed the suggestions, and decided to pursue three matters.

The first proposal being considered is a potential amendment to Rule 609, which addresses when prior convictions can be brought up to impeach a witness on the stand. The proposal is that only convictions for crimes indicating actual dishonesty or false statement would be admissible to impeach, and other types of convictions would not be admissible. The argument is that other types of convictions are not especially probative of credibility. There is also a high price to a defendant who wants to testify but is worried about the admission of prior convictions for crimes such as attempted murder or child pornography.

The second proposal is for a new Rule 416 governing the admissibility of evidence that a victim of alleged misconduct—most often sexual misconduct—had previously made false accusations of similar misconduct. This proposal came from one of the professors on the first panel, who noted that there is a great deal of confusion in the case law about how to treat evidence that a victim of an alleged crime had made false accusations of similar alleged crimes.

The third proposal is a possible amendment to the hearsay rule. The committee is considering two options with respect to out-of-court statements made by a witness on the stand who is under oath and subject to cross examination. A broad option could say that no such prior statements made by a testifying witness can be excluded as hearsay—although it could still be

excluded under Rule 403. A narrower version could say that no prior *inconsistent* statement of a testifying witness can be excluded under the hearsay rule. Today, a prior inconsistent statement can be introduced for its truth only if made under oath at a prior proceeding, which is rare.

The Advisory Committee also plans to hold a conference to further its study of AI and machine-based evidence. The issues, including authentication, hearsay, and expert testimony, are incredibly complicated, and AI technology is changing quickly. The committee's initial focus will likely be on issues of authenticity.

Judge Bates observed that the Chief Justice has focused on AI as an important issue for the Judiciary. These are very difficult issues that the Advisory Committee is considering. In some regards, the difficulty lies in understanding the issues. As to Rule 609, any change in that Rule will be controversial. He thanked Judge Schiltz for the report and the committee's continuing efforts on all those matters.

OTHER COMMITTEE BUSINESS

The Rules Law Clerk provided a legislative update. The legislation tracking chart begins on page 416 of the agenda book. Since the agenda book was published in December, the National Guard and Reservists Debt Relief Extension Act of 2023 became law, meaning that Interim Bankruptcy Rule 1007-I will continue to apply for at least another four years.

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding Strategic Planning on behalf of the Standing Committee.

CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on June 4, 2024, in Washington, D.C.

TAB 2

Agenda E-19
Rules
March 2024

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 4, 2024. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, 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, chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, chair, 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; Zachary T. Hawari, 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. (The Advisory Committees had removed the latter suggestion from their agendas, and the Committee approved the disbanding of the joint subcommittee that had been formed to consider it.) Additionally, the Committee received a report from a joint subcommittee (composed of representatives from the Bankruptcy, Civil, and Criminal Rules Committees) concerning a suggestion to adopt nationwide rules governing admission to practice before the U.S. district courts. The Standing Committee also heard a report concerning coordinated efforts by several advisory committees concerning a suggestion to require complete redaction of social security numbers and an update from its Secretary on the 2024 report to Congress on the adequacy of the privacy rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee met on October 19, 2023. The Advisory Committee discussed several issues, including possible amendments to Rule 29 (Brief of An Amicus Curiae) and Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In addition, the Advisory Committee considered suggestions regarding intervention

on appeal and the redaction of social security numbers in court filings. The Advisory Committee removed from its agenda suggestions regarding the record in agency cases and regarding filing deadlines.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed), Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan), and Official Form 410S1 (Notice of Mortgage Payment Change) with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed)

The proposed amendment to Subdivision (h) would clarify that a court may require an individual chapter 11 debtor or a chapter 12 or chapter 13 debtor to file a supplemental schedule to report property or income that comes into the estate post-petition under § 1115, 1207, or 1306.

Rule 3018(c) (Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed)

Subdivision (c) would be amended to provide more flexibility in how a creditor or equity security holder may indicate acceptance, or a change or withdrawal of a rejection, of a plan in a chapter 9 or chapter 11 case. In addition to allowing acceptance by written ballot, the amended rule would also authorize a court to permit a creditor or equity security holder to accept a plan (or change or withdraw its rejection of the plan) by means of its attorney's or authorized agent's statement on the record, including by stipulation or by oral representation at the confirmation hearing. A conforming change would be made to subdivision (a)(3) ("Changing or Withdrawing an Acceptance or Rejection").

Official Form 410S1 (Notice of Mortgage Payment Change)

The amended form would provide space for an annual Home Equity Line of Credit notice.

Information Items

The Advisory Committee met on September 14, 2023. In addition to the recommendation discussed above, the Advisory Committee continued its consideration of a suggestion to require redaction of the entire social security number from filings in bankruptcy and gave preliminary consideration to a suggestion for a new rule addressing a court's decision to allow remote testimony in contested matters in bankruptcy cases.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The Advisory Committee on Civil Rules met on October 17, 2023, and considered several information items. The Advisory Committee continued to discuss Rule 41 (Dismissal of Actions), and in particular whether to amend the rule to address caselaw limiting Rule 41(a) dismissals to dismissals of an entire action. It also discussed the work of the discovery subcommittee, which is considering proposals to amend Rule 45 (Subpoena) and to address filing under seal. The Advisory Committee formed a new subcommittee to study cross-border discovery. The Advisory Committee also heard updates from its subcommittee on Rule 7.1 (Disclosure Statement). The Advisory Committee commenced consideration of suggestions concerning civil case assignment in the district courts.

Other topics discussed by the Advisory Committee include the Bankruptcy Rules Committee's consideration of a suggestion to permit remote testimony in contested matters, a suggestion to amend Rule 62(b) (Stay of Proceedings to Enforce a Judgment), a suggestion to amend Rule 54(d)(2)(B) (Judgment; Costs) with respect to attorney-fee awards in Social Security

cases, and a suggestion to amend Rule 81(c) (Applicability of the Rules in General; Removed Actions) with respect to jury demands in removed cases.

The Advisory Committee also discussed and removed from its agenda suggestions regarding Rule 10 (Form of Pleadings), Rule 11 (Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions), Rule 26(a)(1) (Initial Disclosure), Rule 30(b)(6) (Depositions by Oral Examination), Rule 53 (Masters), and Rule 60(b)(1) (Relief from a Judgment or Order), and a proposed new rule on contempt.

At upcoming hearings, the Civil Rules Committee will hear testimony from many witnesses on the proposed amendments that have been published for public comment—namely, proposed amendments to Rule 16(b)(3) (Pretrial Conferences; Scheduling; Management) and Rule 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) and proposed new Rule 16.1 (Multidistrict Litigation).

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on October 26, 2023, and considered several information items. The Advisory Committee continues to consider a possible amendment to Rule 17 (Subpoena), prompted by a suggestion from the White Collar Crime Committee of the New York City Bar Association. The Advisory Committee's Rule 17 subcommittee will develop a draft of a proposed amendment to clarify the rule and to expand the scope of parties' authority to subpoena material from third parties before trial.

The Committee also considered a recent request from 38 members of Congress to authorize broadcasting of proceedings in the cases of *United States v. Donald J. Trump*. The Committee concluded that it does not have the authority under the Rules Enabling Act to exempt specific cases from Rule 53 (Courtroom Photographing and Broadcasting Prohibited), which

generally prohibits the broadcasting of judicial proceedings from the courtroom in criminal cases. Further, any amendment to Rule 53 to allow exceptions for particular cases—for example, the cases of *United States v. Donald J. Trump*—would not take effect earlier than December 1, 2026, due to the requirements of the rulemaking process set forth by the Rules Enabling Act and Judicial Conference Procedures. The Committee received a later suggestion from a media coalition to amend Rule 53 to permit broadcasting of criminal proceedings. Given the timing of its receipt, the proposal was not discussed by the Committee at its October 2023 meeting, but the chair appointed a subcommittee to consider the proposal going forward.

The Advisory Committee decided to remove from its agenda a proposal submitted by the Federal Criminal Procedure Committee of the American College of Trial Lawyers to amend Rule 23 (Jury or Nonjury Trial) to eliminate the requirement that the government consent to a defendant's waiver of a jury trial. In order for a bench trial to occur, current Rule 23 requires a written waiver by the defendant of the right to trial by jury, the government's consent, and the court's approval. Among a variety of concerns discussed by the Advisory Committee, one relates to a defendant's ability to obtain credit for acceptance of responsibility under U.S.S.G. § 3E1.1(b) after a jury trial held solely to preserve an antecedent issue for appeal when the government has declined to either accept a conditional plea or consent to a bench trial. Though some members of the Advisory Committee voiced support for clarifying that judges may award acceptance of responsibility in these circumstances, members saw this as a Guidelines issue, not a rules issue. The Advisory Committee expressed support for making the United States Sentencing Commission aware of the concerns expressed by some members of the Committee. After discussion, the Standing Committee (over one member's objection) determined that the Advisory Committee chair could convey the members' concerns to the Sentencing Commission.

FEDERAL RULES OF EVIDENCE

Information Items

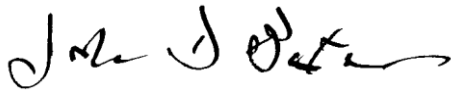
The Advisory Committee on Evidence Rules met on October 27, 2023. In connection with the meeting, the Advisory Committee held a panel discussion with several Evidence scholars on suggestions for changes to the Evidence Rules, followed by a presentation by experts on artificial intelligence and "deep fakes." Following the panel discussion and presentation, the Advisory Committee discussed the potential rule amendments raised by the presenters. In particular, the Advisory Committee decided to consider a possible amendment to delete Rule 609(a)(1), which allows admission of felony convictions not involving dishonesty or false statement, and another possible amendment that would add a new Rule 416 to the Evidence Rules to govern the admissibility of evidence of false accusations. In addition, the Advisory Committee will consider a possible amendment to Rule 801(d)(1) (Definitions That Apply to This Article; Exclusions from Hearsay) to provide for broader admissibility of prior statements of testifying witnesses. The Advisory Committee considered but decided not to pursue a possible amendment to Rule 803(4) (Exceptions to the Rule Against Hearsay) that would have narrowed the hearsay exception for statements made for purposes of medical treatment or diagnosis by excluding from that exception statements made to a doctor for purposes of litigation.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide recommendations for discussion topics at the next long-range planning meeting scheduled for March 11, 2024 and future long-range planning meetings of Judicial Conference committee chairs. Recommendations on behalf of the

Committee were communicated to Judge Scott Coogler, the judiciary planning coordinator, by letter dated January 11, 2024.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Louis A. Chaiten	Gene E.K. Pratter
William J. Kayatta, Jr.	D. Brooks Smith
Edward M. Mansfield	Kosta Stojilkovic
Troy A. McKenzie	Jennifer G. Zipps
Patricia Ann Millett	

TAB 3

Effective December 1, 2023

Current Step in REA Process:

- Effective December 1, 2023

REA History:

- Transmitted to Congress (Apr 2023)
- 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.	

Revised December 7, 2023

Effective December 1, 2023

Current Step in REA Process:

- Effective December 1, 2023

REA History:

- Transmitted to Congress (Apr 2023)
- 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 December 1, 2023

Current Step in REA Process:

- Effective December 1, 2023

REA History:

- Transmitted to Congress (Apr 2023)
- 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:

- Transmitted to Supreme Court (Oct 2023)

REA History:

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

- Transmitted to Supreme Court (Oct 2023)

REA History:

- Approved by Standing Committee (June 2023 unless otherwise noted)
- 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 and Summary	Legislative Actions Taken
A bill to provide remote access to court proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland	**H.R. 6714** *Sponsor:* Van Drew (R-NJ) *Cosponsors:* Nadler (D-NY) Smith (R-NJ) **S. 3250** *Sponsor:* Cornyn (R-TX) *Cosponsor:* Gillibrand (D-NY)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/plaws/publ37/PLAW-118publ37.pdf **Summary:** Provides remote access to criminal proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland notwithstanding any provision of the Federal Rules of Criminal Procedure or other law or rule to the contrary.	• 1/26/2024: S. 3250 signed by President; became Public Law No. 118-37 • 1/18/2024: House passed S. 3250 • 12/11/2023: H.R. 6714 introduced; referred to Judiciary Committee • 12/11/2023: S. 3250 received in the House and held at the desk • 12/06/2023: S. 3250 passed in the Senate with an amendment by unanimous consent • 12/06/2023: Senate Judiciary Committee discharged by Unanimous Consent • 11/08/2023: S. 3250 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) **S. 3328** *Sponsor:* Durbin (D-IL) *Cosponsors:* 8 bipartisan cosponsors	Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp.	**Most Recent Bill Text:** https://www.congress.gov/118/plaws/publ24/PLAW-118publ24.pdf **Summary:** Extends 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.	• 12/19/2023: H.R. 3315 signed by President; became Public Law No 118-24. • 12/14/2023: H.R. 3315 passed Senate without amendment by Unanimous Consent • 12/11/2023: H.R. 3315 passed in the House • 11/29/2023: H.R. 3315 reported by the House Judiciary Committee • 11/15/2023: S. 3328 introduced; referred to Judiciary Committee • 05/15/2023: H.R. 3315 introduced in House; referred to Judiciary Committee

Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 135 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 43 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 the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process— (a) codes of conduct for justices and judges; (b) rules of procedure requiring certain disclosures by parties and amici; and (c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge.	• 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders • 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee • 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 amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization. Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS.	• 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee
Protecting Our Democracy Act	**H.R. 5048** *Sponsor:* Schiff (D-CA) *Cosponsors:* 158 Democratic cosponsors	CR 6; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf **Summary:** Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena. Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President.	• 07/27/2023: H.R. 5048 introduced in House; referred to Oversight & Accountability, Judiciary, Administration; Budget, Transportation & Infrastructure, Rules, Foreign Affairs, Ways & Means, and Intelligence Committees

Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 18 Republican cosponsors **H.R. 3079** *Sponsor:* Bacon (R-NE) *Cosponsors:* 20 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 41 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 **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 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 • 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 31 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant.	• 04/27/2023: Introduced in House; referred to Judiciary 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 district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee

Bankruptcy Venue Reform Act	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsor:* 7 Democratic & 2 Republican cosponsors	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf **Summary:** Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel.	• 02/14/2023: Introduced in House; referred to Judiciary Committee

Legislation Requiring Only Technical or Conforming Changes
118th Congress
(January 3, 2023–January 3, 2025)

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Election Day Holiday Act of 2024	**H.R. 7329** *Sponsor:* Eshoo (D-CA) *Cosponsor:* 21 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf **Summary:** Would make Election Day a federal holiday.	• 02/13/2024: Introduced in House; referred to Oversight & Accountability Committee
Indigenous Peoples' Day Act	**H.R. 5822** *Sponsor:* Torres (D-AL) *Cosponsors:* 86 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf **Summary:** Would replace the term "Columbus Day" with the term "Indigenous Peoples' Day" as a legal public holiday.	• 09/28/2023: Introduced in House; referred to Oversight & Accountability Committee
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 15 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 make Diwali (a/k/a Deepavali) a federal holiday.	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee

September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 4 Democratic & 2 Republican 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
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
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
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 58 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
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 115 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

TAB 5

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
October 17, 2023

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

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

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

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

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

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

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

Review of Minutes

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

Report of Discovery Subcommittee

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

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

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

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

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

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

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

(1) *Service of Subpoena*

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

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

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

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

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

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

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

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

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

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

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

(2) *Filing under seal*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Subcommittee invited reactions to these issues.

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) *MIDP*

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

(4) *Cross-border Discovery*

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

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

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

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

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

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

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

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

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

Rule 41

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

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

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

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

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

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

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

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

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

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

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

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

The Subcommittee will continue examining these issues.

Rule 7.1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Subcommittee will continue with its work.

Inter-Committee Matters

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

E-Filing by Self-Represented Litigants

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

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

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

Midnight deadline for E-filing

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

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

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

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

Redaction of last four digits
of Social Security number

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

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

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

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

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

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

This issue will be carried forward.

Remote testimony in Bankruptcy Court

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

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

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

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

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

Random case assignment

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

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

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

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

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

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

Discussion of the issues involved several Committee members.

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

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

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

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

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

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

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

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

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

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

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

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

Rule 60(b) – Kemp v. U.S.

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

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

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

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

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

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

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

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

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

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

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

Rule 62(b)

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

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

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

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

A possible amendment approach was included in the agenda book:

> **(b) Stay by Bond or Other Security.** At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. 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.

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

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

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

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

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

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

Rule 81(c)

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

(c) Removed Actions.

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

* * *

(3) Demand for a Jury Trial.

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

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

(i) it files a notice of removal; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposals to Remove From Agenda

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

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

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

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

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

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

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

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

Respectfully submitted

951 Richard Marcus
952 Reporter

TAB 6

6. Privilege Log Amendments (Final Approval)

During the public comment period, many testified or submitted written comments about the privilege log amendments proposed for Rules 26(f)(3)(D) and 16(b)(3)(B)(iv). A summary of that the public comments and testimony is included below in this agenda book.

On February 7, 2024, the Subcommittee met via Teams to discuss the public commentary. Notes of this meeting are included in this agenda book. The Subcommittee concluded that no changes were needed in the rule amendment itself. The main goal of the amendment is to get the parties to address privilege log issues up front and, if they cannot agree, to address them with the judge early on.

Though various proposals were made for Note language or rule language to prescribe what should be in a log, the Subcommittee's view was that "no one size fits all." Largely for this reason, it seemed that observations in the Note about burdens and methods of ameliorating those burdens are not likely to be particularly useful in individual cases. Nevertheless, there was extensive commentary about the Note. Some urged that it overly favored producing parties. Others urged that it be strengthened to support positions often adopted by producing parties.

The Subcommittee's consensus was to avoid Note language that seems to favor one "side" or the other. Thus, although the burdens on the producing party of preparing a detailed log can be large, the burdens on the requesting party to make use (perhaps even make sense) of a privilege log are often very heavy as well.

Another challenging aspect going forward is the potential role of technology. Whether or not the term "metadata log" has meaning, it seems clear that many say the term means different things to different people. And though some witnesses contended that pretty soon technological advances will soon supplant existing methods of dealing with logging and simplify (and speed up) the process, it is not possible to be confident about what technology will bring, or when.

Altogether, these thoughts point toward pruning controversial statements from the Note, even when they reflect what the Committee Note said about the new rule requirement when it was adopted in 1993. Accordingly, the revised Note below sets the scene for early consideration of privilege log issues while avoiding taking positions on many of the issues raised by participants in the public comment process.

Rule 26(b)(5)(A) cross-reference amendment: There was some initial discussion of this possibility on Feb. 7, focused on the possible recommendation to add a "chaste" cross-reference in Rule 26(b)(5)(A) to the change to Rule 26(f). Email exchanges after the Feb. 7 meeting, however, confirmed that the Subcommittee does not favor taking this additional step. Because it was proposed by several who testified at hearings or submitted written comments, some explanation may be helpful.

In the first place, though adding this change to the existing amendment package should not require republication, it really seems not to add anything. The published amendment directs the parties to address compliance with this rule in their 26(f) meeting. That being the case, it seems

odd to add something to this rule to remind people that Rule 26(f) applies. Anyone interested in what must be done at a 26(f) meeting presumably should begin by consulting 26(f); checking 26(b)(5)(A) as well seems an odd effort.

It somewhat seems that proponents of an amendment to 26(b)(5)(A) (from the "producer" perspective) were hoping that the revision there would either disapprove judicial decisions calling for a document-by-document log and/or promote categorical logs. The Subcommittee does not favor taking these steps; the "chaste" draft discussed on Feb. 7 avoided taking such positions.

And there is a more general rulemaking point here: Making cross-references might well be avoided unless necessary. To take a tendentious example, one might think that a cross-reference to Rule 11 might be included in Rule 8(a)(2). Surely Rule 11(b) bears on what attorneys should do as they devise their allegations to satisfy Rule 8(a)(2). The cross-reference idea might lead to a slippery slope toward multiple additions to rules that do not do more than call attention to other rules.

In sum, the Subcommittee recommends adoption of the published rule amendments with a shortened Note, but no change to Rule 26(b)(5)(A) itself.

Rule 45 amendment possibility: During the public comment period, some urged that Rule 45 also be amended to address compliance with Rule 26(b)(5)(A) by nonparties subject to subpoenas. The Subcommittee discussed this possibility during its Feb. 7 meeting and decided it did not warrant action.

Putting aside the possibility that this change would call for republication, a major concern was that the current amendment package is keyed to the Rule 26(f) meeting, which does not involve nonparties who receive subpoenas. Moreover, though there have been many reports about the burdens on parties caused by privilege log requirements, there has not been a comparable level of comment about such problems resulting from subpoenas. In addition, Rule 45(d) already specifically commands those serving subpoenas to "take reasonable steps to avoid imposing undue burden or expense" on the person served with the subpoena, and also says that the court "must enforce this duty and impose an appropriate sanction * * * on a party or attorney who fails to comply."

Proposed Post-Public Comment Revisions

Below in underscore/overstrike format are the post-public-comment changes the Subcommittee recommends to the full Advisory Committee. Following that version is a "clean" version of the proposed amended rule and Committee Note.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) Conference of the Parties; Planning for Discovery.

* * * * *

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

(D) any issues about claims of privilege or of protection as trial-preparation materials, including the timing and method for complying with Rule 26(b)(5)(A) and – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

Committee Note

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A), which requires that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials in a manner that "will enable other parties to assess the claim." Compliance with Rule 26(b)(5)(A) can involve very large burdens for all parties. ~~costs, often including a document-by-document "privilege log."~~

Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility. ~~Nevertheless, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens.~~ This amendment directs the parties to address the question of how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

~~Requiring this discussion at the outset of litigation is important to avoid problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period.~~

This amendment also seeks to provide ~~grant~~ the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials. Depending on the

nature of the litigation, the nature of the materials sought through discovery, and the nature of the privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

~~In some cases, it may be suitable to have the producing party deliver a document-by-document listing with explanations of the grounds for withholding the listed materials.~~

~~In some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many withheld documents. For example, it may be that communications between a party and outside litigation counsel could be excluded from the listing, and in some cases a date range might be a suitable method of excluding some materials from the listing requirement. These or other methods may enable counsel to reduce the burden and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the specifics of the action.~~

Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements in this regard is a key purpose of this amendment, and should minimize problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an appropriate description of the nature of the withheld material. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution.

~~Early design of methods to comply with Rule 26(b)(5)(A) may also reduce the frequency of claims that producing parties have over-designated responsive materials. Such concerns may arise, in part, due to failure of the parties to communicate meaningfully about the nature of the privileges and materials involved in the given case. It can be difficult to determine whether certain materials are subject to privilege protection, and candid early communication about the difficulties to be encountered in making and evaluating such determinations can avoid later disputes.~~

"Clean" Version of Revised Rule and Note

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) Conference of the Parties; Planning for Discovery.

* * * * *

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

(D) any issues about claims of privilege or of protection as trial-preparation materials, including the timing and method for complying with Rule 26(b)(5)(A) and – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

Committee Note

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A), which requires that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials in a manner that "will enable other parties to assess the claim." Compliance with Rule 26(b)(5)(A) can involve very large burdens for all parties.

Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility. This amendment directs the parties to address the question of how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

This amendment also seeks to provide the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials. Depending on the nature of the litigation, the nature of the materials sought through discovery, and the nature of the privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements in this regard is a key purpose of this amendment, and should minimize problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an appropriate description of the

nature of the withheld material. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution.

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Management.

* * * * *

(3) ***Contents of the Order.***

* * * * *

(B) *Permitted Contents.*

* * * * *

(iv) include the timing and method for complying with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

* * * * *

Committee Note

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition, two words – "and management" – are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid problems that can arise if issues about compliance emerge only at the end of the discovery period.

Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front. It may be desirable for the Rule 16(b) order to provide for "rolling" production that may identify possible disputes about whether certain withheld materials are indeed protected. If the parties are unable to resolve those disputes, ~~between themselves,~~ it is often desirable to have them resolved at an early stage by the court, in part so that the parties can apply the court's resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case there is no overarching standard for all cases. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) recognize that the court can provide direction early in the case. Though

the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement. But the parties may report that it is too early to settle on a specific method, and the court should be open to modifying its order should modification be warranted by evolving circumstances in the case.

"Clean" Version of Rule and Committee Note

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Management.

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(3) ***Contents of the Order.***

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(B) *Permitted Contents.*

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(iv) include the timing and method for complying with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

* * * * *

Committee Note

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition, two words – "and management" – are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

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parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) recognize that the court can provide direction early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement. But the parties may report that it is too early to settle on a specific method, and the court should be open to modifying its order should modification be warranted by evolving circumstances in the case.

Notes of Discovery Subcommittee Meeting
Feb. 7, 2024

On Feb. 7, 2024, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Teams. Those participating included Judge David Godbey (Chair) and subcommittee members Judge Jennifer Boal, Ariana Tadler, Helen Witt, Joseph Sellers, David Burman, Carmelita Shinn. Additional participants included Emery Lee of the FJC, Allison Bruff and Zachary Hawari of the Rules Committee Staff, and Professors Richard Marcus, Andrew Bradt, and Edward Cooper.

Before the meeting, Prof. Marcus had circulated a sketch of some possible revisions to the Committee Note, and Helen Witt had circulated some further possible revisions. There were no suggestions for changing the proposed amendment to the rule.

Rule 26(f) Amendment

A starting point was that there seemed to be consensus on the objectives of the amendment. The goal is to move up serious consideration of the logging method for the case and thereby avoid problems of the sort that have emerged too often inappropriately late in the discovery process.

At the same time, the three public hearings make clear that there is a significant divide in the bar between what one could call the "requesting" parties and the "producing" parties. At the first hearing, most of those who addressed privilege log issues were producing parties, and at the third hearing they were mainly requesting parties.

So the participants focused on the Note, including both the revisions circulated by Prof. Marcus and the further revisions circulated by Ms. Witt.

One recurrent topic was the extent or manner in which the Note should address the costs of various forms of privilege logging. On the one hand, preparing a detailed document-by-document log can be extremely expensive. The Committee Note that accompanied the addition of 26(b)(5)(A) in 1993 recognized that possibility and suggested that other methods might (including describing the withheld documents "by categories") might be preferred when "voluminous documents are claimed to be privileged." Several on the producing party side urged that the courts had not attended to the guidance provided by this note and instead had gravitated toward document-by-document logging.

But one point emerging from the hearings is that evaluating a privilege log can be very burdensome also when there are many documents involved, and that opaque logging methods can make that burden even greater.

There was considerable discussion of the risk that the Note might be seen to put a "thumb on the scale" in evaluating what would work in a given case. And it was noted that an overarching preference for one method or another might not be suitable to some cases. Instead, for some types of materials one method might make most sense, while a case might also involve other sorts of materials for which a different method might make more sense. It would be unwise to take the position that a single method would be necessary for all production in a given case.

Since the only changes under consideration were to the Note, it was asked whether the content of the Note really made that much difference. Justice Scalia, for example, said more than once that what matters is what the rule says, and that the Note has little importance. And the objection we have repeatedly heard is that the cautions in the 1993 Note to 26(b)(5)(A) when it was added to the rules were overlooked by the courts, hardly suggesting the relatively minor wording changes to the Note will make major differences in practice. But a different view was offered, stressing that more recently attention to the Note has considerably increased; what we say in the Note will be taken into account.

Another topic was the concern by requesting parties about over-designation, or what might be called inappropriate designation of certain materials as privileged. Though that concern was cited by several witnesses during the public comment period, it is not clear that the rule should take a position on whether it is rare or endemic.

Another point to keep in mind is that there are other privileges that implicate additional specifics not important with regard to the attorney-client and work product privileges. For example, one witness on Feb. 6 reported on the privileges that arise in civil rights litigation against police officers and prisons. There are many such cases in the federal courts and it could easily be that a privilege log for such cases would need different specifics than a commercial or product liability case.

A theme emerged: Given the contentious nature of the debate about costs and the variability of cases, perhaps the most prudent course would be for the Note to be relatively "agnostic" about costs and over-designation. Another idea would be to sidestep taking a position on whether document-by-document designation should be the norm.

Agreement on this point stressed that there are really three things to emphasize: (1) early attention to the method to be used is key; (2) both judges and parties need to be reminded that the rule is flexible and that it does not adopt a preference for any particular method or even a single method for everything to be produced in a given case; and (3) whatever method is adopted for a given case, the basic goal is to enable the other side to assess the privilege claim.

Caution was expressed about "drafting on the fly," even as to Note language. Instead, it seemed preferable to permit Prof. Marcus to try to incorporate the themes discussed during the meeting into a revised Note, building in part on the redraft from Ms. Witt and suggestions by other Subcommittee members.

Another theme emerged: Insisting that the parties deal with these issues up front and leaving it to judges to regulate privilege log issues when the parties cannot agree on the method of logging seems preferable to trying to prescribe in the Note, or to endorse certain methods. The goal is not so much to tell judges "this is what to do," but to tell parties "you can persuade the other side or the judge to do things in the way you think they should be done." Prescribing solutions in advance and across the board is unwise. And we have been told that technology may soon play an outsized role in managing some of the burdens of privilege logging.

A reminder was offered: The first time this proposed amendment came before the Standing Committee, there was no problem with the small rule changes, but resistance to the length of the Note. The discussion suggests that things included in the Note as published could appropriately be removed in the expectation that the rule will bring the matter to the judge's attention, and that a judge may flexibly design a suitable method for the case in question. So shortening the Note might actually please the Standing Committee.

The resolution was for Prof. Marcus to circulate a new revision of the published Note based on the circulations before this meeting and the discussion during the meeting. Ideally, that could be evaluated by an exchange of email among members of the Subcommittee rather than necessitating another meeting.

Rule 26(b)(5)(A)

The amendment package did not include any change to Rule 26(b)(5)(A) itself. There was support (from the "producer" side) for including a cross-reference in that rule to call attention to the change to Rule 26(f) about method of logging.

Some who urged a change to this rule also urged that it should say that document-by-document logging is not required or preferred, and perhaps even offer the alternative of categorical logging.

The memo from Prof. Marcus circulated before the meeting offered a "chaste" cross reference to the amendment to Rule 26(f), to say that a party withholding privileged material must make the claim of privilege "after complying with Rule 26(f)(3)(D)."

The draft Note for this possible amendment to 26(b)(5)(A) included a bracketed quotation from the 1993 amendment to the rule that some on the "producer" side said had not been taken seriously enough under the rule. It was agreed that including this quotation of something already in the record (in the 1993 Note) would not be consistent with the Subcommittee's consensus on avoiding taking positions on what method or methods to use to satisfy the rule.

A concern was raised about making any change to this rule. When this additional change was proposed after the Standing Committee remanded the proposed amendment to permit the Advisory Committee to shorten the Note, the reaction was that it would be odd for somebody who is complying with Rule 26(f) to be looking at Rule 26(b)(5)(A) to find out how to do so. Unless lawyers are simply overlooking Rule 26(f), it might be odd to put a reminder in 26(b)(5)(A) that they should comply with 26(f).

Moreover, the Rule 26(b)(5)(A) issue would arise only after a Rule 34 request had gone out. Even though it is now permissible to make "early" Rule 34 requests before the 26(f) discovery-planning meeting occurs, compliance with those "early" requests is to occur only after the 26(f) conference. As a consequence, it would not be usual that 26(b)(5)(A) issues would emerge at the time of the 26(f) conference independent of the proposed amendment to that Rule 26(f). So amending this rule also might not be important unless the Subcommittee wishes to take a position on whether document-by-document, categorical, or some other method is preferred.

And another caution was raised – the rules do not usually include cross-references unless needed. For example, one could say that Rule 11(b) has a bearing on issues pertinent to motions to dismiss under Rule 12(b)(6), but Rule 12(b)(6) does not include a cross-reference to Rule 11.

The question whether to propose an amendment to Rule 26(b)(5)(A) in addition to the published amendment proposals will remain open. Adding that to the amendment package likely would not mean that republication should be required.

Rule 45 Amendment?

Some witnesses in the hearings have urged that Rule 45 be amended as well. That rule does use the same method for logging of withheld materials as does Rule 26(b)(5)(A). The sketch circulated by Prof. Marcus included a possible amendment to Rule 45.

A significant problem with amending Rule 45, however, would be that the pending amendment proposals are keyed to the Rule 26(f) discovery-planning meeting and designed to make the parties (and the judge) attend to the method of privilege logging up front. There is no similar meeting requirement with regard to subpoenas, and they almost always occur after the 26(f) meeting has occurred, since formal discovery may not occur until the parties have devised a discovery plan.

Moreover, though there have been many complaints about the burdens of privilege logging on parties, there has been scant suggestion that subpoena practice has presented similar problems. Rule 45 already directs that the party serving the subpoena avoid unduly burdening the nonparty subject to the subpoena.

The consensus was not to pursue a Rule 45 amendment further.

Summary of Testimony and Comments

This memo summarizes the testimony and written comments about the privilege log proposals during the public comment period. When possible, it gathers together comments from the same source, including both testimony and separate written submissions. On occasion, the summary of testimony includes the written testimony submitted by witnesses.

The written submissions are identified with only their last four digits. The full description of each of them is USC-RULES-CV-2023-0003-0001, etc. This summary will use only the 0001 designation for that comment.

The summaries attempt to identify matters of interest by topics. For some of the initial topics there may not have been comments or testimony. If none are received on those topics they will be removed from the final summary. The topics are as follows:

Privilege Log Amendments

General
Timing of Meet and Confer
Categorical Logging
"Rolling" Logging and Timing
Use of Technology
Amending Rule 26(b)(5)(A) As Well
Amending Rule 45 As Well

Oct. 16, 2023, Washington, D.C. Hearing

General

Robert Keeling & 0003: He regularly serves as "discovery counsel" in major matters. Sometimes that includes millions of documents to review, and turns up tens of thousands for which privilege can be claimed. There is a broad consensus that reform is necessary due to the very large costs of preparing privilege logs, sometimes exceeding $1 million. Despite that, privilege logs themselves often do not include important information. But these proposed amendments will not alleviate the problems that exist, in part because they do not directly amend Rule 26(b)(5)(A). The rule should embrace Sedona Principle 6, giving the responding party to the right to select the appropriate method of preparing a privilege log. It should also provide some general guidelines on privilege log practices. He tends to be called in on asymmetric litigations, and in those the principle of proportionality tends to get lost. There is good reason for caution in screening for privilege, particularly given the risk of inadvertent waiver.

Doug McNamara: I support the proposed amendments because they will aid the courts and the parties to address privilege claims by focusing on the timing and production of logs, and the method for doing so. This can avoid unnecessary delays. It would be useful to consider providing examples of what should be in a proper log. For example, the Committee Note (at line 51-54) might be revised as follows:

In some cases, it may be suitable to have the producing party deliver a document-by-document ~~listing with explanations of the grounds for withholding the listed materials~~ privilege log. Courts have found as adequate privilege logs that provide a brief description or summary of the contents of the document; the number of pages and type of document; the date the document was prepared; who prepared and received the document; the purpose in preparing the document; and the specific basis for withholding the document.

Regarding the risk of privilege waiver, Rule 502(b) provides protection, along with the 26(b)(5)(B) clawback right. And a rule 502(d) order should provide almost ironclad protection.

Alex Dahl (LCJ) & 0003: This proposal is flawed because it does not focus on the real source of the problems – Rule 26(b)(5)(A) itself. There are thirteen references to 26(b)(5)(A) in the proposal, demonstrating that it is the real source of the problems being addressed. There is no question that rule changes are needed. For one thing, even though the Committee Note to the 1993 rule adoption cautioned that document-by-document logs are not required, many courts and lawyers misconstrue the rule to require that sort of log in every case. And since 1993 the explosion of digital data has resulted in ever-increasing burdens of the privilege process. But "[o]nly an amendment to Rule 26(b)(5)(A) can sufficiently clarify that the rule does not require document-by-document privilege logs but rather allows producing parties to create categorical privilege logs or to agree on other alternatives." At the very least, 26(b)(5)(A) should be amended to reference the changes to 26(f). These changes would benefit requesting parties as well as producing parties, for as things now stand requesting parties often must review thousands of entries, irrespective of importance. Often challenges to privilege logs are used as a tool by overly aggressive counsel to impose extra expenses on producing parties. But privilege log disputes rarely result in the production of documents or data that are dispositive of a case or claim. Furthermore, the lack of uniformity among courts (including in local rules) undermines uniformity in the federal court system.

Jonathan Redgrave: There is a significant level of nuance in modern privilege log practice. This proposal is useful, but not sufficient.

Amy Keller & 0055: This rule does the job that needs to be done. I have reviewed millions of privilege log entries, and recognize that all parties to civil litigation have had complaints about privilege logs. But many of those issues could be resolved with early discussion about the how, when, and in what format the logs should be produced, and *if* categorical logging is suitable for their particular case. No "one size fits all" solution is appropriate. That is why courts and parties should strive to resolve these problems collaboratively. I enthusiastically support the proposed amendments to Rules 16 and 26 because they move in this direction. "Resolving those issues at the outset of litigation will reduce the number of disputes the parties have during the discovery process." In a major MDL proceeding recently, we found that leaving the details of logging until a later date ultimately led to significant disputes and *months* of meet and conferring, in part because the defendants insisted on categorical logging. Document-by-document logging is often essential, because only that ensures that producing parties do a secondary review after initial designation of materials as privileged. Even so, requesting parties' challenges to designations (based on detailed logs) regularly produce the concession that many withheld documents are not actually privileged.

Lana Olson (Defense Research Institute) & 0006: DRI supports that proposed amendments to Rule 16 and 26. They will encourage parties to devise proportional and workable privilege log protocols, while facilitating timely judicial management where necessary to avoid later disputes. This is a way to avoid the continual frustration with document-by-document logging. Those logs seldom enable the parties or the court to assess the privilege claims. This problem has escalated due to the exponential proliferation of ESI since Rule 26(b)(5)(A) was adopted in 1993. But despite the 1993 Committee Note recognizing flexibility with regard to logging methods, too many parties and courts adhere to the notion that every document must be separately logged. Doing that is very labor-intensive, and regularly constitutes the largest category of pretrial spending in document-intensive litigation. "Typically, preparing such logs requires lawyers to identify potentially privileged documents, conduct extensive research into the elements of each potential claim, and make and then validate initial privilege calls, and then construct a privilege log describing each withheld document."

Amy Bice Larson: The LCJ comments generally align with my views and experience. She has found that the plaintiff side treats document-by-document logging as the default rule.

John Rosenthal: Modern litigation is excessively burdensome and expensive, and privilege review and logging are usually the largest component of that wasteful reality. The current proposals go a long way toward righting the ship. But something must be changed in 26(b)(5)(A) itself for this to work. Unfortunately the courts did not take the sensible comments in the 1993 Note to heart. The result has been a "default" of document-by-document logging that some plaintiff-side lawyers use as a club.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: The Committee's thoughtful approach reflects current practice and will reduce privilege log disputes. Requiring early meet-and-confer sessions will encourage early resolution of the required format, content, and timing of privilege logs, and will minimize or eliminate later time-consuming disputes and reduce the need for "do-overs." We always try to talk with the other side early in litigation. But the Note does not do an adequate job in addressing the widespread problem of over-withholding and undervalued document-by-document logs. And the Note seems somewhat slanted. "The Committee's emphasis on *burdens* of compliance without addressing the benefit of the rule in *assuring* compliance tips the scale by implicitly suggesting the amendments are designed to address only one side of that equation." "Purported burdens of compliance should not be a justification for non-compliance with Rule 26(b)(5)(A). There is too much discussion in the Committee Note of the burdens on the producing party.

Lori Andrus: I support the proposed rule changes. But I urge the Committee to make changes to the Note: I have never found that the failure of the parties to communicate about the nature of the privileges and materials involved to be a concern. There is too much emphasis on costs for producing parties in the Note. I recommend striking the sentence in the last paragraph of the Note referring to that possibility. In addition, I would strike the sentence about large costs that appears in the first paragraph of the Committee Note. I also support the proposal of Doug McNamara that specific language be added to the Note explaining what should be in a privilege log.

Emily Acosta (testimony & 0020): Many privilege logs are too long because documents have been improperly designated. Over-designation, or "fake privilege," is increasingly pervasive, as illustrated by the recent Google litigation. And increased costs are a result of recent law firm rate hikes and salary increases for associates. If a change is made, "reform rewards bad behavior."

David Cohen: For big cases, waste is upon us. It can cost as much as $4 million to prepare a privilege log. The courts disregarded what the Committee Note said in 1993 about the new Rule 26(b)(5)(A) requirement. Having a requirement to discuss this set of issues up front is an excellent start. We need to do something like the 2015 amendment to Rule 26(b)(1) regarding proportionality.

Chad Roberts (eDiscovery CoCounsel, PLLC): Rapidly emerging technologies are highly likely to fundamentally change historical assumptions concerning the costs and burdens of document-by-document privilege logs. The language of the rule proposal prudently emphasizes flexibility. The comments of some others urging that the amendments go further would likely result in a rule that would be obsolete by the time it went into effect. The preparation of a document-by-document privilege log requires two tasks: (1) identifying the responsive items that contain privileged content; and (2) summarizing those items in a way that complies with the rule and avoids disclosing privileged material. The second task is the one that generates the preponderance of costs associated with document-by-document privilege logging.

Feb. 6, 2024, Online Hearing

Seth Carroll: As a plaintiff civil rights lawyer, I believe the proposed amendments will ensure flexibility to adjust to privilege concerns based on the circumstances of each case, and avoid unnecessarily specific or rigid application that may not meet the varying needs of discovery. Party agreement due to Rule 26(f) consultations will likely reduce discovery disputes and promote efficiency. In a straightforward excessive force case against a single officer, the burden of identifying the specific documents withheld is relatively low. On the other end of the spectrum is a correctional heat-stroke case with hundreds of thousands of pages of documents and a variety of privilege claims, including self-evaluation privilege, joint-defense privilege, and claims about proprietary information. In a case like that, the cost and burden on both sides is significantly greater, but so also is the risk that privilege logs can be used to obstruct discovery of relevant evidence. Efforts to insert "proportionality" into this rule topic should be resisted. Some municipal or corporate actors will attempt to hide probative documents by using unilateral "proportionality" concerns.

William Rossbach: From 40 years' experience litigating plaintiff-side cases involving medical, scientific, and engineering issues, I strongly support the proposed amendments to mandate early development of privilege claim principles. It is critical to have this set of issues addressed at the outset. There are almost always delays. In some cases there is major problem with delayed disclosure of privilege logs, over-designation of allegedly privileged materials, and inadequate descriptions of what has been withheld. I agree with others on the plaintiff side who have already testified, including Mr. McNamara, Ms. Keller, and Ms. Andrus. I think that the Note is somewhat slanted in its emphasis on the burdens of logging on the producing party without also recognizing the burdens on the requesting party of inadequate logs that do not afford a basis for a

confident assessment of privilege claims. I think that the Note should be revised along the following lines:

> Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-document "privilege log." However, such privilege logs may well be required to provide the information the party seeking discovery needs to assess the validity of the privilege claims, as the rule requires.

I also think (along with others) that it would be desirable for the Note to provide a description of what a log should include, as proposed by Mr. McNamara. I also note that some of the burden on corporate parties "has been the previously unimaginable corporate expansion of internal communication with large 'cc' lists which likely reduce the validity of a privilege claim." For example, recently the FTC and DOJ have been warning companies under investigation not to delete their Slack or Signal chat histories.

Brian Clark: I support the proposed rule amendments, but have concerns about the Note. In the District of Minnesota, such planning has long been encouraged as a part of case preparation. The stress on "burden" looks only to producing party efforts, and the Note seems to suggest that a categorical or metadata log is sufficient. But big corporations regularly overclaim privilege, and a categorical log would insulate that behavior. And there is a wide variety of views about what a metadata log is or should contain. I think the sentence at the beginning of the Note about the costs of document-by-document logging should be stricken.

Amy Zeman: Overall, this proposal is very well done. The Committee's efforts to amend the rules regarding privilege logs have resulted in a fair and effective proposal that will benefit parties and the courts. The proposed changes provide needed flexibility while ensuring that parties address the need for case-specific solutions early in the litigation. But I find that the Note places too great an emphasis on the cost of preparing a privilege log and not enough on the harm inherent in over-designation. This imbalance inappropriately suggests that a party may withhold material but fail to provide sufficient information to back up the claim. And it overlooks the ever-developing role that technology plays in producing privilege logs. I think that the following should be added at the end of the first paragraph of the Note:

> And on occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold materials not entitled to protection from discovery.

Adam Polk: From years of experience representing plaintiffs, I support the amendments that align with best practices – (1) engage early; (2) produce privilege logs on a rolling basis, and (3) exercise flexibility when it comes to logging over the life of a case. I have some concerns about the Committee Notes, however.

Kate Baxter-Kauf: Based on my experience in data breach, privacy, and cyber security litigation, I believe the proposed amendments are helpful and likely to aid the parties, in part by frontloading resolution of disputes. In my practice, the substantive privileges are often based on state law, while Rule 26(b)(3) applies to work product protections. Resolving these privilege issues often involves multiple layers of factual inquiry. "Evaluating and litigating a privilege log dispute

in this arena is often a multistage process that is time intensive, expensive, and laborious for the parties and especially courts." But the Note unduly emphasizes the burdens of preparing for production and fails properly to address the burdens on the requesting party that result from flaws or insufficiency in the privilege log. For a variety of reasons, "document-by-document privilege logs exist and are the default mechanism for compliance with Rule 26(b)(5)(A), at least in the complex litigation in which I am involved." I think the Note material on when a document-by-document log is appropriate and inviting consideration of a "categorical" log should be removed.

Anthony Mosquera (Johnson & Johnson): The amendment should prompt adoption of modern approaches regarding the format of a privilege log. Presently the presumption is a document-by-document log. That should be replaced with a presumption in favor of a modern metadata log or a categorical log.

Robert Levy (Exxon): The proposal requires early engagement on privilege log issues, which is potentially helpful, but it does not address the underlying issue, which is the presumption applied by many courts that document-by-document logging is requires in all cases.

Aaron Marks (Committee to Support Antitrust Laws): We support the proposed rule, but have concerns about the Committee Note. The rule strikes an appropriately modest balance that will benefit litigants and courts. But the Note makes needlessly strong statements about a variety of topics:

(1) The Note stresses "burdens" on producing parties without also focusing on the substantial burdens imposed on requesting parties and courts and does not adequately recognize that Rule 26(b)(5)(A) imposes on the party asserting a privilege the burden to show that it applies;

(2) The first paragraph of the Note says document-by-document logs are "often" associated with large costs, which is likely to be interpreted by courts as expressing a preference against document-by-document logs. This paragraph should be removed. Moreover, our experience has been that document-by-document logs entail minimal burden in most cases that are not complex, which make up most of the federal docket. When larger numbers of documents are involved, the vast majority of the log consists of metadata.

Pearl Robertson: It is desirable to encourage early cooperation, but the parties must not be handcuffed by early agreements that prove unhelpful. The second sentence of the Note, referencing the costs of creating a privilege log, should be removed. For one thing, technology can reduce such costs. There should be no suggestion in the notes that categorical logging be considered. The better option is a metadata log.

Maria Salacuse (EEOC): The EEOC supports the proposed amendments to require parties to discuss privilege logs and report to the court about that subject. Unfortunately, those logs are often an afterthought and only supplied in response to a threat of a motion to compel. In some cases, producing parties do not provide logs until after depositions, thereby preventing the requesting party from asking witnesses about documents that should have been produced. Even then, the logs ultimately produced do not sufficiently describe the withheld documents to permit

us to assess the privilege claim. The proposed amendment appropriately focuses on discussion up front. At the 26(f) stage, the parties are poised for such a discussion because document review has not yet commenced. At the same time, the amendments provide the parties and the court with discretion to tailor the logging method the specific case. We propose addition of the following at the end of the first paragraph of the Note (line 27 in the amendment proposal):

> Application of the Rule in a manner that does not allow the receiving parties to assess adequately the claim of privilege likewise imposes burdens on such parties and the court and may prevent parties from identifying improperly withheld documents.

In addition, we propose that the following be added to the Note at line 50:

> Whatever approach is agreed upon, the privilege log must provide sufficient information for the parties and the court to assess the privilege claim for each document withheld consistent with Rule 26(b)(5)(A).

And at line 65 we would add the following underlined language:

> But the use of categories calls for careful drafting and application keyed to the specifics of the action <u>to ensure that the use of any categories or other approach provides sufficient information to assess the privilege consistent with Rule 26(b)(5)(A).</u>

We disagree with assertions made by some that the rule should adopt a presumption that non-traditional logs, such as metadata or categorical logs, are preferred.

<u>Brian Clark</u>: As a plaintiff-side antitrust lawyer, I support the proposed amendments. But I have concerns with the Note and intend to focus on that. Early discovery planning, including privilege logs, is critical. But the Note over-emphasizes the burden and cost of logging. I find this inappropriate for several reasons: (1) large corporations are advised by counsel to label everything "privileged" even when no colorable claim of privilege exists. A categorical log would obscure this practice. (2) Though "metadata log" may have some appeal, there is a wide range of views on exactly what that is. Trying to decipher such a log can be extremely burdensome. (3) Privilege is an area in which there are perverse incentives to withhold non-privileged relevant information. Even under the current regime, I see vast over-designation. (4) To the extent the producing party has legitimate burden concerns, the obvious solution is Fed. R. Evid. 502(d). I think the second sentence of the Committee Note should be stricken; the Note should not be dismissive of document-by-document logs.

Written Comments

<u>Anne Marie Seibel (on behalf of 23 other members of the council and Federal Practice Task Force of the ABA Section of Litigation (0014)</u>: The proposed changes will force communication about these issues. But the changes do not go far enough. The reality is that the undue burdens that motivated the amendment proposal do not exist in all cases, but instead are concentrated in "document-heavy" cases. At least in those cases, the parties are probably not going to be prepared to address these concerns in a meaningful way at the 26(f), conference, with occurs before any document discovery has actually occurred.

Lea Malani Bays (0016): As a plaintiff lawyer actively involved in the Sedona Conference and other pertinent groups, I think the proposed amendments properly recognize that early discussions are a productive way to eliminate disputes and expedite the resolution of disputes over privilege. But I think the Committee Note inappropriately suggests that in "large documents" cases document-by-document logging may not be warranted. "The more documents that are withheld the more important it is that the responding party be able to assess the claims of privilege."

Federal Magistrate Judges Association (0018): "FMJA Rules Committee members are in full agreement with the proposed changes, including the flexibility it allows for parties and the Court to determine the best process for addressing privilege on a case-by-case basis to determine how best to minimize the burden and expense of privilege logging."

Minnesota State Bar Association (0034): The MSBA has voted to support these rule changes. It believes they will foster increased transparency and possibly efficiency between parties and the court.

American Ass'n for Justice (0038): "Some defense-side commenters have focused on a minority of cases involving huge document productions. Of course, there is an objection to document-by-document logs in these cases, but it would be a mistake to draft a rule based on mega-document productions." The appropriate method of logging needs to reflect the number of documents involved in the case, and the proposed amendments strike the right balance as presently written. In particular, AAJ favors retaining Note language emphasizing flexibility in designing logging methods. But the Note should be fortified by clearer emphasis on the problems created by over-designation. At least, emphasis in the Note on the cost of logging should be removed. In addition, as suggested by Douglas McNamara, a definition of an appropriate log could be added to the Note.

John Rosenthal (0039): Discovery of ESI has greatly magnified the cost of discovery, and the review of ESI for production is the largest cost in discovery. Review and logging of documents withheld on the basis of privilege is the largest cost component of discovery. This large cost is compounded by the reality that many courts and parties continue to construe Rule 26(b)(5)(A) as requiring document-by-document logging. The proposed amendments do not directly address the fundamental problem resulting from the routine insistence of many judges on document-by-document logs.

Jory Ruggiero (0040): The Rule 26(b)(5)(A) requirement is critical to fair litigation. In a state court case raising the same issues as a federal MDL, the defendant withheld over 3,700 documents as privileged. But when the court eventually screened them, it turned out that 99% were not privileged. I support the proposed rule amendments, but think the Note should be modified to remove emphasis on the burdens of preparing logs. The logs are essential.

Christine Spagnoli (0044): As a plaintiff's lawyer, I have often had to obtain court orders to probe the specifics of privilege claims, and have often obtained court orders to produce based on those specifics. I generally agree that the proposed changes are helpful, I urge the Committee to take account of the fact that not all cases involve large productions such as those in mass tort cases, and that the rule needs to be flexible to address individual cases.

Hon. John Facciola & Jonathan Redgrave (0045): We strongly urge that flexibility and a focus on the needs of the case be retained in the rule and Note. Some proposals to amend the Note would undermine this objective. If the Note suggests that deviation from the document-by-document method must be justified by a showing of burden by the producing party, that would undermine the amendments' purpose. The 1993 Committee Note got it right – document-by-document logs are sometimes appropriate, sometimes not. And categorical logging should not be categorically rejected. It is also important to retain the current draft Note's emphasis on burden. Failure to act will worsen the already bad situation in which we operate.

Lawyers for Civil Justice (0053): "Privilege review is the largest single expense in civil litigation." This problem is getting worse due to changes in technology. There is a critical "rules problem" due to the incorrect tendency of many courts to interpret Rule 26(b)(5)(A) as regarding document-by-document logging as the default. The solution is clear – amend Rule 26(b)(5)(A) to clarify the this is not the default requirement. In addition, the concept of proportionality should be prominently featured in the Note to this amendment.

In-house counsel at 33 corporations (0056): Many courts misconstrue 26(b)(5)(A) to require a document-by-document log in every case despite the 1993 Committee Note. This mistake results in "one of the most labor-intensive, burdensome, costly, and wasteful parts of pretrial discovery in civil litigation." We believe that the solution must lie in amending 26(b)(5)(A) itself, not only the rules addressed in the published proposed amendments, including a presumption that the parties are not required to log trial preparation documents created after the commencement of litigation.

Mackenzie Wilson (0057): I support the proposed rule because it calls for early discussion and allows flexibility depending on each individual case. I believe that logs should be exchanged early in the case, updated regularly, and should thoroughly explain why each document was withheld. Even though the cases I handle usually do not involve large numbers of documents, I find that vital documents are often withheld without justification. Switching to a categorical log would be unfair to both parties.

Benjamin Barnett & David Buchanan (0058): We are both now at Seeger Weiss, but Barnett spend years on the defense side, with an emphasis on eDiscovery. We fully support the proposed amendment to Rule 26(f). Mandating an early discussion and that this topic be included in the report to the court will product benefits. But the draft Note could be a source of future problems – particularly the emphasis on the cost of preparing a log – belong in the Note. We have found that one of the real drivers of the costs associated with privilege challenges is that corporate defendants over-designate early in the litigation. We dispute the draft Note assertion that Rule 26(b)(5)(A) has not been applied flexibly.

Leah Snyder (0061): Privilege logs must be detailed and complete so parties trying to ascertain the accuracy and appropriateness of the privilege asserted can do so. Over-designation remains a serious problem and categorical logs can conceal bad actors. I believe this rule change will assist the parties in ensuring the logs are appropriate and tailored to provide needed information to the parties.

Briordy Meyers (0063): These amendments are well intentioned, but they don't go far enough. The interpretation of 26(b)(5)(A) "has created an entire sub-industry in the legal profession of attorneys, vendors and legal technology dedicated to addressing claims that go to the heart of the attorney-client relationship and legal ethics." It has forced courts and lawyers to spend weeks, months, and even years wrangling with a problem that is completely self-imposed and did not exist before 1993. "Rule 26(b)(5)(A) is, on its face, inconsistent with Rule 26(b)(1) and Rule 1." But the proposed amendments may lead to even worse outcomes by provoking disputes in cases in which they would not arise absent the rule change. The best solution would be to amend 26(b)(5)(A) to remove the description requirement. Short of that, presumptively valid methods should be included in an amended rule.

MaryBeth Gibson (0064): In an MDL before Judge Grimm, Special Master Facciola ordered that the parties not use categorical logs. Subsequently, defendant Marriott turned over thirteen thousand documents that were indispensable to plaintiffs' case. Had the Special Master permitted a categorical log, these documents would not have been produced. Though categorical logs may be appropriate, that should depend on negotiations between the parties. "Simply put, burden should not be an excuse to demonstrating privilege on a document-by-document basis pursuant to Rule 26(b)(5)."

Joseph Gugliemo (0065): Party agreements about methods for logging, including categorical methods, can be beneficial. But that's only possible once the parties have enough information, and I worry that these amendments would result in hasty and premature arrangements. An official presumption in favor of early resolution of these questions also raises risks of creating perverse incentives for gamesmanship. I therefore recommend rejecting these amendments as written. The problem is timing; often the party's relationship with counsel has not reached a suitable point to make such arrangements. So one party, and the court, will be flying blind at the outset. Often the dynamics are not clear until well into the litigation, after custodians, search terms, and structured data sources have been identified. "For one thing, a hasty agreement on privilege logging can yield large-scale withholding of non-privileged but responsive documents because one party does not fully understand the other's practice regarding, e.g., the inclusion of counsel on email."

Google LLC (0067): The proposed changes do not adequately address the massive challenges associated with privilege logs, and the Committee Note will unintentionally exacerbate the problems. Additional amendments to the rules and Notes are needed. One addition that is needed is a reference to proportionality. There is, at best, a vague reference to proportionality in the current Notes. Proportionality is particularly important with regard to asymmetrical litigation, where parties rarely can reach agreement about solving problems like these. Discovery disputes about logging can readily sidetrack the entire case. The Note should be strengthened with regard to alternative methods of logging, including categorical logging. Metadata or "metadata plus" logs are another possibility. And rolling logs ought not be endorsed for large document cases because they can be a major burden when production may be occurring on a monthly or even bi-weekly basis. This idea overlooks the reality that privilege review is a difficult and time-consuming undertaking. It would be better for the Note to endorse "phased" or "tiered" logging. And in large scale litigation it would usually be true that the log should be prepare only as the production process is nearing completion.

Patrick Oot (0070): I offer examples of privilege logs that cost nearly $500,000 to produce. Despite Fed. R. Evid. 502, the costs of privilege review and logging have continued to escalate. The costs are intolerable, and a change is essential.

Timing of Meet-and-Confer

Robert Keeling & 0003: At the time of the Rule 26(f) conference, the parties are unlikely to be in a position to negotiate a workable privilege logging method. Any privilege protocol developed at this early stage is likely to be too generic to be helpful and to be upset by unanticipated factors or problems. Involving the court at this early point is not an attractive prospect because key information will not be available. It is "far more efficient * * * to compile the privilege log after the majority of documents have been reviewed." It would be more meaningful to change 26(b)(5)(A) itself.

Doug McNamara: "The sooner the better." It is too common that producing parties don't deliver a log until "substantial completion" of document discovery, which may be just before the end of fact discovery. Too often, junior lawyers or contract attorneys making the first cut over-designate, and more senior counsel focus on the review only later. By that time, depositions may have been taken, and only after that do "deprivileged" documents get produced, which may create a need for redeposition. But there is no reason to defer depositions until after the review of the documents and submission of the log is completed. I want the documents ASAP. So I'm more than willing to sign onto a 502(d) order.

Jonathan Redgrave: The early conference is important, and not just in really big cases. Early judicial involvement is very helpful.

Lana Olson (Defense Research Institute) & 0006: Too often, early discussion prompts the other side to demand document-by-document logging. But there is a need to discuss these matters early, though that is productive only if both sides are reasonable. If needed, it is possible to postpone arrangements for logging.

Amy Bice Larson: At the beginning of the case, you don't know enough about the client's information to make precise arrangements. At that point, it is often (despite "early" requests allowed under Rule 34) to know what the other side will be asking for.

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Jeanine Kenney: It is important that the conference between counsel about the manner of logging withheld materials occur prior to document review because the format and means of compliance may implicate how that review proceeds. In some multi-defendant litigation, for example, parties negotiate the precise fields that should be provided. To address concerns that any party may not have sufficient information at the time of the 26(f) conference, some protocols build in an escape hatch permitting modification of the protocol by agreement or by court order for good cause shown, or include placeholders for later negotiations over certain questions.

Jennifer Scullion: It is good to insist that the lawyers "talk more." But we must be careful to add breathing room in the process.

William Rossbach: The most important change is to make early development of a method for dealing with privilege claims mandatory and at the outset of litigation. As the Committee Note says, this should go a long way toward alleviating many of the problems with privilege claims by forcing early attention by the parties and the court on these issues. I stress that Rule 26(b)(5)(A) says the description should "enable other parties to assess the claim" of privilege.

Amy Zeman: I disagree with those who arguing that discussions about privilege logs are premature at the Rule 26(f) stage. This discussion is a natural component of a discovery plan, and it is disingenuous to argue that parties would at this point have sufficient information to design a discovery plan but not to address privilege log issues.

Adam Polk: My practice has borne out the effectiveness of addressing privilege issues early, and involving the judge early in the case has proved valuable. In one case, for example, the judge ordered that the privilege log be produced no more than fourteen days after disclosures or discovery responses were due. The judge's order also specified what a log had to contain: (a) the subject and general nature of the document; (b) the identity and position of its author; (c) the date it was communicated; (d) the identity and position of all addressees and recipients; (e) the document's present location; and (f) the specific privilege and a brief summary of any supporting facts. This directive "served as a starting point for discussions concerning compliance with Rule 26(b)(5) and streamlined those discussions in the case." Failure to develop "rules of the road" in other cases has resulted more protracted disputes about privilege assertions.

Kate Baxter-Kauf: Early discussions of logging documents and communications to be withheld on the basis of privilege is exceptionally helpful as a way to encourage discussion of types of documents for which a dispute may already be ripe. A meet and confer to narrow any dispute should commence immediately.

Pearl Robertson: Though early discussion of the format for privilege logs is useful, it is also important to recognize that experience during the litigation informs the actual process. Parties ought not be handcuffed by early agreements that eventually prove unhelpful. It seems that the proposed amendment is in line with what parties have been doing. But the stress on cost considerations is misguided; "the cost of compliance with Rule 26(b)(5)(A) is not the appropriate test for balancing the receiving party's right to the disclosure of discoverable information."

Written Comments

Lea Malani Bays (016): Speaking from the plaintiff perspective, I feel that "the comments arguing that the timing of privilege log discussions and productions should be delayed until later in the document review process will lead to a significant disadvantage for receiving parties and will likely disrupt court schedules with disputes over privilege emerging closer to the end of discovery. * * * Discussions regarding privilege logs may last longer than one initial meeting, as the parties more thoroughly explore issues related to discovery."

Federal Magistrate Judges Association (0018): "[A] court can often provide guidance and resolve privilege disputes early in the case. Importantly, a court's order for complying with Rule

25(b)(5)(A) does not rely on party agreement, though great weight will be given the parties' preferences. This approach is consistent with active case management and the court's obligations under Rule 1."

Categorical Logging

Robert Keeling & 0003: The rule should endorse standards that focus on whether the party claiming privilege protection has engaged in a reasonable process for logging privileged documents, rather than whether every withheld document was perfectly logged. "As with document production, the withholding party is in the best position to determine how to establish its claim of privilege and should have the flexibility to decide what type of log is best suited to meet the needs of the case."

Doug McNamara: "My experience with categorical logging is categorically bad." In one large MDL, a categorical approach led to a situation in which over 13,000 documents were "de-privileged" late in the discovery process. In part, the problem resulted from the use of "broad categories" for logging withheld documents. In a case before Judge Chhabria (N.D. Cal.), after the initial logging was challenged the producing party de-privileged 63% of the documents originally withheld. "With categorical logging, who sent it, who received it, what was it and when is often reduced to generic buckets like 'communications between client and outside counsel.'"

Alex Dahl (LCJ) & 0007: There should be a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation.

Amy Keller: Categorical privilege logs can be prone to gamesmanship and over-designation. In a recent MDL proceeding, for example, defense counsel refused to (1) agree what categories would be used; (2) include an attestation by an attorney to provide reasonable context as to the role of the person making the privilege assertion; (3) include specific data points for categorical logs; and (4) provide distinct data points for document-by-document logs. Instead, defendants insisted on category descriptions that were facially overbroad while producing millions of documents and indicating that they had withheld substantial numbers of other documents. Only after we involved the Special Master (retired Magistrate Judge Facciola) did defendant finally provide a document-by-document privilege log. That process resulted in one defendant producing 13,000 additional relevant documents that had been previously marked privilege. Had the parties used only categorical logs, we would never have gotten these documents. Many of them spoke directly to defendants' liability, and plaintiffs had been seeking their production for years. Had a document-by-document log been required from the outset, that would have avoided significant expense and avoided duplication of effort made necessary by the initial use of a categorical approach to logging. Proportionality considerations can be given weight as well.

Lana Olson (Defense Research Institute) & 0006: Some categories of documents and ESI are facially privileged or protected and can be agreed by the parties to be excluded from logging. For example, communications between counsel and client regarding the litigation after the complaint is served are clearly protected. The proposed amendments contemplate that parties might agree that work product prepared for the litigation need not be logged in detail. Certain forms of communications, for example those exclusively between in-house counsel and outside counsel of an organization might be so clearly privileged that they need not be logged. Designing

express exclusions, as allowed by the proposed amendments both reduces the burdens of reviews and logging and avoids possible disputes regarding the scope of logging needed in the case.

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Jeanine Kenney: The Note inappropriately suggests that document-by-document listing is appropriate only in "some" cases. This comment could suggest that this method is not generally necessary even though it is the standard approach in most cases and in most courts. In my experience, that method is generally the only meaningful method. "[N]o commenter before this Committee to date has explained how a receiving party is able to assess the propriety of a claim without disclosure of document-by-document information." Using alternative forms generally results in more, not fewer, disputes. In particular, the note inappropriately suggests that such logs are in appropriate in larger cases. "But is large-withholding cases * * * in which document-by-document information is most essential." Categorical methods have been widely criticized. In some cases and for some narrow categories, they may have a use. But there is a risk they might become a mechanism for failing to conduct a proper review in the first place. Some favor "tiered logs," but do not explain how one decides what belongs in which tier.

Lori Andrus: I have agreed to certain categorical exclusions from logging in specific cases. For example, often we will agree that communications with litigation counsel after the filing of the complaint need not be logged. But as a general matter so-called "categorical" logs fail to provide courts sufficient information to support privilege assertions. I have never seen a case where categories of documents could be grouped together while still providing sufficient detail to permit the privilege claim to be determine whether the document is at least potentially protected from disclosure.

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Adam Polk: Some mix of logging conventions, whether document-by-document or categorical, within a single case may make sense under certain circumstances. In the N.D. Cal., for example, the model order provides that "[c]ommunication involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log." Sometimes parties also include communications involving in-house counsel.

Kate Baxter-Kauf: "In my experience, categorical logs merely increase the burden and cost of evaluating privilege disputes for the parties, and lengthen and overly complicate privilege disputes, making it harder for the parties to narrow or eliminate disputes and requiring court intervention in more instances."

Robert Levy (Exxon): The rule should say that logs are not required absent a showing of need with regard to the following categories: (1) all communications with outside counsel; and (2) communications after suit is filed.

Aaron Marks (Committee to Support Antitrust Laws): Categorical logs burden receiving parties and litigants. An opaque categorical log inevitably spawns disputes between the parties. "Unlike document-by-document logs, there is no historical baseline expectation of what constitutes an appropriate 'categorical log.'" Such a method by its nature requires determining an

appropriate level of abstraction for the categories. Due to the stakes, the parties dispute even basic structural components of categorical logs. And in any event, use of this technique increases the number of disputes about whether the privilege assertions are justified. Parties frequently force hundreds of documents into a single "category" because the description of the category is likely to be at a high level of abstraction. But the proposed Note would encourage expansion of their use without discussing how to relieve their shortcomings. And categorical logs prevent cases from being resolved on their merits because the lead to improper withholding of non-privileged materials. Rather than fostering use of categorical logs, the Note should move toward promoting "the primacy of traditional, document-by-document logs." They actually entail the least overall burden and avoid the need for case-specific log format disputes that will result without the presumption that document-by-document logs are what the rules mandate. The current Note does not even maintain "maximum flexibility" because it takes a substantive position that document-by-document logs are "often" associated with "very large costs." The burdens on the requesting party deserve equal time. And document-by-document logs focus the range of disputes and save court time.

Pearl Robertson: The Note should not refer to use of categorical logs because they do not provide the amount of information Rule 26(b)(5)(A) requires. Instead, they produce disputes.

Written Comments

Anne Marie Seibel (on behalf of 23 other members of the council and Federal Practice Task Force of the ABA Section of Litigation (0014): At the time the 26(f) conference occurs, counsel are not usually in a position to discuss these issues in a meaningful manner in "significant document cases." "It is invariably too early in the process to address privilege log issues with any specificity, as counsel are still typically getting their arms around the types, sources, and volume of documents and ESI that is responsive to identified or expected requests for production." In addition, in "asymmetric document cases," the document-light party will often demand a document-by-document log. We worry that if the parties are not really ready to discuss such issues at this early point, when the issues arise later "the court may give them short shrift, believing that they should have been raised at the Rule 16 conference." "If this Rule change is to work as intended, there is no substitute for an available judge who is ready to engage with counsel." We think that "the most appropriate time to address privilege -log issues is at the time of initial production." Too often, when only one side has the major burden of producing documents "the party seeking discovery may seek the most expensive method of logging. * * * [T]he court must be prepared to address the demand at the initial Rule 16 conference."

Federal Magistrate Judges Association (0018): "Many cases do not involve complex privilege issues and are candidates for categorical logs or short document-by-document logs. Other cases may call for a hybrid approach, using a combination of categorical logging and document-by-document logging for specific subject areas, custodian or time periods. Still other cases may benefit from a categorical log with a metadata log. This comment is not meant to endorse any particular methodology for privilege logging but rather to applaud the proposed Rule's flexibility as to approach and call for privilege issues to be discussed at the outset of the case."

"Rolling" Logging & Timing

Robert Keeling & 0003: The references to "rolling privilege logs" are inconsistent with modernizing privilege logging practice and ineffective and inefficient. Parties may over-withhold because they are not familiar enough with the documents to make informed decisions about which to withhold. Instead, it is better to defer preparation of a privilege log until the majority of documents involved have been reviewed by the lawyers most familiar with the issues. It would be better to call for "tiered" or "staged" logging. This approach would prioritize production and logging of key documents and resolving potential disputes early in the discovery process. "Even if the parties are able to reach agreement on a privilege protocol at the outset, it may be so generic as to be unhelpful in establishing key aspects of the privilege review." You really only know about the characteristics of the data collection after completing the initial review, which is unlikely to be completed at the time of the 26(f) conference.

Alex Dahl (LCJ) & 0007: The amendments should suggest tiered logging rather than rolling production. The main change would be to substitute "tiered" for "rolling." The idea is to focus first on the materials most likely to be critical to the resolution of the case, rather than trying to review and log all potentially discoverable materials. Rather than involving huge expenditures of money and substantial delays, this approach can focus attention on the key issues, just as with a tiered approach to document production.

Jonathan Redgrave: The difference between "rolling" and "tiered" logging is significant.

Lana Olson (Defense Research Institute) & 0006: Although it is widely understood that tiered discovery can be an efficient way to focus attention on the most important documents and ESI, courts and parties have been slow to apply that concept to privilege logs. But just as not all documents are equally important, so it is that all documents withheld on privilege grounds have the same value in the litigation. Sampling and other procedures can be used to determine whether various categories of documents and ESI are sufficiently probative to warrant additional productions, and the same sort of approach could be effectively employed to focus the logging effort. Some critics of the proposed amendments assert that categorical and iterative logging may provide an incentive to cheat the system. But that assumes that lawyers will violate their oaths and the rules of ethics. "If a lawyer is going to cheat, he or she will do so under a document-by-document log or a categorical log."

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Jeanine Kenney: It is valuable that the Committee Note highlights the importance of rolling privilege logs. This practice may prevent or at least restrict over-withholding by giving producing parties early guidance that can be used to inform later privilege reviews. Fed. R. Evid. 502(d) orders offer a significant solution to the concern that prompt production of some material may inadvertently include items that should have been withheld.

Andrew Myers (Bayer): The rolling and iterative approach to privilege review is a good idea.

Seth Carroll: Permitting "tiered" logs is undesirable. Defendants in the civil rights cases I handle sometimes try to hide probative documents behind unilateral "proportionality" concerns. Endorsing "tiered" logging or discovery would tend in that direction.

Amy Zeman: The Note's nod to rolling productions is well placed and references a common and effective discovery tool I regularly use in my cases. I disagree with the argument by another commenter that a party cannot simultaneously focus on document review and privilege log production. "Replacing 'rolling' production with 'tiered' production would compound the problem of over-designation rather than solving it, while adding opacity to the process." The comments favoring the use of "tiered" describe it on the basis of materiality and importance of the materials to be produced, but offer no explanation on who would make that determination. If that is left up to the producing party, there is an obvious path to discovery abuse.

Adam Polk: The Committee Note is right that delaying production of the privilege log until the close of discovery can create serious problems. When that happens, the party seeking discovery is delayed in identifying documents that may have been improperly withheld. In order to resolve privilege disputes, sampling or preliminary rulings from the court can prove valuable. Only periodic production of logs over the course of discovery allows the parties to timely raise those disputes, often on an iterative basis.

Kate Baxter-Kauf: Describing "rolling" log production in the Note is exceptionally helpful to the parties. But a "tiered" approach would produce problems. The idea is that the logging should first be done with regard to the "important" documents. Though that sounds sensible, the problem is that only the producing party can make the "importance" determination. "This has the potential to lengthen disputes about privilege and logging as the parties *also* dispute which documents and requests for production are most material to the litigation and *then* discuss both format and content of privilege logs."

Robert Levy (Exxon): The Note should be altered to remove the reference to "rolling" logs. It would be better to use the term "tiered" logs. Rolling logs do not always work well because document productions are methodical and proceed by custodian.

Pearl Robertson: Rolling privilege logs are desirable. They are not more burdensome than "final" logs, and may actually produce less burden. They can also potentially cure the problem of over-designation.

Use of Technology

Robert Keeling & 0003: Sometimes objective metadata logs (to-from, date, etc.) may be useful without the effort of individual characterization of documents and pertinent privileges. Sometimes that approach permits opposing counsel to focus on certain items and perhaps demand a document-by-document log only of those items.

Doug McNamara: "Technology assisted review can easily capture the metadata of authors, recipients, and dates of communications to help with log creation. This data can then be converted from CSV files into spreadsheets and exported." Use of metadata logs can cut down significantly on the effort, but eventually "you have to have the last column" (specifying the privilege claimed). But the to/from listing can point up instances in which the company has adopted a policy of having counsel added as a cc on almost every message.

Alex Dahl (LCJ) & 0007: "While artificial intelligence and other technological advancements have increased the capability and efficiency of finding potentially privileged documents, litigants cannot use these tools alone to assert their privilege claims under the current rules. Instead, creating privilege logs remains a manual, burdensome, and exceptionally expensive process in litigation."

Lana Olson (Defense Research Institute) & 0006: "Providing initial logs with limited information, for example logs abased on extracted metadata fields, permits the receiving party to focus on documents and ESI for which further information is needed to assess the privilege claims."

Amy Bice Larson: Technology can't tell you what privilege applies. Only a trained professional can do that.

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Jeanine Kenney: If a metadata-type log is agreed to, it will be important up front to address documents for which metadata provides little or no information or inaccurate information, and any manual information that must be supplemented, how hard copy versus electronic documents will be logged, the physical format of logs (e.g., sortable spreadsheets), etc. Document-by-document logs are usually generated through automated processes, imposing limited burden. "True" metadata logs "are a type [of] low-burden document-by-document log that remain[s] an option for every type of case."

Lori Andrus: "Technological advances have made privilege logs much cheaper to generate in the last few years, and those costs will continue to plummet."

Jennifer Scullion: I do not think a typical metadata log suffices. Sometimes a "metadata plus" log will be helpful. Another technique that can be used is a "quick peek" (with Evidence Rule 502(d) protections) that persuade opposing counsel that materials on a certain topic are not worth the trouble to examine in the current litigation.

Chad Roberts (eDiscovery CoCounsel, PLLC): The draft rule is "pitch perfect." It is important to avoid getting too far in front of the technology, though the technology is improving by leaps and bounds. Pretty soon, generative AI will be able to summarize documents, so the privilege log can be produced quickly and inexpensively. "There is a healthy and robust commercial marketplace for litigation support technologies that address both the growing diversity of digital evidence and the increasing volumes in which it occurs. * * * Some electronic discovery problems that seemed insurmountable in the recent past are no longer so." Powerful analytics software has greatly economized the task of identifying responsive content within a collected data set. "Thus, using the evidence management platforms to generate a list of the privileged content, the creation of the privilege log itself tends to be a manageable task." But providing a summary of the content of these items has remained a repetitive manual task. Most every major developer of evidence management platforms is doing research seeking to use large language models for electronic discovery tasks. "These technologies have the potential to reliably generate non-privileged summaries of textual content based upon established criteria, and are likely to automate the repetitive and more expensive lawyer-intensive process of privilege log creation in ways not previously available."

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Robert Levy (Exxon): Privilege logs involve significant costs and due to the large increase in documents and records the cots continue to rise even with the advent of technology.

Written Comments

Lea Malani Bays (016): As a plaintiff lawyer actively involved in the Sedona Conference and other pertinent groups, I have found that metadata logs do reduce the burden of privilege logging because they do not require any human input, but that too often they do not provide sufficient insight into the basis for the privilege claims. Metadata field can help supplement a privilege log, sometimes by filling in gaps that otherwise would exist, but they are usually not sufficient on their own.

Amending Rule 26(b)(5)(A) As Well

Robert Keeling & 0003: Although the 1993 Committee Note properly foresaw that document-by-document logging would not be appropriate in every cases, many courts have treated the amended rule as requiring that in every case. Producing parties will not know their full custodian list, the prevalence of privilege documents or the complexity of the issues that may arise one document review begins. Trying to tame the privilege log beast without amending 26(b)(5)(A) is unlikely to work.

Alex Dahl (LCJ) & 0007: The best way to improve privilege log practice would be to adopt the proposal of Judge Facciola and Jonathan Redgrave and add a sentence to Rule 26(b)(5)(A):

The manner of compliance with subdivisions (A)(i) and (ii) must be determined in each case by the parties and the court in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

Adding this sentence will help ensure that courts and parties turning to 26(b)(5)(A) will learn that the rules require them to take the initiative in addressing the appropriate method of logging withheld items. The Committee Note should say that "there is a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation.."

Jonathan Redgrave: Rule 26(b)(5)(A) is the source of the current difficulties. Unless something is done to change that rule, the reform effort will not succeed.

John Rosenthal: Because the document-by-document expectation has become ingrained (even though the 1993 Note actually pointed in a different direction), this rule must be changed, if only to call attention to the new regime of a sensible negotiated method of satisfying the disclosure requirement. There are many less onerous methods, including categorical logging, metadata logs, and what I call "categorical plus" – using either a metadata log or other categorical approach, and following up with possible targeted document-by-document logging.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: Amending this rule could impose greater, not lesser, burdens and parties and prevent judges from establishing their own standing policies and procedures on privilege logs. It must be remembered that compliance with this rule is not optional, so invoking proportionality is not justified.

David Cohen: Amending this rule also would be a good idea. The goal should be to put teeth in the 1993 Committee Note that recognized that document-by-document logging is not essential in many cases.

Andrew Myers (Bayer): Amending this rule also would be a good idea. Better yet, find a way to give real teeth to the 1993 Committee Note recognizing that document-by-document logging is not necessary in every case.

Robert Levy (Exxon): It is important to amend 26(b)(5)(A) as well because this is the rule that govern privilege withholding.

Written Comments

Anne Marie Seibel (on behalf of 23 other members of the council and Federal Practice Task Force of the ABA Section of Litigation (0014): We believe it would be helpful to add a conforming sentence to Rule 26(b)(5)(A)(ii) to emphasize the importance of the court's role in preventing privilege log disputes. We suggest the following additional sentence:

> Where necessary to prevent undue burden, the method of compliance with subdivisions (A)(i) and (ii) shall be determined by the court after consultation with the parties.

Lea Malani Bays (016): As a plaintiff lawyer actively involved in the Sedona Conference and other pertinent groups, I oppose amending Rule 25(b)(5)(A). "Although some members of the defense bar are still encouraging drastic changes to Rule 26(b)(5), I believe the Committee's more measured approach is the right one." Many, perhaps most, parties do in fact carefully review privilege logs and find them necessary for determining whether designations should be challenged. "Non-traditional logs such as metadata logs and categorical logs cannot be presumptively appropriate under this rule. Categorical logs do not reduce the burden of privilege logging; the major burden is making the privilege determination (when properly done), not listing the results on a log.

American Ass'n for Justice (0038): Defense bar suggestions that Rule 26(b)(5)(A) also be amended should be rejected. For one thing, the published amendment proposal did not include a proposed change to this rule, and as a consequence AAJ members and plaintiff-side practitioners were not focused on this possibility and did not comment on it. The proposal by Judge Facciola and Mr. Redgrave would invite controversy, by emphasizing "undue burden" and "proportional to the needs of the case" in the Note. Moreover, there are reasons to refrain from cross-references. "While AAJ itself has on occasion proposed cross-referencing in other rulemaking, it believes that cross-referencing is most suitable when there is a *choice* between two rules to apply." That is not the case here, so the cross-reference is unnecessary, and the draft Note proposed by LCJ would be strongly opposed by AAJ and its members.

John Rosenthal (0039): This rule should also be amended to clarify (a) that document-by-document logging is not required, (b) that courts and parties should consider alternative means of satisfying this rule, (c) that there should be a rebuttable presumption that certain categories of documents need not be logged, (d) what is the exact information needed to establish a claim of privilege, and (e) that Rule 502(d) orders can include provisions that ensure that information contained in a log cannot form the basis for a claim of waiver. Unless these changes are made, requiring additional conferences among counsel under the proposed rule amendments will not address the fundamental burden problems. The 1993 Committee Note to this rule when adopted got it right, and changes are needed to set things right again.

Hon. John Facciola & Jonathan Redgrave (0045): In January, 2023, we formally proposed that a cross reference be added to Rule 26(b)(5)(A), but that was not included in the amendment packet sent out for public comment. We believe that the public comment period confirms the need for a neutral addition to Rule 26(b)(5)(A). Continued, misplaced adherence in cases to document-by-document logs imposes unwarranted burdens on parties and courts. Adding a cross-reference should support and enhance the proposed amendments. Submissions urging that the rule require document-by-document logging show that an amendment to counter this trend in decisions is needed. We propose that the following be added:

> The manner of compliance with subdivisions (A)(i) and (ii) shall be determined in each case by the parties in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

This addition explicitly clarifies that there is no required or default manner of compliance, and that the parties and the court should address compliance in each case with reference to the specifics of that case. This addition would also show that the concept of proportionality should be considered. Because many courts and parties presume, erroneously, that this rule requires document-by-document logging, the absence of a reference in 26(b)(5)(A) to the new Rule 26(f) provision will in practice undermine the amendment. Adding the reference here will also ensure that parties are fully aware that they must address privilege logs early in the case. This amendment will trigger attorneys to consult the amendments to Rule 26(f) and 16(b).

Google LLC (0067): Rule 26(b)(5)(A)(i) and (ii) should be amended as follows:

> (i) expressly make the claim; ~~and~~
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner using any reasonable method or format proportional to the needs of the case that, without revealing information itself privileged or protected, will enable other parties to assess the claim;~~.~~ and
>
> (iii) a party receiving a description of information withheld on the basis of privilege or trial-preparation materials may not object solely on the basis of the method or format utilized by the party making the claim.

Amending Rule 45 As Well

Oct. 16, 2023, Washington, D.C. Hearing

Alex Dahl (LCJ) & 0007: Although Rule 45 makes clear that nonparties should be entitled to greater protection against undue burdens, it fails to provide that expressly with respect to privilege logging. Yet nonparties are unlikely to be involved in Rule 26(f) negotiations. If the Committee does not want to address Rule 45 presently, it should take up the topic in the future to provide protection for nonparties.

Jonathan Redgrave: We need an amendment to Rule 45 connecting to Rule 26(b)(5) as well.

Feb. 6, 2024, Online Hearing

Robert Levy (Exxon): Rule 45 should be amended as well to address the fundamental fairness of burden on third parties to litigation. But it is not clear how the Rule 45 setting provides something like the Rule 26(f) discovery-planning conference required of the parties.

TAB 7

7. MDL Rule 16.1 (Final Approval)

The Rule 16.1 proposal received a great deal of commentary. A summary of the commentary is included in this agenda book. The MDL Subcommittee met twice after the public comment period to consider changes to the rule proposal and to the Committee Note. The first meeting was on Feb. 23, 2024, and the second on March 5, 2024. Notes of both these meetings are included in this agenda book. For the assistance of the other members of the Advisory Committee, each set of notes includes, as an Appendix, the drafting ideas discussed by the Subcommittee during that meeting.

These notes should fully introduce the discussions of the Subcommittee, which produced the revised amendment proposal presented below. This report will therefore identify the major themes of these amendments and presentation at the Advisory Committee's April meeting will elaborate on these changes.

As an introduction, the Subcommittee's changes are actually much less extensive than the overstrike/underline version below suggests. Instead, they may be summarized as follows:

(1) Eliminating the "coordinating counsel" position: Proposed Rule 16.1(b) invited the court to consider appointing an attorney to act as "coordinating counsel." After the public comment period was completed, on Feb. 23 the Subcommittee considered whether this position might be retained as "liaison counsel," with invocation of the Manual for Complex Litigation (4th) use of the term in § 10.221 (referring to "liaison counsel" who would deal with "essentially administrative matters."). But discussion led the Subcommittee to conclude that the strong reaction to creation of this new position provided a reason for removing it from the rule entirely. It no longer appears in the rule.

(2) Reversing the default so that the court need not order the parties to address the topics listed in the rule, but can direct that that the parties need not address certain topics: The published draft made the parties' obligation to address certain matters depend on the court taking the initiative to order them to address those specific matters. But requiring affirmative action by the court to get a report on the listed matters seems unnecessary, particularly since (as said in the Note), the parties can tell the court that it's premature to address certain items. And the rule continues to say the parties may raise whatever matters they wish to raise whether or not the court ordered them to do so. This shift of default in no way limits the court's discretion, but it may sometimes reduce the burden on the court and also perhaps suggest to the parties that they might suggest that the court excuse a report on certain topics.

(3) Separating out the issue whether to appoint leadership counsel: Published Rule 16.1(c)(1) called attention to whether the court should appoint leadership counsel and, if so, also address a number of topics bearing on appointment of leadership counsel. Because this seemed a discrete and important topic, it was separated into a new Rule 16.1(b)(1), distinct from the other topics identified in Rule 16.1(c) of the published rule proposal.

(4) Subdividing the other topics listed in published Rule 16.1(c) into two "tiers," one often calling for early court action and the other not so often calling for early court action (particularly if leadership counsel were to be appointed), as to which the rule should only direct the parties to provide "initial views": These two categories of reporting responsibilities would be divided between Rule 16.1(b)(2) and Rule 16.1(b)(3). These tiers would be:

> Tier 1, in Rule 16.1(b)(2) provides that the parties must address the following unless court orders otherwise:
>
> (A) Previously entered scheduling or other orders that should be vacated or modified;
>
> (B) A schedule for additional management conferences;
>
> (C) How to manage the filing of new actions in the MDL proceedings;
>
> (D) Whether related actions have been filed or are expected to be filed, and whether to consider possible methods of coordinating with those actions; and
>
> (E) Whether consolidated pleadings should be prepared to account for the multiple actions in the MDL proceedings.
>
> Tier 2 in Rule 16.1(b)(3) provides that the parties must provide the court with their "initial views" on the following unless the court orders otherwise:
>
> (A) Principal legal and factual issues likely to be presented;
>
> (B) How and when the parties will exchange information about the facial bases for their claims and defenses. The revised Note makes clear that this is not discovery, and mentions that the court may employ expedited procedures to resolve some claims or defenses based on this information exchange. It also provides that the court should take care to ensure that the parties have adequate access to needed information.
>
> (C) Anticipated discovery
>
> (D) Likely pretrial motions;
>
> (E) Whether the court should consider measures to facilitate resolution; and
>
> (F) Whether matters should be referred to a magistrate judge or a master.

(5) Initial management order: The court should enter an initial management order regarding how leadership counsel would be anointed if that is to occur and adopting an initial management plan that control the MDL proceedings until the court modifies it.

Three versions of the proposed new Rule 16.1 and Committee Note follow: (1) a "clean" Rule 16.1 and Note with changes made following public comment, (2) Rule 16.1 and Note as published in August 2023, and (3) a "redline" Rule 16.1 and Note showing changes made following public comment.

Revised Proposed New Rule 16.1 and Note[1]
(Clean)

Rule 16.1. Multidistrict Litigation

(a) Initial Management Conference. After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial management plan for orderly pretrial activity in the MDL proceedings.

(b) Preparing a Report for the Initial Management Conference. The transferee court should order the parties to meet, prepare and submit a report to the court before the conference. Unless otherwise ordered by the court, the report must address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court, which may include any matter in Rule 16. The report also may address any other matter the parties wish to bring to the court's attention.

(1) The report must address whether leadership counsel should be appointed and, if so, it should also address the timing of the appointment and:

(A) the procedure for selecting leadership counsel and whether the appointment should

[1] This revised Rule 16.1 proposal reflects the changes made to the proposed rule and note following public comment.

be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) the role of leadership counsel in any resolution of the MDL proceedings;

(D) the proposed methods for leadership counsel to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel.

(2) The report also must address:

(A) any previously entered scheduling or other orders that should be vacated or modified;

(B) a schedule for additional management conferences with the court;

(C) how to manage the filing of new actions in the MDL proceedings;

(D) whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

(E) whether consolidated pleadings should be prepared.

(3) The report also must address the parties' initial views on:

(A) the principal factual and legal issues likely to be presented in the MDL proceedings;

(B) how and when the parties will exchange information about the factual bases for their claims and defenses;

(C) anticipated discovery in the MDL proceedings, including any difficult issues that may be presented;

(D) any likely pretrial motions;

(E) whether the court should consider measures to facilitate resolution of some or all actions before the court; and

(F) whether matters should be referred to a magistrate judge or a master.

(c) Initial Management Order. After the initial management conference, the court should enter an initial management order addressing whether and how leadership counsel will be appointed and an initial management plan for the matters designated under Rule 16.1(b) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There has been no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial management conference soon

after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop a management plan for the MDL proceedings and, thus, this initial conference may only address some but not all of the matters referenced in Rule 16.1(b). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(b) should be of great value to the transferee judge and the parties.

Rule 16.1(b). The court ordinarily should order the parties to meet to provide a report to the court about some or all of the matters designated in Rule 16.1(b) prior to the initial management conference. This should be a single report, but it may reflect the parties' divergent views on these matters, as they may affect parties differently. Unless otherwise ordered by the court, the report must address all the matters identified in Rule 16.1(b)(1)-(3). The court also may include any other matter, whether or not listed in Rule 16.1(b) or in Rule 16. Rules 16.1(b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(2)(B) directs the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it." The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceedings. Experience has shown, however, that the matters identified in Rule 16.1(b)(1)-(3) are often important to the management of MDL proceedings.

In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial management conference.

Counsel often are able to coordinate in early stages of an MDL proceeding and, thus, will be able to prepare the report without

any assistance. However, the parties or the court may deem it practicable to designate counsel to ensure effective and coordinated discussion in the preparation of the report for the court to use during the initial management conference. This is not a leadership position under Rule 16.1(b)(1) but instead a method for coordinating the preparation of the report required under Rule 16.1(b). Cf. Manual for Complex Litigation (Fourth) § 10.221 (liaison counsel are "[c]harged with essentially administrative matters, such as communications between the court and counsel * * * and otherwise assisting in the coordination of activities and positions").

Rule 16.1(b)(1). Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointment may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. The rule distinguishes between whether leadership counsel should be appointed and the other matters identified in Rule 16.1(b)(2) and (3) because appointment of leadership counsel often occurs early in the MDL proceedings, while court action on some of the other matters identified in Rule 16.1(b)(2) or (3) may be premature until leadership counsel is appointed if that is to occur. Rule 16.1(b)(1) calls attention to several topics the court should consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly discharge their leadership obligations, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who

suffered injuries and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.

The rule also calls for advising the court whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceedings. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specific suggestions on the leadership structure that should be employed.

Subparagraph (C) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such means as early exchange of information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accordance with the court's initial management order under Rule 16.1(c). In some MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership

counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify a class, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23(g).

Rule 16.1(b)(2) and (3). Rule 16.1(b)(2) and (3) identify a number of matters that are frequently important in the management of MDL proceedings. Unless otherwise ordered by the court, the parties must address each issue in their report. The matters identified in Rule 16.1(b)(2) often call for early action by the court. The matters identified by Rule 16(b)(3) are in a separate section of the rule because, in the absence of appointment of leadership counsel should appointment be recommended, the parties may be able to provide only their initial views on these matters.

Rule 16.1(b)(2)(A). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge. Unless otherwise ordered by the court, the scheduling provisions of Rules 26(f) and 16(b)

ordinarily do not apply during the centralized proceedings, which would be governed by the management order under Rule 16.1(c).

Rule 16.1(b)(2)(B). The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(b)(2)(C). Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related state court litigation at the case management conferences.

Rule 16.1(b)(2)(D). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding becomes a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is

important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

Rule 16.1(b)(2)(E). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

Rule 16.1(b)(3). Rule 16.1(b)(3) addresses matters that are frequently more substantive in shaping the litigation than those in Rule 16.1(b)(2). As to these matters, it may be premature to address some in more than a preliminary way before leadership counsel is appointed, if such appointment is recommended and ordered in the MDL proceedings.

Rule 16.1(b)(3)(A). Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(b)(3)(B). In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. 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. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Early exchanges may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as motions to dismiss or other early matters and their impact on the early exchange of information. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceedings.

This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). Under some circumstances – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

Rule 16.1(b)(3)(C). 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.

Rule 16.1(b)(3)(D). Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

Rule 16.1(b)(3)(E). Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the resolution 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 the court may assist the parties in efforts at resolution. 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 resolution.

Rule 16.1(b)(3)(F). MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial

process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(c). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is appointed after the initial management conference under Rule 16.1(a).

Proposed New Rule 16.1 and Note[1]
(As Published in August 2023)

Rule 16.1. Multidistrict Litigation

(a) Initial MDL Management Conference. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to develop a management plan for orderly pretrial activity in the MDL proceedings.

(b) Designating Coordinating Counsel for the Conference. The transferee court may designate coordinating counsel to:

(1) assist the court with the conference; and

(2) work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).

[1] New material is underlined in red.

(c) Preparing a Report for the Conference. The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must address any matter designated by the court, which may include any matter listed below or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

(1) whether leadership counsel should be appointed, and if so:

(A) the procedure for selecting them and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) their role in settlement activities;

(D) proposed methods for them to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel;

(2) identifying any previously entered scheduling or other orders and stating whether they should be vacated or modified;

(3) identifying the principal factual and legal issues likely to be presented in the MDL proceedings;

(4) how and when the parties will exchange information about the factual bases for their claims and defenses;

(5) whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

(6) a proposed plan for discovery, including methods to handle it efficiently;

(7) any likely pretrial motions and a plan for addressing them;

(8) a schedule for additional management conferences with the court;

(9) whether the court should consider measures to facilitate settlement of some or all actions before the court, including measures identified in Rule 16(c)(2)(I);

(10) how to manage the filing of new actions in the MDL proceedings;

(11) whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

(12) whether matters should be referred to a magistrate judge or a master.

(d) Initial MDL Management Order. After the conference, the court should enter an initial MDL management order addressing the matters designated under Rule 16.1(c) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There previously was no reference to multidistrict litigation in the Civil Rules and,

thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the type of management challenges this rule addresses. On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after the Judicial Panel transfer occurs to develop a management plan for the MDL proceedings. That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial MDL management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(c) may be of great value to the transferee judge and the parties.

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 and to provide an informative report for the court to use during the initial MDL management conference.

While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.

Rule 16.1(c). The court ordinarily should order the parties to meet to provide a report to the court about the matters designated in the court's Rule 16.1(c) order prior to the initial MDL management conference. This should be a single report, but it may reflect the parties' divergent views on these matters. The court may select which matters listed in Rule 16.1(c) or Rule 16 should be included in the report submitted to the court, and may also include any other matter, whether or not listed in those rules. Rules 16.1(c) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow. Experience has shown, however, that the matters identified in Rule 16.1(c)(1)-(12) are often important to the management of MDL proceedings. In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial MDL management conference.

Rule 16.1(c)(1). Appointment of leadership counsel is not universally needed in MDL proceedings. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. This provision calls attention to a number of topics the court might consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly represent plaintiffs, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries, and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. If the court has appointed coordinating counsel under Rule 16.1(b), experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position, but appointment under Rule 16.1(b) is primarily focused on coordination of the Rule 16.1(c)

meeting and preparation of the resulting report to the court for use at the initial MDL management conference under Rule 16.1(a).

The rule also calls for a report to the court on whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceeding.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specifics on the leadership structure that should be employed.

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.

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the

court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accord with the court's management order under Rule 16.1(d). In some MDLs, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities non-leadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

Rule 16.1(c)(2). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred ("transferor district courts"). In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings

in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

Rule 16.1(c)(3). Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(c)(4). Experience has shown that in MDL proceedings an exchange of information about the factual bases for claims and defenses can facilitate efficient management. 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 level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Whether early exchanges should occur may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as whether motions to dismiss or other early matters might render the effort needed to exchange information unwarranted. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

Rule 16.1(c)(5). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for

determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

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.

Rule 16.1(c)(7). Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

Rule 16.1(c)(8). The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(c)(9). Whether or not the court has 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.

Rule 16.1(c)(10). Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed.

Rule 16.1(c)(11). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

Rule 16.1(c)(12). MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(d). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel were appointed after the initial management conference under Rule 16.1(a).

Revised Proposed Rule 16.1 and Note
(Redline)

Rule 16.1. Multidistrict Litigation

(a) Initial ~~MDL~~ Management Conference. After the Judicial Panel on Multidistrict Litigation ~~orders the transfer of~~transfers actions, the transferee court should schedule an initial management conference to develop ~~a~~an initial management plan for orderly pretrial activity in the MDL proceedings.

(b) ~~Designating Coordinating Counsel for the Conference.~~ ~~The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

~~**(c)**~~ **Preparing a Report for the Initial Management Conference.** The transferee court should order the parties to meet ~~and~~, prepare and submit a report ~~to be submitted~~ to the court before the conference ~~begins. The~~. Unless otherwise ordered by the court, the report must address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court, which may include any matter ~~listed~~

Material added after publication is underlined in red. Material removed from the rule as published is overstricken in blue. Material that is the same but relocated is double-underlined (where added) and double-overstricken (where removed) in green. These revisions reflect the changes the subcommittee proposes be made to the rule and note as a result of public comment.

~~below or~~ in Rule 16. The report ~~may~~ also may address any other matter the parties wish to bring to the court's attention.

(1) The report must address whether leadership counsel should be appointed~~,~~ and, if so, it should also address the timing of the appointment and:

(A) the procedure for selecting ~~them~~ leadership counsel and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) ~~their~~the role of leadership counsel in ~~settlement activities~~any resolution of the MDL proceedings;

(D) the proposed methods for ~~them~~leadership counsel to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel~~:~~.

(2) ~~identifying~~ The report also must address:

(A) any previously entered scheduling or other orders ~~and stating whether they~~that should be vacated or modified;

~~**(3)** identifying the principal factual and legal issues likely to be presented in the MDL proceedings;~~

~~**(4)** how and when the parties will exchange information about the factual bases for their claims and defenses;~~

~~**(5)** whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;~~

~~**(6)** a proposed plan for discovery, including methods to handle it efficiently;~~

~~**(7)** any likely pretrial motions and a plan for addressing them;~~

~~**(8)**~~ **(B)** a schedule for additional management conferences with the court;

~~**(9)** whether the court should consider measures to facilitate settlement of some or all actions before the~~

~~court, including measures identified in Rule 16(c)(2)(I);~~

~~(10~~ **(C)** how to manage the filing of new actions in the MDL proceedings;

~~(11~~ **(D)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

~~(12~~ **(E)** whether consolidated pleadings should be prepared.

(3) The report also must address the parties' initial views on:

(A) the principal factual and legal issues likely to be presented in the MDL proceedings;

(B) how and when the parties will exchange information about the factual bases for their claims and defenses;

(C) anticipated discovery in the MDL proceedings, including any difficult issues that may be presented;

(D) any likely pretrial motions;

(E) whether the court should consider measures to facilitate resolution of some or all actions before the court; and

(F) whether matters should be referred to a magistrate judge or a master.

~~(d~~

(c) Initial ~~MDL~~ Management Order. After the initial management conference, the court should enter an initial ~~MDL~~ management order addressing whether and how leadership counsel will be appointed and an initial management plan for the matters designated under Rule 16.1(~~e~~b) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial

portion of the federal civil docket. There ~~previously was~~has been no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the ~~type of~~ management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial ~~MDL~~ management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop a management plan for the MDL proceedings~~.~~ and, thus, this initial conference may only address some but not all of the matters referenced in Rule 16.1(b). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial ~~MDL~~ management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(~~c) may~~b) should be of great value to the transferee judge and the parties.

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 and to provide an informative report for the court to use during the initial MDL management conference.~~

~~While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.~~

~~**Rule 16.1(c).**~~ The court ordinarily should order the parties to meet to provide a report to the court about some or all of the matters designated in ~~the court's~~ Rule 16.1(~~c) order~~b) prior to the initial ~~MDL~~ management conference. This should be a single report, but it may reflect the parties' divergent views on these matters~~. The court~~, as they may ~~select which~~affect parties differently. Unless otherwise ordered by the court, the report must address all the matters ~~listed~~identified in Rule 16.1(~~c) or Rule 16 should be included in the report submitted to the court, and may also~~b)(1)-(3). The court also may include any other matter, whether or not listed in ~~those rules.~~Rule 16.1(b) or in Rule 16. Rules 16.1(~~c~~b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

Regarding some of the matters designated by the court, the parties may report that it would be premature to

attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(2)(B) directs the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it." The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceedings. Experience has shown, however, that the matters identified in Rule 16.1(~~c~~b)(1)-(~~12~~3) are often important to the management of MDL proceedings.

In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial ~~MDL~~ management conference.

Counsel often are able to coordinate in early stages of an MDL proceeding and, thus, will be able to prepare the report without any assistance. However, the parties or the court may deem it practicable to designate counsel to ensure effective and coordinated discussion in the preparation of the report for the court to use during the initial management conference. This is not a leadership position under Rule 16.1(~~c~~b)(1) but instead a method for coordinating the preparation of the report required under Rule 16.1(b). Cf. Manual for Complex Litigation (Fourth) § 10.221 (liaison counsel are "[c]harged with essentially administrative matters, such as communications between the court and counsel * * * and otherwise assisting in the coordination of activities and positions").

Rule 16.1(b)(1). Appointment of leadership counsel is not universally needed in MDL proceedings~~.~~, and the

timing of appointment may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. ~~This provision~~The rule distinguishes between whether leadership counsel should be appointed and the other matters identified in Rule 16.1(b)(2) and (3) because appointment of leadership counsel often occurs early in the MDL proceedings, while court action on some of the other matters identified in Rule 16.1(b)(2) or (3) may be premature until leadership counsel is appointed if that is to occur. Rule 16.1(b)(1) calls attention to ~~a number of~~several topics the court ~~might~~should consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly ~~represent plaintiffs~~discharge their leadership obligations, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who

suffered injuries~~,~~ and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. ~~If the court has appointed coordinating counsel under Rule 16.1(b), experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position, but appointment under Rule 16.1(b) is primarily focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the court for use at the initial MDL management conference under Rule 16.1(a).~~

The rule also calls for ~~a report to~~advising the court ~~on~~ whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL ~~proceeding.~~proceedings. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with ~~specifics~~specific suggestions on the leadership structure that should be employed.

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~~claims. Resolution may be achieved by such means as early exchange 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.~~information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in ~~accord~~accordance with the court's initial management order under Rule 16.1(~~d~~c). In some ~~MDLs~~MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court

should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities ~~non-leadership~~nonleadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

~~**Rule 16.1(c)(2).**~~

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify a class, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23(g).

Rule 16.1(b)(2) and (3). Rule 16.1(b)(2) and (3) identify a number of matters that are frequently important in the management of MDL proceedings. Unless otherwise ordered by the court, the parties must address each issue in their report. The matters identified in Rule 16.1(b)(2) often call for early action by the court. The matters identified by Rule 16(b)(3) are in a separate section of the rule because, in the absence of appointment of leadership counsel should appointment be recommended, the parties may be able to provide only their initial views on these matters.

Rule 16.1(b)(2)(A). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred ~~("transferor district courts").~~. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge. Unless otherwise ordered by the court, the scheduling provisions of Rules 26(f) and 16(b) ordinarily do not apply during the centralized proceedings, which would be governed by the management order under Rule 16.1(c).

~~**Rule 16.1(c)(3).**~~

Rule 16.1(b)(2)(B). The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(b)(2)(C). Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related state court litigation at the case management conferences.

Rule 16.1(b)(2)(D). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding becomes a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

Rule 16.1(b)(2)(E). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form

complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

Rule 16.1(b)(3). Rule 16.1(b)(3) addresses matters that are frequently more substantive in shaping the litigation than those in Rule 16.1(b)(2). As to these matters, it may be premature to address some in more than a preliminary way before leadership counsel is appointed, if such appointment is recommended and ordered in the MDL proceedings.

Rule 16.1(b)(3)(A). Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(~~c)(4).~~b)(3)(B). In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that ~~in MDL proceedings~~ an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. 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. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. ~~Whether early~~Early exchanges ~~should occur~~ may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as ~~whether~~ motions to dismiss or other early matters ~~might render~~and their impact on the ~~effort needed to~~early exchange of information ~~unwarranted~~. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL ~~proceeding~~proceedings.

~~**Rule 16.1(c)(5).** For ease management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).~~

This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). Under some circumstances, – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

Rule 16.1(~~c)(6~~b)(3)(C). 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.

Rule 16.1(~~c)(7~~b)(3)(D). Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

~~**Rule 16.1(c)(8).** The Rule 16.1(a) conference is the initial MDL management conference.~~

Rule 16.1(b)(3)(E). ~~Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.~~

~~**Rule 16.1(c)(9).**~~ Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the ~~settlement~~resolution 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 at resolution. 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~~resolution.

~~**Rule 16.1(c)(10).**~~

Rule 16.1(b)(3)(F). ~~Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.~~

~~When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed.~~

~~**Rule 16.1(c)(11).** On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate~~

~~actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.~~

~~The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.~~

~~**Rule 16.1(c)(12).**~~ MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(~~d~~c). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial

management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel ~~were~~is appointed after the initial management conference under Rule 16.1(a).

Notes of MDL Subcommittee Meeting
March 5, 2024

The MDL Subcommittee of the Advisory Committee on Civil Rules met via Teams on March 5, 2024, to complete its post-public-comment revisions to proposed Rule 16.1. It had earlier met on Feb. 23, 2024, to begin the task of considering and reacting to the public comments.

Participants included Judge David Proctor (Chair of the Subcommittee); Judge Robin Rosenberg (Chair of the Advisory Committee), Judge Hannah Lauck, Ariana Tadler, Joseph Sellers, David Burman, Prof. Richard Marcus (Reporter to the Advisory Committee), Prof. Andrew Bradt (Associate Reporter to the Advisory Committee), Prof. Edward Cooper (Consultant to the Advisory Committee). Also participating were Emery Lee (FJC) and Allison Bruff and Zachary Hawari of the Administrative Office.

Before the meeting, Prof. Marcus had circulated the latest version of the post-hearings revisions to proposed Rule 16.1. That draft is an appendix to these notes. Members of the Subcommittee had circulated reactions to this draft by email before the meeting, indicating considerable agreement on word choices in the draft. The meeting was introduced as an opportunity for the members of the Subcommittee to proceed through the draft, noting where there was unanimity on revisions and also where items called for more discussion. For simplicity, these notes will proceed in the order of the lines on the draft as circulated to the Subcommittee. Unfortunately, the line numbering in the Appendix may not correspond exactly with the draft the Subcommittee discussed.

Line 4 [Rule 16.1(a)]: "MDL" would be removed from the title to (a).

Line 5 [Rule 16.1(a): It was agreed to remove the word "of," so the rule would read "After the Judicial Panel on Multidistrict Litigation transfers actions, . . . "

Line 7 [Rule 16.1(a): It was agreed that the bracketed "begin to" need not be included in the rule text, though those words should be retained in the Note.

Line 19: The words "Initial Management" would be added to the title of (b) before "Conference."

Lines 20-21 [Rule 16.1(b): It was agreed that the lines should be revised to read ". . . should order the parties to meet, and prepare and submit a report to the court before the conference."

Lines 25-26 [Rule 16.1(b)]: After discussion, the consensus was to leave the revised language of the last sentence as published, except that "may" would be moved after "also."

Line 64 [Rule 16.1(b)(3)]: The word "initial" would be used before "views."

Lines 95-96 [Rule 16.1(c)]: "MDL" would be removed from the title of this subdivision and from the first sentence.

Line 135 [Note to 16.1(a)]: The words "begin to" would be retained in the Note.

Line 182 [16.1(b) Note]: The words "begin to" would be retained in the Note.

Line 193 [16.1(b) Note]: The word "coordinate" would be substituted for the word "organize" that was in the draft.

Lines 213-14 [Rule 16.1(b)(1) Note]: The language would be changed to read " . . . appointment of leadership counsel often occurs early in the MDL proceedings, while court action on some of . . . ."

Line 217 [Rule 16.1(b)(1) Note]: The word "should" would be substituted for the word "might."

Lines 225-26 [Rule 16.1(b)(1) Note]: The phrase "discharge their leadership obligations" would be used.

Line 260 [Rule 16.1(b)(1) Note]: The bracketed sentence at the end of the paragraph would be retained, but the phrase "– sometimes one year –" would not be included.

Line 272 [Rule 16.1(b)(1) Note]: "cross-cutting motions" would be changed to "pretrial motions."

Line 298 [Rule 16.1(b)(1) Note]: As a Reporter's call, "accord" would be changed to "accordance" – "in accordance with the court's management order."

Lines 318-26 [Rule 16.1(b)(1) Note]: There was much discussion of whether this added paragraph about the relationship between Rule 16.1 and Rule 23(g) sent the correct message when addressing the management of MDL proceedings including class actions. There has been considerable concern about these issues in the class action bar. One suggestion was to replace the last sentence of the paragraph with something like: "Rule 16.1 does not displace Rule 23(g), which continues to apply to class actions."

The concern is that MDLs may include class actions and other actions. Among other things, there may be individual actions brought by those who opted out of the class action after certification. And in some MDLs there may be multiple class actions, maybe so many that the court has to appoint some form of leadership counsel to manage the multiple class actions. And there may be derivative actions as well. Moreover, sometimes the class action is used as the vehicle for settling an MDL, i.e., to conclude that was previously a more "ordinary" MDL that did not originally include class actions.

One perspective is that in some sorts of class actions – perhaps antitrust and securities provide good examples – there are established practices that we do not desire to disrupt. Indeed, the PSLRA has its own provisions about selection of the lead plaintiff and that party's authority to pick the lawyer for the class. But somewhat similar class-action issues can arise in other sorts of MDLs, such as consumer protection and data breach MDLs. Some may be entirely made up of class actions, while in others there might be a mix of sorts of cases.

And there is no assurance that class certification (and therefore appointment of class counsel under Rule 23(g)) will be an early decision. In one major MDL, for example, though there were a number of class-action complaints the question of class certification was deferred while other matters were addressed. In that MDL, a *Daubert* ruling eventually ended the proceeding, so the question of certification never had to be reached.

The Rule 23(g) authorization for interim class counsel means that a 23(g) appointment can occur well in advance of class certification in some instances, including MDL proceedings. But MDL leadership counsel are different from class counsel. Even interim class counsel can, for example, propose a classwide settlement to the court that can include an agreement by defendant to certification for purposes of settlement and be binding on all class members who do not opt out. MDL leadership counsel cannot do that.

One basic point that was emphasized was a familiar one – MDLs come in many different sizes and shapes. The public comment period demonstrated that the class action bar is worried about the interaction of 16.1 and 23(g), but the reality may well be that there is no blanket solution to the potential difficulties presented by class actions – perhaps with appointed class counsel – alongside other actions with appointed leadership counsel – in some MDL proceedings.

After much discussion, the resolution was **the Subcommittee members should circulate proposed Note language to improve the presentation of what is currently in lines 318-26**.

Lines 331-38 [Rule 16.1(b)(2) and (3) Note]: Concern was raised about the use of the words "administrative" and "substantive" to characterize the difference between the topics in (b)(2) and (b)(3). Some of the matters in (b)(2), such as whether to use consolidated pleadings, might seem fairly "substantive." But they would ordinarily be topics that ought be considered seriously up front. Saying "administrative" might, however, suggest that under *Gelboim* such combined pleadings might be viewed as superseding individual complaints, which is not what is meant. One potential solution would be to remove the language at lines 332-33 – "are generally of an administrative nature, and" leaving "The matters identified in Rule 16.1(b)(2) often call for early action by the court." But the next sentence says that more "substantive" matters in 16.1(b)(3) stand in "contrast," which doesn't seem quite right.

Perhaps the focus should be on what is ripe for potential court action at the initial management conference or shortly thereafter, in contrast to others that more often are wisely deferred until after leadership counsel are appointed if such an appointment is contemplated. Another suggestion was that the distinction is "categorical," and perhaps the (b)(2) is more about "procedural" matters and (b)(3) more about "substantive" matters.

After considerable discussion, as with lines 318-26, the resolution was that **the Subcommittee members should circulate proposed Note language to improve the presentation at lines 328-38.** It seemed that the Subcommittee was in essential agreement about what the Note should say but uncertain about how to express that agreement.

Lines 372-73 [Rule 16.1(b)(2)(C) Note]: The consensus was to revise the language to read: " . . . it is important to address other matters that can arise, such as properly handling . . . ."

Line 392 [Rule 16.1(b)(2)(D) Note]: It was agreed to replace "coordinating" with "the coordination of" so the line would read: "For example, the coordination of overlapping discovery is often important."

Lines 404-16 [Rule 16.1(b)(2)(E) Note]: The draft language would be shortened considerably:

> The Rules of Civil Procedure apply in MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings. Decisions whether to use master pleadings . . . .

The discussion of pleading rules and the question whether to include defenses here would be removed as unnecessary in this portion of the Note, which is basically about consolidated pleadings rather than the "vetting" topic.

Line 436 [Rule 16.1(b)(3)(B) Note]: "and defenses" would be retained.

Line 454 [Rule 16.1(b)(3)(B) Note]: The discussion agreed on revising the sentence at lines 454-55 as follows: "Other factors such as pending motions to dismiss, might include whether there are legal issues that should be addressed . . ." But the previous sentence might make this addition redundant: "And the timing of these exchanges may depend on other factors, such as motions to dismiss or other matters and their impact on the early exchange of information." **The addition of this language might be reconsidered in light of the presence of similar language in the prior sentence.**

Lines 458-68 [Rule 16.1(b)(3)(B) Note]: The Note would be shortened and simplified to read as follows:

> This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). Under some circumstances – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

This change removed the unnecessary invocation of certain (but not other) Civil Rules.

Lines 488-49 [Rule 16.1(b)(3)(C) Note]: The underscored sentence at the end of the paragraph would be deleted. The question of evidence preservation was not raised in the published preliminary draft, and might be a provocative thing to add at this point.

Line 510 [Rule 16.1(b)(3)(E) Note]: The bracketed phrase about Rules 16(a)(5) and 16(c)(2)(I) would be removed, as the Subcommittee has decided to use "resolution" rather than "settlement" in the rule.

Appendix
Draft before Subcommittee
on March 5, 2024

Feb. 29 Meeting Revisions (with Cooper suggestions)

Rule 16.1. Multidistrict Litigation

(a) Initial MDL Management Conference. After the Judicial Panel on Multidistrict Litigation ~~orders the~~ transfers of actions, the transferee court should schedule an initial management conference to [begin to] develop an initial management plan for orderly pretrial activity in the MDL proceedings.

~~**(b) Designating Coordinating Counsel for the Conference**. The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

(be) Preparing a Report for the Conference. The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. Unless otherwise ordered by the court, t~~T~~he report must address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court, which may include any matter in Rule 16. The report ~~may~~ also may address any other matter the parties wish to bring to the court's attention.

(1) The report must address whether leadership counsel should be appointed~~,~~ and, if so, it should also address the timing of the appointment and:

(A) the procedure for selecting leadership counsel ~~them~~ and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) the~~ir~~ role of leadership counsel in any resolution of the MDL proceedings ~~settlement activities~~;

(D) the proposed methods for leadership counsel ~~them~~ to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel.;

(2) The report also must address:

(A)~~(2) identifying~~ any previously entered scheduling or other orders that ~~and stating whether they~~ should be vacated or modified;

(B) a schedule for additional management conferences with the court;

(C) how to manage the filing of new actions in the MDL proceedings;

(D) whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

(E) whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings.

(3) The report also must address the parties' [preliminary] {initial} [early] views on:

(A)~~**(3)** identifying~~ the principal factual and legal issues likely to be presented in the MDL proceedings;

(B)~~**(4)**~~ how and when the parties will exchange information about the factual bases for their claims and defenses;

~~**(5)** whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;~~

(C) ~~**(6)** a proposed~~ anticipated ~~plan for~~ discovery in the MDL proceedings, including any unique issues that may be presented ~~methods to handle it efficiently~~;

(D)~~**(7)**~~ any likely pretrial motions ~~and a plan for addressing them~~;

~~**(8)** a schedule for additional management conferences with the court;~~

(E)~~**(9)**~~ whether the court should consider measures to facilitate resolution ~~settlement~~ of some or all actions before the court~~, including measures identified in Rule 16(c)(2)(I);~~

~~**(10)** how to manage the filing of new actions in the MDL proceedings;~~

~~**(11)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and~~

(F)(12) whether matters should be referred to a magistrate judge or a master.

(cd) Initial MDL Management Order. After the initial management conference, the court should enter an initial MDL management order addressing whether and how leadership counsel will be appointed and an initial management plan for the matters designated under Rule 16.1(be) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There has been ~~previously was~~ no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the type of management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to [begin to] develop a management plan for the MDL proceedings and, thus, this initial conference may only address some but not all of the matters referenced in Rule 16.1(b). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial MDL management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(be) should ~~may~~ be of great value to the transferee judge and the parties.

~~**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 and to provide an informative report for the court to use during the initial MDL management conference. While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL~~

~~proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.~~

Rule 16.1(b~~e~~). The court ordinarily should order the parties to meet to provide a report to the court about some or all of the matters designated in ~~the court's~~ Rule 16.1(b~~e~~) ~~order~~ prior to the initial MDL management conference. This should be a single report, but it may reflect the parties' divergent views on these matters, as they may affect different parties differently. Unless otherwise ordered by the court, the report must address all the matters identified in Rule 16.1(b)(1)-(3). The court also may ~~select which matters listed in Rule 16.1(bc) or Rule 16 should be included in the report submitted to the court, and also may~~ include any other matter, whether or not listed in Rule 16.1(b) or in Rule 16~~those rules~~. Rules 16.1(b~~e~~) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(2)(B) invites the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it." The goal of the initial management conference is to [begin to] develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceedings. Experience has shown, however, that the matters identified in Rule 16.1(b~~e~~)(1)-(3~~1~~2) are often important to the management of MDL proceedings.

In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial MDL management conference.

Oftentimes, counsel are able to organize in early stages of an MDL proceeding and, thus, will be able to prepare the report without any assistance. However, the parties or the court may deem it practicable to designate counsel to ensure effective and coordinated discussion in the preparation of the report for the court to use during the initial management conference. This is not a leadership position under Rule 16.1(b)(1) but instead a method for coordinating the preparation of the report required under Rule 16.1(b). Cf. Manual for Complex Litigation (Fourth) § 10.221 (liaison counsel are "[c]harged with essentially administrative matters, such as communications between the court and counsel * * * and otherwise assisting in the coordination of activities and positions").

Rule 16.1(b~~e~~)(1). Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointment may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. The rule distinguishes between whether leadership counsel should be appointed and the other matters identified in Rule 16.1(b)(2) and (3) because appointment of leadership counsel is often an early action, and court action on some of the other matters identified in Rule 16.1(b)(2) or (3) may be premature until leadership counsel is appointed if that is to occur. Rule 16.1(b)(1) ~~This provision~~ calls attention to several ~~a number of~~ topics the court might [should] consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly [represent their clients~~plaintiffs~~,] {discharge their leadership obligations} keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries~~,~~ and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. ~~If the court has appointed coordinating counsel under Rule 16.1(b), experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position, but appointment under Rule 16.1(b) is primarily focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the court for use at the initial MDL management conference under Rule 16.1(a).~~

The rule also calls for advising ~~a report to~~ the court ~~on~~ whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceeding. [Transferee courts have found that appointment for a term – sometimes one year – is useful as a management tool for the court to monitor progress in the MDL proceedings.]

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specifics on the leadership structure that should be employed.

Subparagraph (C) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such means as early exchange of information, expedited discovery, cross-cutting motions, bellwether trials, and settlement negotiations. ~~, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible. 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.~~

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accord with the court's management order under Rule 16.1(c~~d~~). In some MDLs, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify a class, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDLs, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Particularly before class certification is resolved, there is no across-the-board rule on handling such issues.

Rule 16.1(b~~e~~)(2) and (3). Rule 16.1(b)(2) and (3) identify a number of matters that are frequently important in the management of MDL proceedings. Unless otherwise ordered by the court, the parties must address each issue in their report. The matters identified in Rule 16.1(b)(2) are generally of an administrative nature, and often call for early action by the court. The matters identified by Rule 16(b)(3), by contrast, are generally of a more substantive nature and, thus, in the absence of appointment of leadership counsel should appointment be recommended, the parties only may be able to provide their [preliminary] {initial} [early] views on these matters.

Rule 16.1(b~~e~~)(2)(A). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts

from which cases were transferred ("transferor district courts"). In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge. Unless otherwise ordered by the court, the scheduling provisions of Rules 26(f) and 16(b) ordinarily do not apply during the centralized proceedings, which would be governed by the management order under Rule 16.1(c).

Rule 16.1(b)(2)(B). The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(b)(2)(C). Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate ~~transferor~~ district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related state court litigation at the case management conferences.

Rule 16.1(b)(2)(D). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems [(e.g., California and New Jersey)] have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding ~~may~~ becomes a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, coordinating ~~avoiding~~ overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

Rule 16.1(b)(2)(E). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule

56. ~~As noted above,~~ [The Rules of Civil Procedure] {Rules 8, 9, and 12} continue to apply in MDL proceedings. Not only must each claim or defense satisfy Rule 11(b), each claim [or defense] must also satisfy Rule 8(a)(2) [or Rule 8(b)] even though presented by a short form complaint [or answer] that relies in part on the allegations of the master complaint [or answer]. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

Rule 16.1(b)(3). Rule 16.1(b)(3) addresses matters that are frequently more substantive in shaping the litigation than those in Rule 16.1(b)(2). As to these matters, it may be premature to address some in more than a preliminary way before leadership counsel is appointed, if such appointment is recommended and ordered in the MDL proceedings.

Rule 16.1(b~~c~~)(3)(A)~~(3)~~. Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(b~~c~~)(3)(B)~~(4)~~. In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims [and defenses] have been asserted without the inquiry called for by Rule 11(b). Experience has shown that ~~in MDL proceedings~~ an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. 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 methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. ~~Whether~~ E~~e~~arly exchanges ~~should occur~~ may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as ~~whether~~ motions to dismiss or other early matters and their impact on the early ~~might render the effort needed to~~ exchange of information ~~unwarranted~~. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

This court-ordered exchange of information is not discovery, which is addressed in Rule 16.1(c)(3)(C). As noted above, there should be no doubt that – as in all actions – [the Rules of Civil Procedure] {Rules 8,9, 11 and 12} apply in MDL proceedings. An important part of the court's management of the MDL proceeding may include implementing the requirements of those rules. [Under some circumstances, {– after taking account of whether the party whose claim or defense is involved has reasonable access to needed information –} the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.]

~~**Rule 16.1(be)(2)(D)(5).** For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).~~

Rule 16.1(be)(3)(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. Some issues relating to discovery the court may want to address include the suitability of early preservation and service-of-process orders.

Rule 16.1(be)(3)(D)~~(7)~~. Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

~~**Rule 16.1(be)(2)(G)(8).** The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.~~

Rule 16.1(be)(3)(E)~~(9)~~. Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the resolution ~~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),][1] the court may assist the parties in ~~settlement~~ efforts at resolution. 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 resolution ~~settlement~~.

[1] If we are avoiding use of the word "settlement," the bracketed references might better be removed. Rule 16(a)(5) refers to "facilitating settlement." Rule 16(c)(2)(I) is more general: "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." The latter does use "resolution" as well as "settlement," but is limited to procedures "authorized by statute or local rule," which might introduce some perplexities.

~~**Rule 16.1(bc)(2)(I)(10).** Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.~~

~~When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related state court litigation at the case management conferences.~~

~~**Rule 16.1(bc)(2)(J)(11).** On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.~~

~~The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.~~

Rule 16.1(bc)(3)(F)~~(12)~~. MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(cd). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is ~~were~~ appointed after the initial management conference under Rule 16.1(a).

Notes of MDL Subcommittee Meeting
Feb. 23, 2024

On Feb. 23, 2024, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Teams. Those participating included Judge David Proctor (Chair), Judge Robin Rosenberg (Advisory Committee Chair); Judge Hannah Lauck, Ariana Tadler, Helen Witt, Joseph Sellers, and David Burman. Additional participants included Emery Lee of the FJC, Allison Bruff and Zachary Hawari of the Rules Committee Staff, and Professors Richard Marcus and Andrew Bradt, as Reporters.

Before the meeting, Prof. Marcus had circulated two sketches of post-public-comment revisions of the published proposal to adopt a Rule 16.1. These sketches, which were referred to as Version 1 (dated Feb. 19) and Version 2 (dated Feb. 22 and circulated the evening before this meeting), appear as appendices to these notes of the meeting.

The meeting began with an overview of the main differences between Version 1 and Version 2. Both versions eliminate the position of "coordinating counsel," to which there had been many objections during the public comment period. In addition, as written Version 1 required the parties to include in their reports to the court only those matters the court had directed them to include, while Version 2 directed them to address every matter identified in Rule 16.1(b) unless the court ordered otherwise.

Both versions separate appointment of leadership counsel from other matters. The public comment period emphasized the importance of addressing appointment of leadership up front. But on other topics preliminary views may be all the court needs.

The two versions also different in how they treated issues other than leadership counsel. Both versions directed the parties to address appointment of leadership counsel. In Version 2, however, the other topics identified in Rule 16.1(b) were divided into two "tiers." The first [Rule 16.1(b)(2)] consisted of matters that were largely administrative and often needed prompt action by the court. The second [Rule 16.1(b)(3)] addressed other matters that were more "substantive" and might often be addressed most effectively after appointment of leadership counsel and, sometimes, after more experience with the evolution of the MDL proceedings.

So a basic question was whether to follow the Version 1 or Version 2 approach to topics other than leadership counsel. As the discussion developed, the consensus was to use Version 2.

One member began the discussion by explaining that Version 2 represents an effort to accommodate two sets of concerns. For one thing, many witnesses who appeared in the public hearings stressed that – at least from the plaintiff side – it would often be true that many of the matters included on the list in the rule would depend on familiarity with the cases that counsel did not yet fully possess. And this problem would be magnified if leadership counsel were to be appointed but had not yet been appointed.

At the same time, there were several matters that called for fairly immediate attention. A good example of that would be the possibility that scheduling or other orders entered before the cases were transferred by the Panel calling for actions that would not fit the overall management

of the MDL proceedings. These concerns prompted a desire to postpone action on these topics until later.

Balanced against this uncertainty, particularly among some on the plaintiff side, there was also an understandable desire among judges to get some basic information about the various topics listed in Rule 16.1(b) in addition to appointment of leadership counsel.

The division between 16.1(b)(2) and (3) sought to address these topics by "frontloading" the ones on which immediate action might be important [16.1(b)(2)] and calling only for "preliminary views" on the other topics.

A judge suggested that this approach could enable lawyers not ultimately selected for leadership to provide their views, and also present the court with a variety of views rather than (perhaps) only the views of the self-selected "leadership" emerging from "private ordering" within the plaintiff bar. Put differently, the concern was that "non-repeat players" be heard.

Another judge observed that the idea of "coordinating counsel" was conceived as assisting the court in part by enabling divergent views to come to the court's attention. That was not meant to give greater weight to the views of coordinating counsel. Instead, as was emphasized during the public comment period, the plaintiff lawyers self-organize pretty frequently.

A lawyer expressed concern about addressing several of the matters on the rule's list before appointment of leadership counsel. "We walk into court, and somebody goes up the podium and starts telling the judge things." It can be dangerous to have people talking to the transferee judge about factual and legal issues. "It's like a hand has been shown before it should be shown." Too often important decisions – even about the basic issues raised in the case – ought not be addressed until leadership counsel are appointed. This is a serious concern. People who presume they will be in leadership may prove to be mistaken about that, and it should be up to leadership to make the strategic decisions about which issues to push, and how.

At the same time, several of the matters included in 16.1(b)(2) in Version 2 could be helpfully addressed in the initial management conference.

But premature action on several of the matters in 16.1(b)(3) could have dangerous consequences. For example, requiring the plaintiff side to discuss the "principal factual and legal issues" or a "plan for discovery" could produce unfavorable consequences. "The problem is with the 'musts' in these redrafts." The transferee judge is hearing what might be regarded as unvetted views of only one or only a few lawyers on that side.

These comments drew the reaction that the command "must" had been in the published rule proposal, so long as the court directed the parties to discuss a given matter.

A judge noted that it could be desirable for lawyers not in leadership to be able to present their views to the court. That drew the response that it was important sort out potential positions before statements are made on the record before the court. Moreover, it is rare that individual attorneys appear at management hearings.

Another attorney shared these concerns. True, the judge benefits from having information about the views of the parties on a range of issues. And it's also true that in appointing leadership counsel courts should and have stressed getting a variety of views represented. This focus is carefully explained in the Committee Note.

A judge commented that it seemed odd that it might be too early to get "preliminary views" from counsel. For one thing, those preliminary views might properly affect the judge's selection of leadership counsel. For another, it stands to reason to expect defense counsel to address several of those matters, so it seems to make sense to prompt plaintiffs to address them also. Another judge noted that courts often require position statements.

An attorney reacted to the "preliminary views" terminology. If this had gone out for public comment with that term in it, there likely would have been comment that it was not defined. A response was to ask whether it would be more palatable without the word "preliminary" – "the parties views on" the various matters. Adding "preliminary" seems to stress that these are not binding views.

A different point was raised. Version 2 shows consolidated pleadings as a topic on which only preliminary views need be presented. That might sensibly be moved into 16.1(b)(2) rather than (3). But other things in (3) – for example the factual and legal issues likely to be presented, or a plan for discovery – ought not be the topic of a binding management order at this early point. Particularly as to leadership counsel appointed later, there is a risk they would be "handcuffed" by such an order.

A judge responded that judges need to hear about these issues early on, and that judges can be judicious about what provision for them ought to be included in the initial management order.

Discussion turned to the directive in Version 2 that all listed topics in 16.1(b) must be addressed unless excluded from the court's order. Proposed 16.1(b)(3) is watered down, and only seeks "preliminary views." What reason would a judge have for leaving things on that list out, particularly since the parties can tell the judge that it is premature to take action on them.

Another judge suggested that the Committee Note might make the point that the positions taken on these matters are "non-binding." And it was noted that the draft Committee Note seems already to say that in new language added after public comment:

> Regarding some of the matters designated by the court, the parties may report that it would be premature to attempt to resolve them during the initial management conference, particularly if leadership counsel has not yet been appointed. Rule 16.1(b)(8) invites the parties to suggest a schedule for additional management conferences during which such matters may be addressed, and the Rule 16.1(c) initial management order controls only "until the court modifies it."

A judge recognized that there could be a risk that premature comments by some counsel might mislead the judge, but noted also that the rule could serve as an "information-forcing" device that prompted counsel to provide the judge with insights and an array of views that would improve management of the MDL proceedings. Having only one voice on the plaintiff side could cause

problems. Perhaps an example is the common benefit order entered by Judge Chhabria in the Roundup litigation. Had he heard, for example, from lawyers with cases pending in state courts who challenged his authority to "tax" their settlements to pay leadership counsel in the federal MDL, he might have been better equipped to address the issue.

Another judge noted that "This rule is not just for judges." Instead, it's designed to unify what's going to happen in the litigation. "There are *always* multiple discovery plans." The judges and lawyers can handle these things appropriately.

Discussion turned to the 16.1(b)(3) item regarding a possible discovery plan. The consensus was that the alternative language would be preferable: "an overview of anticipated discovery in the MDL [proceedings], including any unique issues that may be presented."

A lawyer proposed moving what Version 2 presented as 16.1(b)(3)(C) (on consolidated pleadings) into the "frontloaded" category of 16.1(b)(2). That prompted a question about whether direct filing should be addressed so soon. A response was that this is really about tagalongs. Dealing with those up front can be important. Another reaction was that direct filings should receive early scrutiny. It is important that direct filing orders take account of possible choice of law complications. It was noted, however, that the Committee Note already addressed this concern:

> When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and *how choice of law issues should be addressed* (emphasis added).

A different view of direct filings was presented. Including that in the rule could seem to create a presumption that this is a legitimate practice. From a defense viewpoint, that is far from a unanimous view. But another participant noted that the cases cited in a challenge to direct filing orders (usually by stipulation) showed that they do not exceed the transferee judge's powers.

As the meeting was ending, there was an effort to recap. The next step would be for Prof. Marcus to provide a new draft reflecting the discussion during this meeting. Version 2 would be the starting point, with the following changes:

> Line 7: the added phrase "consider appointment of leadership counsel and" would be removed.
>
> Line 23: "address" would be moved after "must."
>
> Lines 25-26: the reference to Rule 16 would be restored.
>
> Lines 31-32: The brackets would be removed around "the timing of such appointment."

Lines 62-63: The verb would be changed to "address" and alternatives to "preliminary" would be offered, probably "initial" or "early."

Lines 72-74: 16.1(b)(3)(C) (on consolidated pleadings) would be moved into 16.1(b)(2).

Lines 76-78: This would be changed to "an overview of anticipated discovery in the MDL [proceedings], including any unique issues that may be presented."

Professor Marcus would try to circulate a revised rule draft promptly. Ideally, the Subcommittee could try to meet again on March 1 or March 4. The latter date looked more workable to some Subcommittee members. The "official" due date for agenda book materials is March 15.

APPENDIX
Drafts before Subcommittee on
Feb. 23, 2024

Version 1
(draft of Feb. 19)

Rule 16.1. Multidistrict Litigation

(a) Initial MDL Management Conference. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to consider {address} appointment of leadership counsel and develop an initial {interim} management plan for orderly pretrial activity in the MDL proceedings.

~~**(b) Designating Coordinating Counsel for the Conference**. The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

(be) Preparing a Report for the Conference. The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must address whether leadership counsel should be appointed and any other matter designated by the court, which may include any matter identified in Rule 16.1(b)(1) and (2) ~~listed below~~ or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

(1) If the report recommends appointment of ~~whether~~ leadership counsel, it should address [the timing of such appointment and] ~~be appointed, and if so~~:

(A) the procedure for selecting them and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) their role in [the] {any} resolution of the MDL proceedings ~~settlement activities~~;

(D) proposed methods for them to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel;

(2) The [report] {agenda} must also provide {the parties'} views on:

(A)~~(2) identifying~~ any previously entered scheduling or other orders that ~~and stating whether they~~ should be vacated or modified;

(B)~~(3) identifying~~ the principal factual and legal issues likely to be presented in the MDL proceedings;

(C)~~(4)~~ how and when the parties will exchange information about the factual bases for their claims and defenses;

(D)~~(5)~~ whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

(E)~~(6)~~ a proposed [an overview of a] plan for discovery, including methods to handle it efficiently;

(F)~~(7)~~ any likely pretrial motions and a plan for addressing them;

(G)~~(8)~~ a schedule for additional management conferences with the court;

(H)~~(9)~~ whether the court should consider measures to facilitate resolution ~~settlement~~ of some or all actions before the court~~, including measures identified in Rule 16(c)(2)(I)~~;

(I)~~(10)~~ how to manage the filing of new actions in the MDL proceedings;

(J)~~(11)~~ whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and

(K) ~~(12)~~ whether matters should be referred to a magistrate judge or a master.

(c~~d~~) **Initial MDL Management Order.** After the initial management conference, the court should enter an initial MDL management order addressing whether and how leadership counsel would be appointed, and an initial [a tentative] {an interim} management plan for the matters designated under Rule 16.1(b~~e~~) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Version 2
(Draft of Feb. 22)

Rule 16.1. Multidistrict Litigation

(a) Initial MDL Management Conference. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to consider appointment of leadership counsel and develop an initial management plan for orderly pretrial activity in the MDL proceedings.

~~**(b) Designating Coordinating Counsel for the Conference**. The transferee court may designate coordinating counsel to:~~

~~**(1)** assist the court with the conference; and~~

~~**(2)** work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).~~

(b~~c~~) Preparing a Report for the Conference. The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must, unless otherwise directed by the court, address the matters identified in Rule 16.1(b)(1)-(3) and any other matter designated by the court~~, which may include any matter in Rule 16~~. The report may also address any other matter the parties wish to bring to the court's attention.

(1) The report must address whether leadership counsel should be appointed. If the report recommends appointment of leadership counsel, it should address [the timing of such appointment and]:

(A) the procedure for selecting leadership counsel ~~them~~ and whether the appointment should be reviewed periodically during the MDL proceedings;

(B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;

(C) the~~ir~~ role of leadership counsel in any resolution of the MDL proceedings ~~settlement activities~~;

(D) the proposed methods for leadership counsel ~~them~~ to regularly communicate with and report to the court and nonleadership counsel;

(E) any limits on activity by nonleadership counsel; and

(F) whether and, if so, when to establish a means for compensating leadership counsel;

(2) The report must also address:

(A)~~(2) identifying~~ any previously entered scheduling or other orders that ~~and stating whether they~~ should be vacated or modified;

(B) a schedule for additional management conferences with the court;

(C) how to manage the filing of new actions in the MDL proceedings; and

(D) whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them.

(3) The report must also include the parties' preliminary views on:

(A)~~**(3)** identifying~~ the principal factual and legal issues likely to be presented in the MDL proceedings;

(B)~~**(4)**~~ how and when the parties will exchange information about the factual bases for their claims and defenses;

(C)~~**(5)**~~ whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;

(D)~~**(6)**~~ a proposed [an overview of a] plan for discovery, including methods to handle it efficiently;

(E)~~**(7)**~~ any likely pretrial motions and a plan for addressing them;

~~**(8)** a schedule for additional management conferences with the court;~~

(F)~~**(9)**~~ whether the court should consider measures to facilitate resolution ~~settlement~~ of some or all actions before the court~~, including measures identified in Rule 16(c)(2)(I)~~;

~~**(10)** how to manage the filing of new actions in the MDL proceedings;~~

~~**(11)** whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and~~

(G)~~**(12)**~~ whether matters should be referred to a magistrate judge or a master.

(cd) **Initial MDL Management Order.** After the initial management conference, the court should enter an initial MDL management order addressing whether and how leadership counsel would be appointed, and an initial management plan for the matters designated under Rule 16.1(be) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Summary of Public Comment Period Testimony and Written Comments

This memo summarizes the testimony and written comments about the Rule 16.1 proposal. When possible, it gathers together comments from the same source, including both testimony and separate written submissions. On occasion, the summary of testimony includes the written testimony submitted by witnesses.

The written submissions are identified with only their last four digits. The full description of each of them is USC-Rules-CV-2023-0001, etc. This summary will use only the 0001 designation for that comment.

The summaries attempt to identify matters of interest by topics. For some of the initial topics there may not have been comments or testimony. If none are received on those topics they will be removed from the final summary. The topics are as follows:

Rule 16.1

General
Rule 16.1(b) – Coordinating Counsel
Rule 16.1(c)(1) – Leadership Counsel
Rule 16.1(c)(2) – Previously Entered Orders
Rule 16.1(c)(3) – Identifying Principal Issues
Rule 16.1(c)(4) – Exchange of Factual Basis of Claims
Rule 16.1(c)(5) – Consolidated Pleadings
Rule 16.1(c)(6) – Discovery Plan
Rule 16.1(c)(8) – Additional Management Conferences
Rule 16.1(c)(9) – Facilitate Settlement
Rule 16.1(c)(10) – Manage New Filings
Rule 16.1(c)(11) – Actions in Other Courts
Rule 16.1(c)(12) – Reference to Master/Magistrate Judge
Rule 16.1(d) – Initial Management Order

Oct. 16, 2023, Washington, D.C. Hearing

General

Mary Massaron: The biggest problem is the presence of meritless claims. Early MDL practice was like the wild west. An overwhelming proportion of the claims submitted turned out to have no foundation. Winnowing those claims should be job 1. Timing should be imposed by rule. Ad hoc approaches to this vetting process will not work. For individual cases, we have bright line rules to weed out groundless claims up front. But in large MDL proceedings that is not happening. In large MDL proceedings, however, Rule 12(b)(6) does not work.

Alex Dahl (LCJ) & 0004: Proposed 16.1 contains no requirements; to call it a "rule" is aspirational. At the same time, the Committee Note merely offers advice. Moreover, those suggestions include topics that are not suitable for rulemaking because they are either unsettled matters of law or disallowed by (or in serious tension with) existing rule provisions. Not every

topic that comes up in court is appropriate for incorporation into the rules. The 16.1 proposal should be revised to provide rules guidance to ensure claim sufficiency and to remove the subsections that could do more harm than good by enshrining into the rules concepts that raise complicated or undecided questions about existing rule or statutory provisions. For example, it is far from clear that MDL courts have authority to appoint leadership counsel or to supplant an MDL plaintiff's own lawyer, so it would be imprudent to include this ill-defined concept in the rules.

Kaspar Stoffelmayr & 0008): Promulgating a rule for MDL proceedings is long overdue. The current reality in MDL proceedings is ad hoc rulemaking. "I can't tell the client what to expect." Although ensuring the MDL transferee judges have broad latitude in managing transferred cases is important, the current proposal falls short of what is needed because it includes no mandatory language. This current reality contributes to the proliferation of unsubstantiated claims and inadequately restricts the judge's discretion with respect to what are essentially non-reviewable orders. Altogether, these circumstances have contributed to the lack of confidence among both plaintiffs and defendants in MDLs as a means to fairly adjudicate disputes. I agree with the LCJ comments. "The unpredictability inherent in ad hoc rulemaking contributes to the unsubstantiated claims problem that has become the defining characteristic of modern MDLs," prompting "cut and paste complaints on behalf of hundreds or thousands of plaintiffs." Not every judge will be equally adept at MDL case management, so "there is much to be said for restricting a lone MDL judge's discretion in favor of considered rules of procedure." Only the insiders know how to play the game. The proposed rule should be amended as suggested by LCJ to remove the unnecessary invitation to engage in ad hoc rulemaking. In short, though there is a crying need for rules to solve these problems, this rule will not do so. There is great need to insist that claimants show that their claims have substance up front.

John Beisner: I generally agree with the LCJ comments.

Chris Campbell: We need a rule amendment providing firm positions on MDL management. But the current draft conflicts with existing rules, advisory notes, and existing law. The 1926 Senate Judiciary Committee Report on the Rules Enabling Act stated that the goals of the national rules were to make process "uniform," and also aimed at "simplicity." But the current reality is that, in the absence of rules accessible to the entire legal community, repeat players thrive while others face confusion and delay. Instead of solving this problem, the draft invites increased process ad hockery. This is not a real rule.

James Shepherd: We need MDL rules that are specific. Although 16.1 is a good start, it has flaws.

Fred Haston (Int'l Assoc. of Defense Counsel): Based on 20 years of involvement in major MDL proceedings, I endorse the LCJ comments. The reality of the practice has been ever expanding dockets of MDL cases. This is not a healthy situation. Rule changes should recognize the need for structure, predictability and uniformity. That permits litigants to know what's coming, and promises more efficient outcomes.

John Guttmann: My views are generally in line with the DRI comments on proposed 16.1. There has been an exponential growth in the number of actions transferred to MDL courts. But the 16.1(c)(4) provisions do not adequately address this upsurge in filings with meaningful methods

to screen out unsupportable claims. The rule should require each plaintiff to provide support for the claim asserted, and the Note should outline the reason for the rule's adoption – the proliferation of unfounded claims in MDL proceedings. With such a requirement, "failure to supply the required information makes their dismissal almost a ministerial task rather than calling for the more resource-intensive motion practice required under the existing rules."

Harley Ratliff: Based on 20 years of experience with MDL proceedings, I can report that the current system is broken. It imposes on the courts the burden of dealing with thousands of largely un-vetted claims. The presence of those claims devalues the claims of real plaintiffs who have real claims. Rule 16.1 is a start toward dealing with the disfunction of MDL today, and much of what it proposes already takes place frequently in large MDLs. Although the draft rule therefore may be helpful to entirely uninitiated MDL judges, it does not address the underlying problems. "To fix the current situation, we must go beyond Rule 16.1 and begin to address the real problems with our MDL system."

Sherman Joyce (President, American Tort Reform Assoc.): The preliminary draft is insufficient. An industry has developed around MDL litigation. "Hundreds of millions of dollars are spent on generating claims for a single mass tort." The total amount spent on such ad campaigns is $7 billion. This spending supports advertising campaigns and the filing of speculative litigation. Because screening is minimal, clams are filed *en masse*. As a consequence, the MDL docket has surged; as of the end of the 2022 fiscal year it reached an astounding 73% of pending actions. But a significant proportion of these claims – as high as 40% or 50% – are not viable. What is needed is a rule that (1) responds to the extraordinary surge of mass tort litigation, (2) requires that cases be carefully screened and provides a mechanism for courts to dismiss speculative claims at an early stage, and (3) encourages courts to rule on dispositive legal issues, such as t novel theories of liability, general causation, preemption, or statutes of limitation, as soon as practicable.

Deirdre Kole (Johnson & Johnson): I applaud the Committee's efforts to bring much needed change to the governance of MDL proceedings. There is undoubtedly a great need for amending the rules to address these issues. The federal judiciary is struggling under the current rules to deal with ever-growing MDLs. Tens of thousands of claims are being submitted without basic factual or legal support, and the judiciary is besieged as a result. Some plaintiff attorneys engage in "stockpiling of claims" because FRCP safeguards that ordinarily prevent the initiation of baseless lawsuits are not utilized or do not function in the MDL context. These groundless claims disappear when real vetting begins. But they should never have been filed in the first place. In some litigations, as many as 45% have dropped out at that point. But the current draft does not solve this problem.

Leigh O'Dell: Based on extensive experience representing plaintiffs in MDL proceedings, I support efforts to improve the MDL process. 16.1 is valuable in encouraging the MDL court to schedule an initial management conference soon after the creation of an MDL proceeding. And it could be very helpful for the court then to address several of the matters specified in 16.1(c) – (1) appointment of leadership counsel; (2) identifying orders that might appropriately be vacated or modified; (3) identifying the principal factual basis for the case and legal issues to be presented, to the degree known and without prejudice to leadership after appointment (language we think should be added to (c)(3), (10) managing the filing of new actions, and (11) whether related actions have been or will be filed in other courts. This shortened list of topics will enable the court to

address preliminary matters needing attention at the outset. On the other hand, it would be premature for the court at this early stage (and before leadership counsel are appointed) to address the other items listed in 16.1(c): (4) exchange of information; (5) consolidated pleadings; (6) a plan for discovery; (7) likely pretrial motions; (8) schedule for further management conferences; (9) measures to facilitate settlement; and (12) whether matters should be referred to a magistrate judge or a master. Before decisions are made about these matters, leadership counsel should be in place and able to evaluate these issues. Thee is a risk that the process could become "an ill-informed box-checking exercise." We favor a more limited rule with an initial management conference limited to the matters suitable for consideration at that point.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: We always try to talk with opposing counsel early in the case, and also talk with other counsel on our side. But opposing counsel often does not want to have discussions. But this rule should not apply to all MDL proceedings. The Committee's entire focus has been on mass tort MDLs. But most MDLs are not mass torts. MDLs that are not mass torts implicate different case-management issues. For that reason, application in such MDLs could disrupt and delay other MDLs. For example, when there are class actions included ordinarily the first step is appointment of leadership counsel, and those class counsel are authorized by court order to act on behalf of the entire class. For example, there simply are not bellwether trials in class actions. This is not a distinction based on the nature of the substantive claims asserted (securities or antitrust v. mass torts), but the distinctive features of class actions.

Mark Chalos: Not two MDLs are exactly alike. The needs of each MDL are different, so the management plans need to be tailored to the given MDL. I think the last sentence of the first paragraph of the Note should be changed to insert the word "flexible" before "framework": "There previously was no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a flexible framework for the initial management . . ." In addition, at the beginning of the second paragraph of the Note I would add the following sentence: "Because MDLs vary significantly, some or all of the provisions of Rule 16.1 may not apply in a particular MDL." The amendment should also say somewhere whether the initial management conference supplants the Rule 26(f) requirement to develop a discovery plan.

Tobi Milrood: There is a risk that this rule would inject unintended ambiguity or uncertainty into complex litigation. For example, the LCJ recommended additions are purely focused on product liability MDLs and ignore the vast array of complex litigation before transferee judges. "For judges without experience in MDLs, the list of topics will often become a de facto checklist of matters that must be considered by the parties. * * * [E]xperience foretells that defendants in an MDL will urge the transferee judge to address all listed topics." This is the "initial management conference," but there is no provision for additional conferences. Using this conference to lock the plaintiff side into a schedule would be harmful. How about instead saying it is an "early" management conference. "The rule cannot be a substitute for training new judges or for Manual on Complex Litigation, which is still a beacon for MDL courts."

Alyson Oliver: The coordinating counsel should be somebody who has a substantial stake in the litigation. If you get an outsider, considerable time (and expense) will be involved in getting

that person up to speed. This concern is not about allowing the court to supervise the conduct of the litigation, but instead to foster efficiency.

James Bilsborrow: I am encouraged that proposed 16.1 embraces a flexible approach to the initial MDL management conference. "MDLs are not one-size-fits-all and many of the environmental and toxic tort cases I litigate involve diverse claims pursued by a range of people and entities." There are no parameters in the rule about qualifications to be coordinating counsel. By way of comparison, interim class counsel under Rule 23(g) must have a client. Without this interlocutor, there may be competing reports. If the court designates somebody as coordinating counsel, the parties will treat that person as de facto lead counsel because the court "has blessed this individual." This effect could stifle divergent views. In one toxics MDL, for example, the court received two competing reports and ended up establishing separate tracks for claims of different sorts. The worse case scenario haunts this proposal.

Diandra Debrosse: I am not part of the "old boys network," and that is the likely source for this early appointment. So including this provision will impede new entrants. Inevitably this person will hold great power even though the judge has not explicitly granted that power.

Dena Sharp: "The draft rule and note promote the flexibility and discretion that an MDL transferee court needs to effectively manage its docket in a manner that is tailored to the needs of the unique MDL before it." But Rule 16.1(c) has too many topics on its list. Instead of frontloading all those topics, the court should be urged to hold periodic status conferences. One approach would be to add this to the introductory text of Rule 16.1(c): "The transferee court may determine, or a party may suggest, that certain topics should be addressed on a preliminary basis at the initial conference, or deferred to a subsequent conference, as appropriate to the needs of the MDL, and consistent with Rule 16.1(d)."

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: This proposed rule is particularly gratifying to me because it fulfills my own decade-long crusade championing a rule amendment to address MDLs. "I urge the Committee to stay the course." I was the first to compare the statistics maintained by JPML staff with those of the A.O. and found then that MDLs included more than 40% of pending civil cases, and that percentage has recently jumped to more than 60%, largely due to the 3M Combat Earplug MDL. I offer 43 style and formatting suggestions. More generally, the Committee Note overreaches when suggesting that its recommendations might also be suitable for other multiparty litigations. The draft goes too far, and ventures into areas far afield. The Manual for Complex Litigation is a more suitable guide for such litigation. In addition, the Committee Note at lines 132-43 should be revised to add the following:

> The germaneness and urgency to address certain topics at the initial management conference will depend on the nature of the MDL, the judge's and parties' familiarity with MDL practices and procedures, and the importance and necessity of input from leadership counsel, who may not yet have been appointed. Subdivision (c) lists certain case-management topics that might be useful to discuss at the initial management conference, particularly in some large MDLs, but expressly provides discretion to the court and the parties to address other topics. Those other topics are described in the Manual for Complex Litigation, which contains more comprehensive lists of topics that may be useful.

There is actually little consensus on what topics should be addressed up front. Focusing on a select prescribed list of topics is not likely to be useful. "There is no reason to believe that the bench and bar will behave differently after the Rule takes effect. In fact, by enshrining these selected topics in the rule without meaningful clarification, the bench and bar likely will focus solely on them, disregarding many topics that might be more important under the specific circumstances of the case.

Frederick Longer (0019): I commend the Committee for its efforts to provide some structure for modern MDL practice, but many of the rule's fixes amount to solutions to problems that do not exist or are matters best left to practice guides. LCJ, for example, said that the rule is "aspirational," and not really a rule. The rule is not necessary. The problems cited in pharmaceutical product MDLs are not present in other types of MDLs. "Calls for a uniform MDL rule mandating receipts or medical records at jump street amounts to overkill for most other MDLs." I believe that benign neglect is the best course. If the Committee insists on proceeding, some Note mistakes should be fixed. A leading example is that the Note compares class actions (with commonality requirements) to MDLs. But in a data breach MDL consisting solely of consolidated class actions, that's too broad a brush and the Note could haunt class counsel. I think that sentence should be removed. In addition, it could be beneficial to remove the word "initial" from the description of the management conference called for by 16.1(a); this should be an iterative process.

Norman Siegel: There is a facial disconnect between proposed 16.1 and the MDL cases my firm typically handles, which are class actions. The disconnect is evident throughout the entire rule, which fails to take account of the reality that many MDLs are made up of class actions. The "coordinating counsel" position, for example, could be counterproductive in class actions. In MDLs consisting of multiple class actions, the first order of business should be a schedule of motions for appointment of interim class counsel. And Rule 23(g)(3) on interim class counsel already exists. I propose three solutions: (1) Exclude MDLs consisting solely of class actions from the rule; (2) As to "hybrid MDLs" (consisting of class actions and individual actions), the rule should be clear that nothing in 16.1 supersedes Rule 23(g); and (3) if "coordinating counsel" is retained, the rule should make it clear that this position is limited to purely ministerial duties pending the appointment of interim class counsel.

Jennifer Hoekstra: There is no urgency about adopting a rule. MDL counsel and transferee judges are not attempting to circumvent the FRCP. "The Committee must understand that there have been decades of MDL litigation where the FRCP, as they exist, have already been adequately applied. Codifying the types of clauses included in proposed Rule 16.1 will have an unintended consequence of changing the fabric of mass torts unless this committee considers [my] comments." There are already more than enough sources of guidance for handling MDLs, including the Manual for Complex Litigation and the Annotated Manual for Complex Litigation. If the rule goes forward, 16.1(c) should be limited to (1) (leadership counsel); (2) (scheduling order identification); (3) (identifying factual and legal issues, though without prejudice to later revision); (10) (managing new filings); and (11) (whether related actions have been filed in other courts. As to the other matters, there is a significant disadvantage for plaintiff counsel and the rest should be stricken from the rule.

Patrick Luff: I share the concern of an Advisory Committee member about "mission creep." "A seemingly innocuous rule providing mere suggestions for early management could quickly become an unwieldy leviathan." On that, recall the length of the Manual for Complex Litigation. On the particular issue of "claim insufficiency," the Committee might wisely not try to devise a rule for MDL proceedings; "the matter would better be dealt with through an amendment of Fed. R. Civ. P. 23 that allows class certification of individuals injured by corporate misconduct." "The solution is simple. Amend Rule 23 to relax certification requirements and allow for class treatment of personal injury and consumer protection claims."

Emily Acosta (testimony & 0020): From a mass torts plaintiff-side background, I believe some of the proposed changes strike an appropriate balance, but others raise serious concerns. I generally support the idea of an MDL management conference. But I disagree with several specific proposals. Most of the items in 16.1(c) should be removed, or at least no "formal, written report" to the court should be required. Instead, 16.1(c) should only say that counsel should "be prepared to address" the enumerated topics.

A.J. de Bartolomeo: At the earliest stages of the cases, the plaintiffs (unlike the defendants, who have fewer organizational problems) are often not really in a position to deal with most of the issues listed in Rule 16.1(c). Only after formal leadership is appointed would it be timely to address those issues.

Lise Gorshe: As a plaintiff lawyer, I support the proposed rule as a method to provide guidance to courts and parties. But in the mass tort context, I find some provisions troubling. The coordinating counsel provision in 16.1(b) is not a good idea. "In fact, appointing first a coordinating counsel that is later replaced by leadership counsel may slow the process when continuity is lacking." And the list of topics in 16.11(c) includes many that should not be addressed until leadership has been appointed. This applies to topics (4), (5), (6), (7), (9), and (12). Scheduled status conferences will provide occasions for the judge to monitor and supervise these topics.

Rachel Hampton: From the perspective of a young lawyer, it still seems like much of this material deals with "inside baseball" issues. It would be useful to have a road map for MDLs, since currently they are not mentioned in the FRCP.

Jennifer Scullion: The best way to achieve efficient management of MDL proceedings is through early and continuing management. But the proposed rule tries to do too much, too soon. Combining both the selection of leadership counsel and many topics that leadership will have to address at the same time is not sensible. Often it will not be possible early on for plaintiffs to identify the principal factual and legal issues. And the draft seems to invite attention to "early discovery" based on that forecast. The potential for phasing, bifurcation, etc., is often one of the most hotly contested issues in litigation. Similarly, modification of existing scheduling orders, the possibilities of consolidated pleadings, the timing and nature of motions to dismiss and for class certification and a proposed discovery plan are all matters the parties should have more time to consider. And settlement is among the most important issues in many cases. "While it certainly can be helpful to begin addressing settlement processes early, it makes better sense to settle on a leadership structure and map out some of the 'big picture' issues first, rather than having the parties submit premature proposals through an ad hoc drafting process." At least the rule should be softened to say that the initial conference is to allow the court to "consider and take appropriate

action" on the leadership and imminent scheduling matters set forth in 16.1(c)((1) and (2). The coordinating counsel idea should be removed. And 16.1(c) should not call for a report, but only that counsel be prepared to discuss specified issues with the court at the initial management conference.

Feb. 6, 2024, Online Hearing

Mark Lanier: What problem is this rule trying to solve? It seems designed to provide guidance to judges because they will have a big job handling an MDL. The rule was not proposed because something is broken, but the rule goes further than mere guidance to judges. As drafted, it will add complexity to MDL proceedings and reduce both efficiency and justice. The fact that the number of actions subject to an MDL transfer order has increased is not a problem, and not due to the growth in unsubstantiated claims. Indeed, the number of MDLs has declined int he past decade, and only 10% of those MDLs involved more than 1,000 actions. The growing total number of actions in MDL proceedings is largely a function of the length of time it takes to resolve a complex MDL. And just now, the main reason the MDL actions are such a large portion of the federal civil docket is the 3M earplug MDL. The vast majority of those claims are valid and are being settled.

Jessica Glitz: MDLs are so varied that there is no "magic formula" for handling them. And though a small number of MDLs include the great variety of all individual actions within MDL proceedings, actually only a small proportion of MDLs approach this dimension. At present, nearly 60% of the MDLs have fewer than 100 cases.

Ellen Relkin: Based on decades of experience in MDLs, I can report that they have functioned well for decades. Relatively recently, there has been a concerted campaign by the defense bar to obtain legislation or, when that did not work, rule changes to erect barriers to product liability MDLs. The current proposal is not necessary, though it may be slightly helpful to some new MDL judges in the initial handling of a new MDL assignment.

Jennie Anderson: The proposed changes appear mainly directed toward mass tort MDLs, and not those comprised mainly or entirely of class actions. Rule 23 already exists to govern class actions, and Rule 23(g) provides criteria of interim class counsel. The rule should only apply to mass tort MDLs.

Seth Katz: Based on extensive experience in MDLs, I see some components of the proposed rule that will improve or "codify" what is being done by many transferee courts. But other components, though drafted with good intentions, are likely in practice to create less efficiency or result in confusion. Specifically, in terms of the items listed in 16.1(c) it is useful to focus on (1) appointment of leadership counsel; (2) identifying scheduling orders that might be vacated or modified; (3) identifying the primary factual and legal issues to the extent known; and (4) managing the filing of new actions. This shortened list focuses on what should be addressed up front. But discussion of the remaining topics in 16.1(c) would be premature because they all require substantive decision-making about the case itself, which is not possible until leadership is appointed. There is a risk that this list will become an ill-informed box-checking exercise.

Roger Mandel: There should be a two-tiered approach to initial organization of an MDL, with most of the topics listed in 16.1(c) deferred until leadership counsel are in place. I attach a proposed rewrite of the proposed rule and Note to implement these suggestions. Among other things, the revision addresses the reality that leadership in class actions (if included in the MDL) must be appointed differently from plaintiff leadership counsel. I see nothing in the testimony on this proposal – from either side of the v. – arguing against deferring attention to most of the issues until after appointment of leadership counsel. Taking this approach will alleviate major stakeholder concerns.

Lauren Barnes: Most of my MDL experience is with class actions, and they are not really suited to this rule. I think the rule should exclude MDL proceedings made up primarily or exclusively of class actions. Alternatively, an explicit cross-reference to Rule 23(g) in Rule 16.1(b) and 16.1(c)(1)(B) should be added. The rule should also state that the role of coordinating counsel is purely ministerial pending appointment of class counsel. I addition, the reference to consolidated pleadings should acknowledge that under Rule 23 it may be that a consolidated class action complaint is all that is needed, and is usually provided now without the need for this new rule.

Kellie Lerner (President, Committee to Support the Antitrust Laws): Although mass tort MDLs represented hundreds of thousands of individual actions, most MDLs are not mass torts. So a rule for all MDLs must consider the diverse range of cases that are subject to transfer under § 1407 and whether a rule animated by just one kind of MDL should apply to others that do not implicate the same issues.

William Cash: It is essential that any rule ensure that MDL judges retain their traditional flexibility to handle the MDLs assigned to them. "I have never seen an MDL judge who did not approach MDL procedure as the unique animal that it can be." But the proponents of this rule seem to think there is too much variation from judge to judge, so that a uniform format should be prescribed. I do not understand this to be a problem worth solving. So the directive in 16.1(c) that the judge may select appropriate topics for the report, but 16.1(d) then says that the judge "should" enter an order afterwards. The implication is that every one of the factors set out in 16.1(c) must be the focus of the court's order, even if not particularly relevant to this MDL. The problem is that "suggestions" in rules "sometimes have a way of calcining by practice into mandatory inflexible 'musts' later." The Rule and Note should be modified to emphasize that the court retains flexibility. The Note or Rule should be amended to make clear that it may not apply to every MDL.

Max Heerman (Medtronic): MDL proceedings impose huge costs on defendants. "Every dollar that Medtronic and other Life Sciences companies unnecessarily spends on MDL litigation could be used far more productively to provide more jobs, return money to shareholders, and – most importantly – improve healthcare for patients." I focus my concerns on (c)(4).

Jessica Glitz: It is notable that nearly 60% of the currently active MDLs have fewer than 100 cases in them. For decades, these MDL proceedings have used the FRCP, and there is no urgent need for an additional rule in the average MDL. I agree that some features of it might be of use, such as initially addressing selection of leadership counsel, providing a schedule for additional management conferences, providing for management of newly-filed actions, and management of related actions, many other issues should not be addressed until leadership counsel are appointed.

Seth Katz: Don't "fix" what is not broken. Though some aspects of proposed 16.1 may improve MDL practice, others are problematical. The coordinating counsel proposal could cause confusion or even chaos. If this is to be a neutral, that seems to usurp the position of the magistrate judge. The proposal is unclear about where this person's powers start and end. Only a few of the topics in proposed 16.1(c) are suitable for discussion prior to appointment of leadership counsel. What would be better than this proposal is a much more limited rule that calls for a very early management conference addressing only a short list of subjects.

Dimitri Dube: Proposed 16.1(b) will automatically stifle diversity. The plaintiffs' bar can self-organize and give appropriate weight to diversity. The Note to 16.1(c)(1) does take a balanced approach to leadership counsel appointments. But the 16.1(b) appointment happens too soon.

Written Comments

Andrew Straw (0012 & 0013): We need a national standard for how to implement state court rules applied to an MDL. Whenever an MDL court decides an issue of state law, that court should be required to certify those question of state law to the relevant state supreme court, and to be bound by the answers. In MDL 2218, the MDL court said one thing about state law and the state supreme court adopted a different interpretation. In addition, it should be required that if the court of appeals having jurisdiction over the MDL court makes a decision interpreting state law, that interpretation should be binding after return of the case to the originating court. In addition, to avoid the problem of "alien circuits" deciding the meaning of state law for states outside their circuit, MDLs should be created in the same circuit where the injury actually occurred.

Prof. Charles Silver (0015): This comment attaches copies of the following articles: Charles Silver & Geoffrey Miller, The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal, 63 Vand. L. Rev. 107-77 (2010); and Robert Pushaw & Charles Silver, The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations, 48 BYU L. Rev. 1869-1959 (2023).

James Beck (0017): In this century, the MDL procedure has had an effect opposite to what Congress wanted in 1968. Instead of promoting judicial efficiency, it has had the opposite effect, at least in mass-tort MDLs. These developments have led to a wholesale abandonment of the Federal Rules. Against this background, proposed 16.1 falls far short of addressing the real problems. Nearly 80% of pending federal civil cases are in MDLs, but the rules do not address the unique adjudicatory and administrative problems these agglomerations cause. The rules were crafted decades before MDL proceedings arose, so it is not surprising that they do not address these problems. Without uniform rules, there is no predictability in MDL proceedings. The rules regularly neutered in MDL proceedings include the following:

> Rule 3: This rule is circumvented in MDL proceedings that use filing alternatives like an "MDL census" or "census registry." These provisions do not require claimants to state a claim, but only to "register" their claims with a third party claims administrator. These claimants are relieved of the need to pay a filing fee, as are ordinary plaintiffs. And this has been used in at least three large MDLs – 3M Earplugs, Zantac, and Juul Labs. "MDL courts' refusal to follow Rule 3 effectively eliminates any barriers to asserting claims. * *

* The lack of a Rule 3 complaint essentially freezes each MDL claimant's suit, since the filing of a complaint is what triggers the application of other FRCP."

Rule 7: Repeatedly, MDL courts have departed from Rule 7 by allowing "master" complaints. Some excuse their failure to follow the rules by characterizing these submissions as "administrative tools." The predictable result is that large numbers of unvetted plaintiffs remain in the MDLs for years. A rules change could fix this problem. Many MDLs feature pleadings that do not exist under Rule 7.

Rule 8: Under the Supreme Court's *Twombly* and *Iqbal* decisions, MDL courts preclude individualized motions that are routine in individual civil actions and critical to policing insufficiently pleaded claims. "Refusal to apply Rule 8 to MDLs is only getting worse." In one case, a master nullified Rule 8 altogether by treating fact sheets as a substitute.

Rule 12: "Despite Rule 12(b)'s critical gatekeeping role, MDL courts have postponed or even refused to consider defendants' Rule 12(b) motions, despite the Rule not providing for postponements or rejections, in either MDL proceedings or any other civil litigation."

Rule 16: The *Opiates* litigation pushed Rule 16 "right to the edge."

Rule 26: In MDLs, plaintiffs are often excused from making required initial disclosures. In addition, some courts reorient the "proportionality" requirement of Rule 26 to look not to the proportionality with regard to the individual claim, but instead with regard to the overall MDL proceeding.

Rule 56: In some MDL proceedings, courts permit a postponement under Rule 56(d) without requiring what the rule says must be supplied – an affidavit supporting postponement of the court's decision.

Proposed Rule 16.1 does nothing to prevent MDL transferee judges from failing to follow these rules. "Given the enormity of the problem * * * it is questionable whether proposed Rule 16.1 * * * is worth the effort."

Federal Magistrate Judges Association (0018): "The FMJA Rules Committee members fully endorse the new rule and its flexible approach."

Maria Diamond (0029): I question the purpose behind the rule proposal. What problem are we trying to solve? The rule goes much farther than providing mere guidance to judges, and would add unnecessary complexity of an already complex process. For example, the coordinating counsel idea will mainly add complexity. Defense representations that MDLs are "overwhelming" the courts are wrong.

Hon. Charles Breyer (N.D. Cal.) (0031): I have conducted more than a dozen MDL proceedings. I am a "recent convert to the rules process directed to Multidistrict Litigation." My case management decisions in MDL proceedings have always been guided by the Federal Rules of Civil Procedure. Proposed Rule 16.1 addresses the goal that litigation be "just and efficient" by providing the parties with a checklist of options that, in any given case, may achieve efficiency and a just result. I was an early skeptic about rulemaking in this area, but am now a convert in light

of the "precatory, as distinct from mandatory" nature of this rule proposal. "I urge adoption of proposed Rule 16.1."

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. We believe "the Rule is a good idea and orients judges and counsel to the court case management principles that effective case management requires." In particular, early vetting, two-way discovery, and coordination with overlapping litigation in state court will help move along meritorious claims while eliminating meritless ones.

Laura Yaeger (0033): This rule reflects steps MDL transferee judges are already taking to address preliminary matters. But it broadens the scope of matters typically covered at the initial management conference. In particular, I think it would be premature then to address exchange of information about the basis for claims asserted, whether consolidated pleadings should be prepared, a plan for discovery, likely pretrial motions, measures to facilitate settlement, and whether to refer matters to a magistrate judge or a master. Each of those topics requires substantive knowledge of the case and would be better addressed after the judge appoints leadership counsel.

Minnesota State Bar Association (0034): The MSBA has voted to support these rule changes. It believes they will foster increased transparency and possibly efficiency between parties and the court.

John Rosenthal and Jeff Wilkerson (0035): Without changing the draft on the subject of early vetting, we think that LCJ is right that it would be better to have no rule than the current draft. Though it is true that early management is key, the "endless barrage of advertising for personal-injury claims on television, radio, and social media" calls for more vigorous vetting. The current draft functions largely as a checklist of things the courts *may* address in an early case management conference. This does not serve the ordinary function of a "rule," since it provides suggestions rather than instructions.

American Ass'n for Justice (0043): The proposed rule provides the flexibility that judges and parties require. MDLs come in many sizes, and too much rigidity is unnecessary for small MDLs, hampering and delaying the resolution of claims. AAJ appreciates the consideration the Advisory Committee has given to class action MDLs, mass action MDLs, and MDLs based on non-product liability claims. AAJ's major concerns are that the coordinating counsel position should be removed and that it would be premature to focus on many of the topics identified in Rule 16.1(c) at the initial management conference. "If the rule lists multiple topics, then discussion of those listed topics will become the default even if the parties need to focus on the basic structure of the MDL early in the litigation. A judge who insists that the parties address each of these topics will often produce a waste of time and resources. The rule tries to do too much, too soon.

A. Layne Stackhouse (0046): Some of the provisions of Rule 16.1 make sense, but several of the topics listed in 16.1(c) will not be ripe of action at the initial management conference. These matters should be addressed only after leadership counsel are appointed.

Warren Burns, Daniel Charest & Korey Nelson (0048): One important matter was left off the 16.1(c) list – motions to remand cases transferred by the Panel. At least for cases originally filed in state court, the rule should state that the court ought to act promptly to resolve motions to remand the state courts from which they were removed when plaintiffs challenge that removal. Removal weakens state sovereignty. And the federal courts' have a duty to determine whether they actually have subject matter jurisdiction of removed cases. Of particular concern is the possibility that Rule 16.1 might encourage the development of early assessment of the merits of claims presented. MDL courts must not address the merits of cases in the MDL until they verify that they have jurisdiction over those cases. Therefore, 16.1(c) should add the following:

> (13) how and when the court will rule on any pending motions to remand matters to state court.

John Yanchunis (0049): This rule is not suitable for MDLs that consist solely or mainly of class actions. For one thing, interim class counsel under Rule 23(g) would make coordinating counsel under proposed Rule 16.1(b) unnecessary. And Rule 23(g) enumerates the factors to govern appointment of class counsel, but Rule 16.1(b) falls woefully short in that regard. Accordingly, if only class actions are centralized, they should be excluded from this rule. With hybrid MDL proceedings – including class actions and individual actions – it should be made clear that nothing in 16.1 supersedes Rule 23(g). Finally, if coordinating counsel is retained it should be made clear that such a person's role is limited to purely ministerial duties until class counsel are appointed.

Pamela Gilbert (COSAL) (0051): COSAL requests that the Note be amended to clarify that other rules and statutes apply when class actions are included in an MDL proceeding. It should be made clear that this rule does not supplant Rule 16.1 or the PLSRA.

Nardeen Billan (0052): As a law student, I offer a comment on the use of the word "should" in the draft rule. "The word 'should' is prickly. It is a modal verb, used as a recommendation or suggestion. Initial management of MDL cases allows for appreciation on both sides of the 'v.' Overall, its malleability allows for more of a reach than having a limiting effect."

Amy Keller (0053 and 0068): "It is important when considering a rule that would apply to *all* MDLs that the Committee not treat the rule as a 'one-size-fits-all' *requirement* (which may be the case, even if language like 'may consider' is used)." It is also important to take note of the PSLRA, which has a statutory direction how the lead plaintiff is to be selected in many securities fraud class actions.

Lawyers for Civil Justice (0053): There is only one "rules problem" identified in the comment on Rule 16.1 that can be addressed via the rules without creating harm. That is the problem of insufficient claims aggregated into an MDL. There are no "rules problems" regarding appointment of leadership counsel, facilitating settlement, managing direct filing, appointing special masters or preparing pleadings that are not allowed by Rule 7. Rulemaking on these topics would produce substantial negative consequences.

In-house counsel at 33 corporations (0056): Enforcement of the requirements of FRCP 3, 7, 8, 9, 10, 11 and 12 can ensure that the constitutional requirements of Article III standing are satisfied. But these rules are ineffective in mass tort MDLs.

Mary Beth Gibson (0059): My extensive experience with MDL practice persuades me that the procedure for appointment of leadership works in its current form. Only after that appointment occurs should the court's attention turn to the many matters identified in draft 16.1(c)(2)-(12). There is a risk that this rule could upend the natural and existing process. In particular, the idea of "coordinating counsel" under 16.1(b) is unwise.

Ilyas Sayeg (0062): The implication in the draft Note that the rise in number of cases in MDLs presents a problem is mis-directed. Defense side claims that rising numbers show there is a problem are simply not true. The draft's seemingly inflexible insistence on discussion of all items listed in 16.1(c) at the initial management conference could prompt a new MDL judge to force the litigants to spend needless time and energy on a premature discussion of issues that should be addressed later. I think that proposed 16.1(c)2), (3), (8), (10), and (11) are appropriately included in the list. But items (4)-(7), (9), and (12) should not be on the list for the initial conference.

16.1(b) – Coordinating Counsel

Oct. 16, 2023, Washington, D.C. Hearing

Leigh O'Dell: To expect "coordinating counsel" to provide adequate information on many of the topics listed in 16.1(c) is unworkable. The rule does not require that this person have any stake in the litigation. In some instances, there may be competing theories of the case and different slates of attorneys vying for leadership. In such instances, the court must make a leadership appointment before addressing substantive issues in the proceeding. The appointment of leadership is an issue that affects almost exclusively the plaintiffs' side. It is extremely important for plaintiff lawyers to have leadership appointed quickly. The use of coordinating counsel inserts a two step process into the selection of leadership without establishing any criteria for the vetting process for coordinating counsel. Under this setup, the court will have to undertake a second process of appointing more permanent leadership.

Jan. 16, 2024, Online Hearing

Jeanine Kenney: In MDLs including class actions, this proposed rule is out of place. What is needed is appointment of interim counsel under Rule 23(g). "I am not aware of any class action MDL where interim class counsel has not been appointed." The bench and bar would be better served by a rule limited to mass torts, or at least that specifies that the rule is not designed for "simple MDLs."

Mark Chalos: Including this provision carries unnecessary risks. The rule does not explicitly give the court space to implement a process to consider applicants for this position in advance of this designation. So this will worsen the "repeat player" problem. Without a prescribed selection process, the court potentially will be inclined to base this designation only or mostly on the court's experience with the lawyer, or other such things. Moreover, it seems likely that coordinating counsel will have the inside track on being appointed to leadership, exacerbating the "repeat player" concern. Moreover, this is unnecessary. Without such a designation, on the plaintiffs' side counsel will work their differences and arrive at a consensus, or present them to the court to sort out in due course. I favor eliminating 16.1(b), though something of the sort might be mentioned in the Note.

Tobi Milrood: AAJ (of which I was president a few years ago) has deep reservations about this provision. "Concerns about early organization can be addressed without a rules-mandated appointment that may lead to unintended consequences." For one thing, "a formal rule-based title could be seen as the logical stepping-stone to permanent leadership." If this provision is retained, it would be better to use the term "interim." Permanent leadership, not temporary leadership, should decide what discovery should be pursued, what pretrial motions to make, whether the court should consider measures to facilitate settlement and whether matters should be referred to a magistrate judge or master. Instead of this rule provision, a Note "could urge the MDL judge to use the preliminary conference as an opportunity to invite those counsel who have vested interest, resources and are engaged in the litigation to assist the Court with some of the preliminary matters."

Alyson Oliver: From a plaintiff perspective, my view is that if the coordinating counsel remains in the rule it should remain as flexible as possible. But I think adding such a step is not necessary and therefore that this provision should be eliminated in whole. Otherwise, it will substantially increase the costs of litigation. Without a vetting process to select coordinating counsel, the court will be left with no input from the lawyers who have a stake in the litigation. As a consequence, for a designated coordinating counsel it may involve a considerable amount of work to get up to speed. Surmounting that learning curve is not free. Moreover, to the extent the views of this court-appointed lawyer are given importance by the court, the effect will be to slow the proceedings down.

Dena Sharp: In recent MDL proceedings the term used for this sort of position has been "interim" counsel. That should be considered.

Jose Rojas: The rule does not provide explicit criteria on who should be selected or whether serving in this position would preclude later participation in leadership counsel. Absent extraordinary circumstances, transition from coordinating counsel to leadership should be discouraged absent evidence that the person selected as coordinating counsel satisfied my proposed changes to the leadership counsel provision (presented below). Perhaps prominent MDL practitioners who often are appointed to leadership would be sensible choices for the coordinating counsel position, but the rule should be amended to add the following: "Designation as coordinating counsel does not presuppose a subsequent leadership role in the MDL proceedings." And the Committee Note language at lines 184-92 should be replaced with the following:

> While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference.

James Bilsborrow: The coordinating counsel idea could have negative effects. The rule provides no parameters for this appointment and, given the early stage in the litigation, the transferee court is likely to choose lawyers familiar to the court rather than those most familiar with and best positioned to successfully litigate the cases. In my experience, transferee judges encourage plaintiffs' counsel to informally coordinate in addressing a set of issues identified in an initial order. This approach allows for the various stakeholders to be heard. In the dicamba herbicides MDL, on which I worked, this sort of arrangement permitted two groups of plaintiffs' counsel to submit reports to the court, and the court ultimately appointed members of both groups to leadership and set a separate litigation track for certain sorts of claims. "Had the court appointed coordinating counsel, this minority proposal might not have made it into the Rule 16.1(c) report." There is little lost in permitting multiple reports to the court, but the rule will likely curtail presentation of diverse plaintiff viewpoints. The rule should ensure that coordinating counsel do not make substantive decisions that bind leadership counsel.

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: In the Committee Note, lines 122-26 should be deleted because they restate what is already stated at lines 118-21. In addition, the Note uses the confusing phrase "facilitate the management of the action." What does that mean? Regarding lines 126-27, they should be rewritten: "After the initial management conference, the court ~~may designate~~ can consider retaining the coordinating counsel to assist ~~the court~~ it on administrative matters before leadership counsel is appointed." The draft is ambiguous.

Does it refer only to appointing coordinating counsel before the initial conference and before appointing leadership, or is it intended to apply to an appointment that continues after the initial management conference?

Dena Sharp: The Committee should consider using the term "interim counsel" rather than "coordinating counsel." This nomenclature has already been adopted by some MDL transferee judges. Possibly the Note should refer to Rule 23(g), though leadership considerations in MDLs differ from class actions. On that score, the Note should be rewritten: "MDL proceedings in non-class cases may ~~do~~ not have the same commonality requirements as class actions, . . . "

Frederick Longer: So far as I know, this "coordinating counsel" position has never before existed. The newly minted designee is not well described in the proposed rule or the Note. Adding new layers of counsel could spur contest within the plaintiffs' bar for an interim, undefined position that is unnecessary if the court were instead to address appointment of leadership counsel.

Jennifer Hoekstra: This provision is redundant and duplicative; it might even curtail judicial discretion in selecting leadership. It is silent about the requirements or experience required of such persons. "Would someone who was involved in the Talc litigation be appointed to coordinating counsel in an antitrust litigation?" "Although criticism of 'repeat players' in mass torts exists, the expertise gained from years of experience working on complex litigation cannot be substituted by an inexperienced third party." Moreover, this coordinating counsel position appears duplicative of the magistrate judge or master appointment. Why add another layer to an already complicated system?

Emily Acosta (testimony & 0020): There is little need for this kind of rule. And this rule proposal does not even contain a requirement that the attorney selected actually have a stake in the litigation, such as representing a claimant. This targets an issue that is almost exclusively about the plaintiff side. But this person can't really do much. "[B]oth sides cannot have productive conversations about how to organize and move a litigation forward unless and until both sides are vested with decision-making authority." The Committee should remove (b) because it would "disrupt the natural coordination that already occurs and, as written, is ambiguous and does not provide the court with appropriate guidance."

A.J. Bartolomeo: I request that the Committee provide more clarity as to the role and responsibility of Coordinating Counsel. As things presently stand, this addition may create more complications in MDL proceedings. Guidance can be found in § 10.221 of the Manual for Complex Litigation. Moreover, 16.1(c) "requires that the transferee court 'should order the parties to meet and prepare a report'" on twelve topics. But that should not happen until leadership counsel is appointed. If the Committee wishes to proceed, it should adopt a new 16.1(e):

> After the appointment of lead counsel through the process identified in subparagraph (c) above, the court shall direct plaintiffs' lead counsel to meet with defense counsel to consider and report to the Court on the following matters in connection with the Rule 26(f) conference, to the extent these matters are not already addressed by Rule 26(f):

This should be followed by what are now in 16.1(2)-(12). Otherwise, the rule could inadvertently put the plaintiffs and their counsel at a disadvantage when discussing the items now listed in 16.1(c).

Michael McGlamry: While defendants come to an MDL with their chosen counsel in place and prepared to move forward, that is not true on the plaintiff side. So the court has a responsibility to decide how best to structure the plaintiff leadership. Given the importance of that project, there seems no reason to hurry things as this provision appears to dictate. "[W]hy not take 30-60 days up front to appoint a complete, diverse, and appropriate Plaintiffs' leadership team?" The rule does not answer that question; to the contrary "there is no criterion, no process, no direction, and no structure" for the choice of coordinating counsel. But "until Plaintiff's Leadership is put in place, constant and intense pressure, manipulation, negotiations, and alliance building will occur behind the scenes." Moreover, it's not fair for coordinating counsel to make the decisions about many of the matters listed in proposed Rule 16.1(c). "[P]roposed Rule 16.1 empowers coordinating counsel, who are selected absent any criteria, process, direction, or structure, to bind all plaintiffs for all time."

Norman Siegel: It would be all right to have somebody like this to handle "ministerial" tasks, but most of the things listed in 16.1(c) go well beyond that. A discovery plan, for example, is extremely important to the entire litigation.

Jayne Conroy: From a mass tort context, I am opposed to this concept. It mainly adds another layer and is potentially harmful to both sides. In particular, it is a potential step backwards for diversity. MDL transferee judges have made a real effort to diversify leadership and they have succeeded. But adopting a coordinating counsel provision could blunt this worthy effort. The topics listed in 16.1(c) are too important to be handled by this person.

Feb. 6, 2024, Online Hearing

Kelly Hyman: As a solo plaintiff-side mass tort practitioner, this provision raises concerns for me. Neither the rule nor the note provides clear criteria for who should be selected. Courts are likely to appoint repeat players. This vagueness makes the coordinating counsel position an automatic leadership appointment. It will lead to unnecessary repetition of work and a secondary fight for leadership. The draft does not even require the court to appoint a lawyer with a stake in the litigation, suggesting that the court should consider the role like a special master, but a neutral appointee would be subject to a steep learning curve. I agree with Jose Rojas, who supported "broadening the leadership committee." This provision "limits diversification of practitioners with specialized interest and experience in the litigation. I think this provision should be eliminated unless language is added to specify the distinction between this position and leadership counsel. Often the plaintiff side can self-organize; this provision is not needed, and its vagueness is troubling. Using the term liaison counsel might be more familiar and less troubling.

Jonathan Orent: The coordinating counsel provision should be eliminated; it would probably become standard practice and it would create significant risks. Since the rule provides no criteria, the rule makes it likely that courts will base these designation on experience with particular lawyers. That would place familiarity over qualification and diversity of experience and background in selection of what would undoubtedly be a leadership position in the litigation.

Moreover, this provision would result in duplication of judicial effort. There is no need for this layering or duplication of process. There very often is a local liaison counsel to facilitate dealing with the court in a manner that the court ordinarily uses, a sort of "administrative liaison."

Mark Lanier & Rebecca Phillips: Only plaintiff's counsel has the experience-based insight necessary to make leadership structures work and work well. This provision should be stricken, and 16.1(a) should be amended to state that the main goal of the initial management conference is to Appoint leadership counsel, with all other "prompts" in the rule made discretionary. Under the proposal, the court must – without guidance – make an important decision, and coordinating counsel "must take substantive positions on behalf of plaintiffs" with regard to the other matters listed in 16.1(c). How can the court know whether the selected lawyer is at odds with the other lawyers? How can the court know whether this lawyer is accurately representing the positions of other plaintiff lawyers? Permitting this lawyer to make important decisions for the plaintiff side risks prejudicing plaintiffs. "My firm has already had a negative experience with a protocol similar to that contained in Proposed Rule 16.1, requiring the submission of a joint report before leadership is appointed." There were significant differences among counsel about how to proceed. In terms of early presentation of evidence, it is important to keep in mind that defendants are the ones with proof of product use. That reality is central to the decision in the Federal Rules not to require plaintiffs to prove their cases at the outset.

Jessica Glitz: Since most MDLs have fewer than 100 plaintiffs, designating coordinating counsel would be obsolete. Ordinarily a small group of attorneys have organized themselves prior to the initial MDL management conference. In my experience, that's even true with MDLs with more than 1,000 claims. Appointing coordinating counsel would only lead to complications down the road. And sometimes coordinating counsel may be needed in the defense side. In the hair relaxer litigation, for example, there are more than 21 defendants. The right approach is to set up strict timelines for appointment of leadership counsel.

Ellen Relkin: There is no explanation how the judge would go about making the appropriate temporary appointment at the inception of the litigation. Providing for such an appointment may result in the submission of agenda items or discovery suggestions that are not appropriate because the individual selected in not as engaged in the issues as those who initiated the litigation. Certainly the discussion of the issues in 16.1(c)(3) or (4) should not be addressed by such a temporary appointee. Instead, my experience is that is always involving "an organize process whereby those lawyers who are most engaged are presumed or accepted by consensus to be the spokesperson." Creating this new position is a distraction. There has been one instance involving an immediate need for action in which the court appointed several interim counsel. But that is not the norm. "The plaintiffs' bar has its own mechanism to coordinate in advance of the first hearing held by the selected MDL court and generally reach a consensus."

Jennie Anderson: Creating this new position to be appointed before appointment of leadership would be inefficient and potentially damaging, particularly for plaintiffs. It could leave plaintiffs essentially unrepresented at a mandatory meet and confer at which coordinating counsel has been authorized to negotiate with defendants prior to appointment of plaintiffs' leadership counsel. "[T]he proposed amendment appears to hand that same counsel broad authority to meet and confer on far reaching topics." These difficulties are compounded by the Committee Note that says coordinating counsel may later seek a leadership position. That could enable an end run

around the leadership application process and give the selected lawyer an undeserved advantage. The proposed rule provides no guidelines for selecting coordinating counsel, and an application process is required to assure that such lawyers are properly qualified. But providing that process will mean that no time savings are achieved by the appointment.

Ashleigh Raso: I believe the best way to organize an MDL is to appoint *qualified* liaison counsel. When I have had that role, sometimes my tasks go beyond basic communications with lawyers. The additional tasks have included putting together digestible case criteria to ensure that meritorious cases are filed, working with defense counsel on test practices of serving complaints and discovery, working with the court's clerk to create a "Case Filing Master Manual," publishing a plaintiffs-only website where all court orders are posted. "It is crucial to appoint a liaison counsel who is most qualified and actually wants a position that involves high levels of organization and communication. Premature appointment to this position could engender conflicts among attorneys on the plaintiff side, a rush to select leadership that could exclude good candidates, confusion regarding authority, and a lack of diverse candidates being appointed.

Seth Katz: This provision is unclear and unnecessary. For one thing, it's not clear whether this will be one of the counsel or a neutral, how the counsel will be selected, and where this person's powers will start and where they will end. There is a potential for newly appointed transferee judges to consider this "suggestion" mandatory. There is also the unaddressed issue of how this person will be compensated.

Adam Evans: The main problem with this provision is the timing. Partly for that reason, this proposal is unmoored to diversity, capability, leadership potential and other things that are important. There's no context for making this appointment, and the proposal will "hamstring the judges." It will also have an unfortunate effect on the incentives for the plaintiffs' bar, who will pursue this early appointment as the route to permanent appointment to leadership. This early decision will necessarily be made by a judge who is to some extent myopic. It will also incentivize filing of many unvetted claims because having lots of claims on file will be the ticket to appointment as coordinating counsel.

Kellie Lerner (President, Committee to Support the Antitrust Laws): This provision would cause unnecessary delay in class actions. At present, the transferee court selects interim class counsel using a clear set of criteria set forth in Rule 23(g). Otherwise, the time required to appoint leadership counsel is usually not great. Data from the last ten antitrust MDL cases (on which I focus) shows that appointment happens within about 90 days of Panel transfer. Under these circumstances, adding an additional layer of leadership is not warranted. Moreover, the proposed rule does not provide specific criteria for coordinating counsel, which will create confusion in class actions. It is not even clear who appoints this person. Are the various class counsel designated under this rule chosen through private ordering or is the role filled by the court prior to appointment of interim class counsel? And the responsibilities of the role are undefined. Is it an "administrative" role or a "substantive" role? Given that only interim class counsel (or the court) can bind the class, what role is there for this person? In any event, this addition could produce much waste effort. In addition, this provision could impose additional costs and burdens on defendants, who prefer to discuss and negotiate case schedules only with interim class counsel who have the authority to make decisions about these matters.

Roger Mandell: There should be a two-tier approach, with selection of leadership counsel the first step. At the same time, the court should stay all the actions and suspend all scheduling orders, etc. Only "ministerial" considerations should be taken up at the outset. Until formal appointment of leadership counsel, the plaintiff lawyers can self-organize. The key is a deliberative process from the outset; the coordinating counsel provision just lets the judge appoint somebody she knows. Keep in mind the defense perspective; defense lawyers don't want to negotiate with somebody who may soon be out of the case, or at least not in leadership. This rule creates a risk that at least some judges will treat its proposals as "gospel." This position is not analogous to interim class counsel under Rule 23(g). Rule 23(g) was modeled on long judicial experience with appointment of class counsel before it was formally added to Rule 23, and judges used that experience to guide selection of interim counsel also.

William Cash: This provision is confusing and needs better elaboration, if not outright elimination. Among the problems:

(1) There is no mechanism to determine how coordinating counsel should be appointed, which is dangerous because every plaintiff's lawyer who applies for a leadership position will cite appointment as coordinating counsel as a reason for appointment to leadership.

(2) The rule is not clear on whether coordinating counsel are even drawn from the ranks of the lawyers representing the parties. Saying that coordinating counsel may "work with plaintiffs or with defendants" suggests that the appointed person might come from neither side.

(3) In MDLs where plaintiffs are not yet organized, no one person or team can speak for all. There is a risk that defendants would be in a position of choosing their opponents. Moreover, there is a risk that reports will come with "dissents" or competing arguments from different groups. How would that work?

(4) The selection of plaintiff leadership and manner of organization of leadership are not issues on which defendants should have much input. Plaintiffs have no right to tell defendants what lawyers to hire, how they should be compensated, etc.

(5) Many of the other topics in 16.1(c) should be addressed only after leadership counsel are appointed. True, some may say the court will appreciate that initial positions are "just preliminary." Plaintiffs should be allowed to get organized before consequential topics are resolved by the court. Defendants always start with an advantage because they know more. Though that is in some ways unavoidable, adding the coordinating counsel provision puts the cart before the horse.

Jessica Glitz: Because most MDLs have fewer than 100 plaintiffs, the designation of coordinating counsel seems obsolete. With only 100 plaintiffs, there are far fewer attorneys in the room. And in my experience, that is also true in MDLs with over 1,000 claims. "Plaintiffs have become organized, utiliz[ing] platforms and databases to share information when a new tort is on the horizon. Therefore, the designation of a separate counsel to help coordinate the initial conference would only lead to complications down the road. And the proposal raises more questions than it answers. How long is the appointment to last? Can such lawyers be considered

for leadership appointments? Can another coordinating counsel be appointed later in the MDL? The better solution is to set strict timelines and guidelines as to how and when leadership counsel will be appointed. I propose that the rule be changed to say:

> The transferee court should order the parties to meet and be prepared to address, in particular, the appointment of leadership under subsection (1) and its scope. Additionally, the parties should be ready to address any matter designated by the Court, which may include any matter addressed in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

Ashleigh Raso (testimony & no. 0050): Early organization and coordination is critical, and the best way to do that is to appoint qualified liaison counsel. I have held that post, and sometimes my tasks went beyond basic communication with lawyers. The person selected for this role must be well organized. But this provision could prompt a premature fight to obtain this designation, and the rule proposal is confusing on the responsibilities and authorities of such persons. Though acting rapidly has desirable features, rushing to make this appointment may exclude good leadership candidates.

Amber Schubert: I believe 16.1(b) should be removed. This is an entirely new position. "Coordinating counsel" is not a term commonly used in MDLs or other complex litigation. It is not defined, and is not well understood by practicing attorneys. In class actions, in which I work, we already have the term "interim counsel." The two-step process of appointing coordinating counsel before the initial management conference and then leadership counsel after it would create inefficiencies and confusion. And it may be unnecessary, as the Note acknowledges. "In my experience, self-ordering among plaintiffs' counsel prior to an initial case management conference is *the rule* in class actions, not the exception." Retaining this provision would exacerbate the repeat player problem in MDL leadership. The Note discussion of leadership counsel provides guidance about that selection, but the Note to 16.1(b) does not do the same. "In my experience, without adequate guidance, transferee judges often select attorneys for these roles who they have previously appointed in prior cases and are most familiar with." This provision "would hinder diversity and encourage implicit bias in MDL leadership."

Christopher Seeger: Many of the topics identified in 16.1(c) are not suitable for resolution before appointment of formal leadership. In its current form, the rule risks either giving coordinating counsel an outsized role in making critical strategic decisions or producing a report that is not very useful to the court. I am skeptical there is a real need for this rule; there have not been significant problems with initial conferences under the current rules.

Lexi Hazam: Designating coordinating counsel prior to the initial case management conference may deprive courts of the chance to conduct more fulsome vetting of potential leadership, and also shorten the time for qualified candidates to come forward. It might also short circuit attempts by counsel to informally organize in ways that may prove helpful. In addition, an early designation may produce inefficiencies by requiring a transition from one form of leadership to another in the early period of the case. Avoiding this duplication of effort is especially important given that there are no defined criteria or process for selecting coordinating counsel. The solution should be to appoint permanent leadership prior to the initial management conference, and then calling for a report like the one called for by Rule 16.1(c) before the next management hearing.

Federal Magistrate Judges Association (0018): "[t]he explicit recognition that a court may appoint 'coordinating' counsel prior to appointment of any leadership counsel is a helpful management tool. Indeed, appointment of coordinating counsel will assist the court and parties to prepare for the initial conference and map out a preliminary plan, including preliminary issues such as extensions of time to answer and discovery stays. Appointment of coordinating counsel allows additional time to ensure the court has a full appreciation of any differences between and among plaintiffs and the different strengths and skill sets of potential leadership counsel."

Fred Thompson (0041): Creating this new position is not a wise move. "It smells of creating a special guild of professional coordinating counsel who doubtless will see themselves as somehow expert in MDL formation. * * * I can see special masters seeing this slot as a desirable appointment if it is lucrative." It would be better to convene an immediate first hearing of all interested parties to devise methods for appointing leadership, liaison and steering committee members.

American Ass'n for Justice (0043): AAJ has deep reservations about the creation of this new position. One alternative, it seems, might be to call this "liaison" counsel, but that change of name does not address the reality that the rule is not clear about who would be eligible or what criteria should guide the court's selection. Although the appointment of coordinating counsel is optional, a rule providing that the option may make it more likely than not that a coordinating counsel is designated by the transferee judge.

A. Layne Stackhouse (0046): This provision would cause more confusion than it would aid in the efficient and fair litigation of an MDL. The rule contemplates early designation of lead counsel for both sides, which is par for the course already. This new position is ill defined.

Charles Siegel (0060): Adding "coordinating counsel" will not measurably aid any MDL judge, but instead will introduce another layer of needless bureaucracy and complexity.

Gerson Smoger (0069): The coordinating counsel provision should be eliminated even though it is styled as permissive and not mandatory. Though the Note acknowledges that counsel are often able to organize themselves, adopting this rule will likely have adverse consequences. "Once set forth in a formal rule, experience is that it will soon become standard practice even when not expressly mandated." This provision addresses a "problem" that does not really exist.

16.1(c)(1) – Leadership Counsel

Oct. 16, 2023, Washington, D.C. Hearing

Alex Dahl (LCJ) & 0004: The concept of leadership counsel should not be inserted into the rules because it is too fraught with legal uncertainty. The leadership orders of MDL transferee judges have exhibited "the most extreme level of 'ad hockery.'" Many contain no directions for the appointed counsel. Some seem to allow leadership counsel to self-define their own roles. Reportedly, such court orders appointing leadership counsel lacked any limits on the activities of non-leadership counsel in some 22% of MDL proceedings. (See study by Prof. Noll.) But there is no obvious authority for courts to assign leadership counsel the duty to represent clients of other lawyers. Yet (c)(1) seems to embrace this dubious practice. Although appointment of leadership counsel is mentioned in the Manual for Complex Litigation, there is no identified source for this authority. 16.1 certainly does not flow from the MDL statute. The Committee should not enshrine the notion of overriding clients' choice of counsel when doing so is unsupported by law, contradicts state ethics rules, and is not consistent with the Rules Enabling Act. Directing leadership counsel to consult with other attorneys, as ordered by some MDL courts, does not resolve the ethical dilemmas. And such efforts blur the ethical responsibility to keep clients apprised of developments in the litigation. For example, suppose leadership counsel insist on using a particular science expert but other counsel believe another expert would be better equipped to prove plaintiffs' case. How can a court resolve such disputes? Must they be addressed in open court with defense counsel present?

John Beisner: In recent years, there has been a substantial change in MDLs. Until recently, the plaintiff attorneys organized themselves. The court did not have a hand in this activity. But recently the courts have migrated to using an application process to make leadership selections. The biggest concern is the displacement of individually retained plaintiff lawyers. Their clients have hired them to prosecute their cases, yet this rule seems to say the court can tell those lawyers to stand back and leave everything to the leadership counsel selected by the judge. There is not even a rule that requires leadership counsel to consult with the other lawyers. Though one might say this is not the defendant's problem, in reality it is. There is an abiding fear that the excluded counsel will argue that due process requires that their clients get to be represented by the lawyers they selected, not by the ones picked by the judge.

Chris Campbell: Suggesting that the court promptly consider whether leadership counsel should be appointed is undesirable. No definition of leadership counsel is provided in the rule, so including this provision is confusing. The 2020 study by Prof. Noll shows that MDL leadership appointment orders are insufficient. Only about half enumerate the duties and responsibilities of leadership counsel. Additionally, suggesting that the court consider limits on the activities of nonleadership counsel is inappropriate as it asks lawyers who are not selected for leadership to stand down and neglect their client obligations. Though it is true that appointment of leadership is very common, it is also true that we need a specific and clear process.

Leigh O'Dell: From the plaintiff side, defense side worries about encroachment on plaintiff counsel, whether in leadership or not, are new to me. These are, after all, defense counsel, and they surely do not represent the many claimants gathered together in an MDL proceeding. Leadership counsel understandably focus mainly on the central liability issues and not individual causation

issues. When I "can't find my client," too often it's because the client has died or is too ill (as a consequence of using defendant's product) to respond to my inquiries. That does not mean I made an unsupported claim, but only that getting that support sometimes take considerable time due to the harms suffered by my clients.

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Jeanine Kenney: In class action MDLs, the compensation of court-appointed class counsel occurs only if there is a class-wide settlement overseen by the court or a judgment at trial. And Rule 23(h) provides standards for such awards of fees.

Tobi Milrood: Consideration of several topics listed in 16.1(c) is untimely and imprudent before true leadership counsel are appointed. This could empower MDL courts to go beyond their charge of managing only the pretrial stage of these proceedings.

Jose Rojas: Leadership appointments in many MDLs have become a revolving door, with repeat players dominating the scene. That gives the court reassurance that the lawyers managing the MDL have the needed experience, financial resources and structural resources to advance the litigation. Those are all legitimate considerations. But "an over-emphasis on prior MDL experience often results in appointments that fail to be representative of the plaintiffs * * * and fails to ensure diversity of experience and background." To address these concerns, the following should be added to proposed Rule 16.1(c)(1)(A):

> In considering the appointment of leadership counsel, the transferee court should evaluate potential candidates based on their role in advancing the litigation to date, experience and expertise relevant to the subject matter of the litigation, diversity of experience, diversity of background, geographical distribution, nature of claims, and other relevant factors. The court's responsibility is to ensure diverse and capable representation, without unduly emphasizing prior MDL experience.

Diandra Debrosse: The rule should expressly include diversity as a factor in leadership appointments.

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: Rule 16.1(c)(1)(F) should be amended to read "whether and, if so, when to establish a means for compensating ~~leadership~~ counsel for common benefit work." The proposed text is ambiguous and does not reflect existing practice in large MDLs. The Note should be revised to recognize that the court "may decide to appoint leadership counsel, which may include lead counsel, members of a leadership committee (executive or steering committee), and chairs of subcommittees." This revision clarifies the scope of the rule provision. On the other hand, the Note at lines 170-75 (referring to the commonality requirements of class actions) should be changed because that language introduces the concept of mass-tort MDLs as quasi-class actions and may add confusion. The Note should also recognize the potential utility of "consensus-selection proposing a slate of candidates." In many situations, the slate-selection method is the most appropriate. Subparagraph (c) should acknowledge that court involvement in settlement should occur only when the timing is appropriate. At line 226, the Note should endorse using "a dynamic, online central-exchange platform" as a shared document tool. The Note does not mention technology tools, but they are becoming indispensable. Finally, the

sentence at lines 245-47 should more explicitly suggest that the court defer deciding the percentage to be deposited into a common benefit fund, but not defer directing that there be such a fund. It would also be good to say that the fund provision may be adjusted as the proceeding continues.

Dena Sharp: The Committee should consider encouraging the court to use its initial MDL order to expedite leadership proceedings and provide guidance on the court's expectations and preferences in the leadership application process. For example, it might invite the court to state whether it is receptive to "slates" or prefers individual applications. Another useful specific would be whether the court wishes the parties to provide contact information for other judges before whom the applicants have appeared. Because there are often class actions included in MDLs, it would also be important to cross-reference Rule 23(g), or somehow explain how its criteria compare to those for leadership counsel under Rule 16.1.

Alan Rothman: What we need is something like the ticket- taker at a baseball game. The ticket-taker looks only to whether your ticket is to this stadium and shows this day's date. Once you are inside the stadium you need to get to the right seat, etc. What we don't have in MDLs (to draw on the Field of Dreams metaphor) is something like that. We need a quick and very early method to make sure these plaintiffs are in the right litigation stadium. This should require very limited information, but insisting on this admission ticket will greatly benefit the MDL process.

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Ellen Relkin: 16.1(c)(1)(C) should be excised. For one thing, to have the stopgap "coordinating counsel" address settlement would be wrong. "I strongly believe that MDL judges should not, in leadership orders, designate specific settlement counsel." Settlement is a responsibility of leadership counsel, not somebody else chosen by the judge. "I agree with some comments from the defense and plaintiffs' bar that this initial discussion i open court of settlement is premature and can be counterproductive, sending the wrong message to novices in the field." This provision could lead to the filing of more cases, based on a misapprehension that a settlement is in the works. On the other hand, the emphasis by some on the problems that flow from having "repeat players" involved undervalue the experience they can add to the proceeding. Certainly one would want an experienced surgeon for an important operation. So also with leadership counsel. In addition, the financial commitment leadership lawyers must make would present a major obstacle to new entrants and young lawyers.

Andre Mura: I think more specific guidance about methods of selecting leadership counsel should be added. A judge without a preferred method will not find much guidance in the Note, which merely mentions that various methods have been used. Some courts require applications to be filed publicly on the docket, while others request applications be sent to chambers for in camera review. Some courts prefer that plaintiff counsel self-organize into committees, which the court can then review and/or modify, while others are reluctant to consider proposed slates. I suggest the following four revisions to the Note:

(1) Courts gain valuable insights from plaintiffs' attorneys when they ask which other applicants counsel would recommend. Asking this question is a way to gain insight into whether various individuals are hard-working, insightful, responsive, or collaborative.

(2) Such information is best submitted in camera or ex parte.

(3) Ordinarily the court should not defer the appointment of leadership. It makes little sense to prepare a report about how to appoint leadership because many courts have their own preferences and may not be interested in what the lawyers prefer that they do.

(4) Using a reapplication process as the case progresses is a good idea. Among other things, this allows more attorneys to serve at point in the litigation. An annual review is good.

Jennie Anderson: Defense counsel should have no role in selection of counsel to represent plaintiffs, but the rule appears to require negotiations with defense counsel on that subject. Instead, plaintiff counsel should be allowed to organize themselves without interference by opposing counsel. In my experience, defense counsel have not taken the position that they should be allowed to influence the choice of leadership counsel of the structure for leadership counsel to employ. If a proper procedure is used to select counsel to represent plaintiff interests, I see no problem with initial consideration of the other issues in Rule 16.1(c) early in the proceeding.

Written Comments

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. In our experience, the court need not undertake an active role in the selection of leadership counsel. Instead, the court should sit back and let plaintiff counsel organize themselves. Otherwise, there is a risk that the court may seem to be a kind of guarantor of the adequacy of representation provided by leadership counsel. The Committee Note suggests that the court has some such fiduciary duty, but we doubt that is supported by the law and think that it should not be undertaken without clear justification. We also agree with the caution in the Committee Note that the court take care not to interfere with the responsibilities that non-leadership counsel owe to their clients. We are uncertain about whether the federal court has authority to "tax" settlements in state-court proceedings to create a common fund to pay leadership counsel appointed by the federal court.

John Rosenthal and Jeff Wilkerson (0035): There are important and unanswered questions about the authority of leadership counsel to represent plaintiffs who have not retained them.

Amy Keller (0053): In class action MDLs, the question of an attorney fee award comes up only if the case is successful. Mass torts sometimes need to address common benefit orders, but that's not a concern in class action MDLs, given Rule 23(h).

16.1(c)(2) – Previously Entered Orders

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. We suggest that the rule should state that the transferee judge should stay all transferred actions pending further order of the court at the initial MDL management conference. In particular, undecided motions regarding discovery should be put on hold.

16.1(c)(3) – Identifying Principal Issues

Oct. 16, 2023, Washington, D.C. Hearing

Fred Haston (Int'l Assoc. of Defense Counsel): The emphasis should be on cross-cutting legal and factual issues instead of promoting settlement.

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John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: The rule should specify that a separate document should be used for identifying the principal factual and legal issues. It is important to make clear that the stated positions are not part of the report, because that could cause unwanted problems. Then, lines 260-66 should be deleted, and the following language substituted because it is standard language in large MDLs:

> In a separate transmission to the court, the plaintiffs and defendants should submit to the court a brief written statement indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. The court should make clear that these statements will not be filed, will not be binding, will not waive claims or defenses, and may not be offered in evidence against a party in later proceedings. The parties statement should list all pending motions, as well as all related cases pending in state or federal court, together with their current status, including any discovery taken to date, to the extent known. The parties should limited to one such submission for all plaintiffs and one submission for all defendants.

Indeed, since this is separate from the report to the court, it probably should become a new 16.1(d) rather than remaining as part of 16.1(c).

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Jeanine Kenney: In class action MDLs, the principal legal and factual issues as to everyone in the class are laid out in a single consolidated complaint and there is no need for a process to identify them.

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Robert Johnston & Gary Feldon: The proposed rule has promise, but must go farther by giving more concrete guidance on a modern, merits-driven approach to MDL proceedings. Presently "too many federal courts have conflated efficiency with global settlement and entirely disregarded justice." But what we call the "merits-driven" approach has started to become the prevailing philosophy of MDL case management. Under this approach, transferee judges engage on the key legal and factual issues from the outset. The rule should instruct courts to pursue this approach. The rule should make it clear that, from the outset, the transferee court's obligation is to find ways to efficiently resolve the case inventory. 16.1(c) is not sufficiently directive in this regard. For example, it does not provide enough concrete direction about what constitutes a principal factual or legal issue that can lead to early resolution of claims. One example is general causation; addressing that issue as early as possible promotes merits-driven resolution of plaintiffs' case inventory.

16.1(c)(4) – Exchange of Factual Basis of Claims

Oct. 16, 2023, Washington, D.C. Hearing

Mary Massaron: This provision is too loose to do the job that needs to be done. Something like a 12(b)(6) scrutiny of individual claims at the outset is what is needed, and this provision is too loose. Something like this might be usefully included in the Manual for Complex Litigation as advice, but it does not suffice for the current state of MDL proceedings.

Alex Dahl (LCJ) & 0004: The overriding challenge of MDLs now is claim insufficiency, but this proposal conflates dealing with that problem with discovery. It does not offer a firm response to the Field of Dreams problem. Rule 16.1(c)(4) speaks of "exchange" of information, which connoted discovery. It should be revised as follows:

> (4) how and when sufficient ~~the parties will exchange~~ information regarding each plaintiff will be provided to establish standing and the facts necessary to state a clam, including establishing the use of any products involved in the MDL proceeding, and the nature and time frame of each plaintiff's alleged injury ~~about the factual basis for their claims and defenses~~.

The Note should also be significantly revised. It mentions "exchange" five times, and (like the rule) inappropriately includes defenses. It specifically promotes the use of abbreviated discovery methods such as fact sheets and census orders. It also conveys the sense that requiring claims to meet the most basic requirements of standing and stating a claim could be an "undue burden." This language destroys the whole point of (c)(4) by implying that courts should ignore the mass filing of unexamined claims because discovery will take care of that problem. The discovery plan should be addressed in regard to (c)(6) and play no part in (c)(4). That later provision is the place to mention fact sheets and census efforts. The Note should also make clear that the Committee has adopted (c)(4) to counter the filing of large numbers of unsupported claims. it is urgent that the rule make clear that plaintiffs must establish their standing at the outset. It is also worth noting that winnowing unfounded claims can assist the court in making leadership counsel appointments, which may be affected by claim volume.

The recent developments in the 3M earplug cases show the need for more aggressive action. Finally – years down the road – the judge is beginning to winnow the huge field of claims. The plaintiff bar realizes this is an invitation to file meritless claims. Focusing only on cross-cutting issues is not sufficient. For one thing, these can't be proper "actions" unless plaintiffs have standing to pursue the claims asserted on their behalf. It's critical to create an expectation in the plaintiff bar that they will have to satisfy standing up front. A clear barrier to such unfounded claims is needed in the rule itself. Judges cannot be expected to work this up by themselves. Even though the ordinary rules apply in theory, in practice there is no way to apply them if there are 20,000 plaintiffs.

Kaspar Stoffelmayr & 0008: Screening out unfounded claims should be Job 1. I favor the "fact sheet plus" approach, before any other actions are taken in the case.

Chris Campbell: We need a rule that specifically invites an early dispositive motion challenging the inadequate claims. Improper MDL early case management thwarts the ability to

assess risks and allows meritless claims to linger. 16.1(c)(4) conflates information sharing and managing discovery without first questioning the plaintiffs' standing and ability to state a claim.

James Shepherd: It is important to provide transferee courts a rule that allows them to vet legally insufficient cases. The way to do that is to require plaintiff attorneys whose cases are included in an MDL to provide proof of use and injury within 30 days of transfer. This measure would help screen out legally insufficient cases. It would not be burdensome to plaintiff lawyers. Under Rule 11, they have a duty to use due diligence before signing a complaint, and that should include gathering the needed information. It is important to disincentivize plaintiff lawyers who might otherwise file such unsupportable cases.

Christopher Guth: This provision should be strengthened. It is not reasonable to expect the judge to handle thousands of motions to dismiss. As things stand now, these proceedings create chaos. The rule should include language regarding (i) when each plaintiff should provide information establishing standing and the facts necessary to state a claim, and (ii) the type of information that must be provided, such a use of the product involved and the nature of their alleged injury. Plaintiff fact sheets do not do this job. They are more of a discovery mechanism, and have been adopted only because plaintiffs do not include necessary information in their complaints. And even fact sheets are employed only at advanced stages of MDL proceedings. They are really only a sort of discovery vehicle and insufficient to adequately address the issue of claim sufficiency. My experience in a number of product liability MDLs is that early and specific attention to the above matters expedites proceedings and focuses the court and the parties on the core issues of liability. The PFS process now ingrained in MDLs takes a lot of time and effort. Judges are too lenient with claimants who don't supply the information they are ordered to supply. In one MDL, the judge permitted plaintiffs in default on this need eight opportunities to cure. Meanwhile, the theoretical possibility of discovery by the defendant is not a real option given the number of claims. But until the groundless claims are squeezed out of the system defendants will not settle. Indeed, the good plaintiff lawyers agree that the presence of lots of unfounded claims complicates and delays the process, and harms their clients. The rule must require vigorous judicial scrutiny of individual claims up front. To take one recent MDL, the negotiation of the PFS took 17 steps. And there should be a stay on all other litigation activity until this initial screening is completed.

Fred Haston (Int'l Assoc. of Defense Counsel): The cause of docket escalation is the ease of "park and ride" filings. There has been an exponential growth in unwarranted filings. The solution is early scrutiny of claims – early scrutiny of individual claims. We endorse the LCJ position. The emphasize should be on pleading sufficiency. Judge Rodgers' 2021 article points up the need for screening. The MDL vehicle has made it too easy to get into court, and some plaintiff-side lawyers (not all of them) are exploiting this feature of the process.

Markham Leventhal: This provision raises serious constitutional issues respecting Article III subject matter jurisdiction over claims that are consolidated in large MDLs. There is no Article III exception for MDL proceedings, and the Supreme Court's 2021 decision in *TransUnion LLC v. Ramirez* applies to such cases. Unfortunately, in many MDL proceedings, particularly with large numbers of plaintiffs and cases, the judges are not provided with essential information necessary to ensure that all plaintiffs have the necessary standing. Standing must, under *TransUnion*, be established for each plaintiff. So facts must be provided up front in MDL proceedings. Moreover,

it cannot be argued that providing basic, essential facts to establish "injury in fact" and "traceability" to a particular defendant is an undue burden. The court must have sufficient information from each plaintiff to evaluate and establish that plaintiff's standing. But the rule does not require that the plaintiff satisfy this threshold. Accordingly, (c)(4) should be revised to include, at a minimum, that the report must address the following:

> (1) whether all named plaintiffs have satisfied their burden of proving to the court with sufficient information to establish standing;
>
> (2) if not, how and when sufficient information will be provided by each named plaintiff to establish Article III standing, including
>
> (3) facts establishing the use of any products or services involved in the MDL proceeding, injury in fact (e.g., the nature and time frame of each plaintiff's alleged injury), and traceability to one or more named defendants; and
>
> (4) if necessary, the mechanism to remove from the MDL proceeding claims that do not satisfy minimum standing requirements.

John Guttmann: The upsurge in groundless claims has at least three causes: (1) careless "harvesting" of claims relying on TV ads and the like: (2) the incentive to file as many claims as possible to get onto the leadership team; and (3) the likelihood that the number of clients a lawyer has will increase the size of the settlement pot from which the lawyer extracts a percentage fee. All of these conspire to neuter the ordinary requirements of Rule 11(b). (c)(4) offers only nonbinding guidance. But the problem of groundless claims is increasing and the situation will improve only with a clear, rule-based approach. "Unsupportable claims are relatively easy to weed out in mine-run litigation where there is little if any incentive, for example to file a claim against a pharmaceutical manufacturer where the claimant did not actually use the drug." But in MDL proceedings the problem of unsupportable claims creates asymmetrical issues of scaling. The rule should be amended to **require** specifically that the report include a **mandatory** proposal for addressing the supportability of claims. It would be desirable for the Note to make clear that the rule is designed to counter the upsurge of groundless claims. Treating this concern as relating to an "exchange of information" implies shifting to discovery, and this sort of filtering should occur before discovery begins. Even the AAJ Working Group's submission in 2018 candidly acknowledged that grounds claims can be a serious problem. At a minimum, each plaintiff must demonstrate standing to sue. In sum, there must be a "mandatory provision of information at the outset of the information necessary to establish each MDL plaintiff's Article III standing.

Harley Ratliff: To move the ball forward, there needs to be serious attention to addressing the viability of these lawsuits at the front end, not after years of expensive and potentially unnecessary litigation. Therefore, plaintiffs should be held to the standards that apply in an individual lawsuit. "For example, does the plaintiff actually have proof that they used the product in question (proof of use)? Does the plaintiff have proof that they used Defendant's products vs. some other, similar, product (product identification)? Have they been diagnosed with or, at the very least, have some basic medical corroboration that they have the injury they allege (proof of injury)?" Addressing these issues first, rather than last, will streamline proceedings. As things now stand, MDLs are treated by many filing attorneys as little more than part of their diversified

investment portfolio. “File hundreds of cases, let the sit in the MDL, and hope for a return at a later time.”

Deirdre Kole (Johnson & Johnson): It is important to make clear that the normal pleading rules are not somehow suspended in MDL proceedings. Instead, the rule should provide clear instructions for the early vetting of cases to ensure that claims in an MDL have at least a minimal factual basis. Requiring such information up front is not burdensome. Plaintiff counsel should obtain it as part of counsel’s intake process. Moreover, Rule 11 requires lawyers to do such background work before filing suit. “Today, aggrieved plaintiffs do not seek out lawyers to achieve justice. Lawyers develop a tort theory, recruit investors, and use their money to advertise for plaintiffs and, in many situations, hire marketing firms to generate leads. Lawsuit ads are then blasted on television, the internet, and billboards, instructing consumers to call, click, fill out forms, and their claims will quickly be filed.” In ordinary individual lawsuits, the rules would permit defendants to challenge such claims, but that ordinary process does not work in MDL proceedings. For example, in an MDL involving Ethicon Pelvic Mesh devices, 46,511 cases were filed, but 24,695 – more than half – were dismissed for basic factual shortcomings or the inability to establish a cognizable injury. So the rule should have a Rule 11 analogue and require sanctions on lawyers who violate the rule. Within 30 days of filing or transfer to an MDL, plaintiff must be required to produce evidence such as medical records identifying the product used and documenting the injury involved. If that evidence is not forthcoming, the rule should direct the MDL court to dismiss the case with prejudice, impose sanctions on the plaintiff or the plaintiff lawyer and allow the defendant to recover its costs and attorneys fees incurred in defending that claim. “Only after these extraneous cases are removed and the core issues in the litigation are decided can the parties evaluate the merits of the litigation.”

Leigh O’Dell: The use of master complaints and short-form complaints does not suspend the normal rules of pleading sufficiency. From the plaintiff side, she is certainly not advocating the lawyers not comply with Rule 11. But the eventual failure of individual claims – whether on pleading motions or at the summary judgment stage or at the settlement stage – does not show that it was improper to file them in the first place. I am not against sensible vetting of claims, and not in favor of robocall outreach to drum up claims.

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Jeanine Kenney: This process – the “plaintiff fact sheet” process – is applicable only to mass torts MDLs. In class actions, ordinarily there are only a handful of class representatives on the class complaint. The Note should say that this issue-identification process should only be employed in mass torts.

James Bilsborrow: Any early census or procedures to screen “unsupportable” claims are likely to vary significantly based on the claims and entities involved. “This is not a job for coordinating counsel and it is not a role that should be emphasized by an initial, organizational Rule 16.1(c) report. Instead, the transferee court should deal with these case-specific scenarios as transferee courts have done throughout the life of MDLs: by applying its discretion to manage complex litigation with input from the experienced attorneys appointed to leadership roles or retained by defense counsel.”

Diandra Debrosse: This rule would wrongly limit the rights of millions of injured people and restrict their rightful access to the court. Already, such people "face a rigorous gauntlet of high-powered corporate defense machinations and challenging legal hurdles." They are "facing multinational, billion-dollar, lobbyist-protected Goliaths hiding behind the country's wealthiest defense firms." The "proof of product use" that is sought is not a fixed and defined term. Moreover, in many instances, the defendants or third parties are the gatekeepers of product use information. Indeed, in some MDLs the court has ordered defendants to produce core produce identification information. A rule change that would "require that plaintiffs prove key elements of their claims prior to discovery would do harm to plaintiffs.

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: The Committee note at lines 270-73 should be revised to recognize the screening function of fact sheets by saying that they are used not only to plan and organize the proceeding but also for "identifying unsupportable claims." There is a virtual consensus that large MDLs have unsupportable claims, and growing numbers of cases involve considerable efforts to remove these claims from the mix. "Fact sheets have become increasingly longer (e.g., 20-70 pages) and are used for screening purposes, with provisions requiring submission of some evidence of product use or exposure."

Jennifer Hoekstra: There is no prohibition against filing meritorious cases simply because defense counsel does not want to defend against a large volume of lawsuits by those harmed by the exact companies against who lawsuits are brought." "[T]he MDL process remains one of the only mechanisms in our country for consumers to hold companies accountable for their dangerous and defective products."

Emily Acosta (testimony & 0020): The "unsupportable claims" defined by the MDL Subcommittee should not be the focus of rulemaking. Identifying such claims is often difficult. For example, "compensable injuries" often evolve with litigation. And "time-barred" is often litigated, not clean-cut. It can happen that during the course of the MDL proceeding new scientific discoveries change the shape or direction of the claims being asserted. If the concern is that some lawyers don't do their homework before filing suit, we already have a solution – Rule 11. The fact the number of claims in MDL proceedings has risen is not inherently nefarious, but the result of broader distribution of consumer products. Moreover, the fact that there are lots of claims does not make the proceeding inherently unmanageable.

Lee Mickus: The rule should establish a disclosure requirement to eliminate claims that are not viable. Several judges who have handled proceedings with many groundless claims have recognized that this is needed. Moreover, including possible settlement as an initial topic of discussion worsens the problem by providing an incentive for plaintiff lawyers to file even more groundless claims. Though the proposed rule could permit defense counsel to persuade the judge to require something of the sort, it should not be necessary for them to do that. It should be automatic.

Scott Partridge: What is needed is a method of removing the meritless claims, and including settlement up front goes in the wrong direction. Particularly for a publicly traded defendant, the volume of meritless claims creates major headaches. What should e reported in quarterly and annual securities filings? What financial exposure should be disclosed? It is critical to develop a rule that takes account of the realities of corporate decision-making. If one wants to foster

settlement, for example, one must appreciate that corporate counsel must consider an array of things, including fallout with regulators or shareholder, disclosures to insurers, information to be provided to customers, what reserve to create for settlement, and how or whether to borrow funds to complete a settlement, to name a few considerations.

Lise Gorshe: Exchanging some of the information Mr. Partridge (the prior witness) wants early on would be fine with me. But this information is often very difficult for the plaintiff lawyer to obtain. Any method that does not permit that information-gathering to be completed would be unfair to plaintiffs.

Alan Rothman: In 2021, I published an article entitled Early Vetting: A Simple Plan to Shed MDL Docket Bloat in volume 89 of the UMKC L. Rev. (The article is attached to the submission.) I believe that screening claimants would produce efficiencies, and that it can be done by obtaining limited information at an early stage of the proceeding. A copy of the article is attached.

Toyja Kelley (former president of DRI): I support the DRI proposals on screening out unjustified claims up front. The court must assure itself that the claimants before it have standing. Rule 11 recognizes that lawyers must vet their cases, and this rule also. In every case (not only mass torts) the court should require a Rule 11 type of affirmation.

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Jonathan Orent: This provision should be eliminated; "setting forth this subject in a formal rule creates a strong likelihood that it would become standard practice for MDL defendants to try to use this as an opportunity to extinguish plaintiffs' claims before they can gain access to essential information through discovery." This provision "is not tied to existing discovery rules." Enabling defendants to press for early production of information about individual claims would be contrary to the objective of § 1407 to provide for the "just" conduct of litigation. Existing practices using plaintiff facts sheets have proven more than sufficient to address concerns about unfounded claims. This rule might force a court to adopt a rigid procedure unsuited to the MDL before it. MDL judges are very creative; this rule should not get in their way. Existing "big tent" practice ensures non-leadership participation.

Jessica Glitz: "Regardless of what has been presented, most MDLs are made up of Plaintiffs whose cases have been thoroughly reviewed and researched by Plaintiffs' counsel before filing." Sometimes the statute of limitations compels plaintiff counsel to file an action before full research has been completed. And Rule 11 already provides the court with a substantial amount of power to deal with groundless claims.

David Cooner (Sr. V.P., Becton Dickinson; on behalf of Product Liability Advisory Council) (testimony and no. 0047): We believe the MDL process is broken in many respects. The primary one is the proliferation of non-meritorious claims. I see lawyers boast of claim inventories, larding the MDL with cases that have little or no vetting. I have seen countless cases that would never have been filed were it not for the ease of aggregation and, worse, "protection within the MDL system." From the perspective of plaintiff counsel, the volume of cases escalates one's profile in an inevitable settlement program and improves the prospects of being appointed to

leadership. But (c)(4) is more aspirational than compulsory. It does not describe the information that must be presented, or say when exactly it should be provided. Because it has no teeth, it will not "change the flaws that lard out courts with meritless cases, siphon costs, and delay justice for meritorious claimants." As things now stand, we on the defense side have no means to accurately assess the magnitude of the risk. PLAC agrees with the LCJ proposal. Rule 26(a)(1) disclosure is not a substitute for this sort of vetting process. But it would be a good step for the Note to stress obligations under rule 11(b). It's not enough that this rule would permit the defendants to request early and rigorous disclosure by plaintiffs, the rule should make that mandatory. Although precise data on unwarranted claims is difficult to obtain, but there are decisions that illustrate the problem.

Max Heerman (Medtronic): This rule is inadequate. For one thing, it is discretionary, and requires nothing. It treats the problem of non-cognizable claims as though it were the result of lack of adequate discovery. That is not the source of the problem. Instead, the problem is that (1) as a practical matter, the MDL system accepts the logic that "where there's smoke there's fire," and (2) an MDL can become "too big to fail." Plaintiff counsel create a lot of "smoke" by bringing as many claims as possible. This activity distorts the constitutional and statutory role of the federal court system. Claims that cannot be substantiated must be dismissed early in the life of the MDL. I agree with LCJ's suggestion that the new rule require each plaintiff to provide information to establish standing. For example, in one recent litigation, once the defense was able to challenge individual claims 60% were found unsupported.

Christopher Seeger: I believe firmly that the plaintiffs' bar has a responsibility to carefully vet cases before filing, in MDLs as in any other case. "The plaintiffs' bar can and should do better in meeting that responsibility." But the defense bar argument that the growth in MDL claims is driven in substantial party by frivolous cases is simply untrue. Though there are many cases filed in MDLs that would not be filed as stand-alone individual cases, but that does not mean they are groundless. For one thing, the public attention given MDLs means that the public is more aware of these cases, and more injured people learn of their possible rights to relief in court. The amendment proposal is appropriately careful to avoid any language that would demean the legitimacy of those ordinary people's claims. And there is no reason to try to force transferee judges to prioritize individual case screening over cross-cutting issues. I have worked collaboratively with plaintiffs' lawyers, defense counsel, and courts to resolve this problem in specific cases. The resulting solutions are driven by the specifics of the given MDLs. Those solutions are better than the sort of rigid limitations the defense bar endorses.

Lexi Hazam: Given that the exchange of such information already occurs through discovery, and that 16.1(c) already calls for a discovery plan, this provision seems both vague and unnecessary. The proposal seems to call for some unspecified form of early attacks on claims outside of motion practice and discovery. The consequence may be erect new barriers unmoored to discovery rules, rather than allowing courts and parties to design procedures that are fair and efficient for each case. It may place an undue burden on plaintiffs in cases where defendants have far more information regarding key components of plaintiff-specific evidence, such as in the Social Media MDL, where defendants possess reams of data about their young users' accounts and activities which the users themselves cannot access. Although this provision is not mandatory, its presence in a new Federal Rule is likely to encourage the standardization of such practices in MDLs. This would be a detrimental development.

DRI Center for Law and Public Policy (0010): Rule 16.1(c)(4) should be strengthened "to **require** specifically that the report called for by proposed Rule 16.1(c) include a **mandatory** proposal for addressing the supportability of claims pending or transferred into the MDL." Otherwise, the judiciary must bear the burden. The Panel must initially decide whether a given case is a tagalong. (DRI does not endorse the concept of "direct filing" orders.) Then the MDL transferee judge has the large burden of deciding whether individual claims are supportable. A rules-based solution is necessary to overcome these problems.

Bayer U.S. LLC (0011): The proposed rule does not address "the core problem with MDLs today" – that a significant number of claimants turn out eventually not to have supportable claims. Plaintiff Fact Sheets do not deter such claims. The are discovery tools, not an early vetting method. In the *Mirena* MDL, the PFS process required Bayer to interact with an unsupportable case eleven times, on average, to obtain final dismissal. This process could take 180 days for each claim, and it occurred 650 times in that MDL proceeding. In another MDL, one attorney filed a complaint on behalf of 127 plaintiffs, but 117 of them did not comply with the PFS order – 92% of those in a single complaint. Despite the PFS requirement, plaintiffs' lawyers still file such claims *en masse*. Bayer therefore supports LCJ's proposal, which would require the MDL transferee court and the parties to identify how and when "sufficient information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim." This requirement would permit the claims to be tested under Rules 8(a), 9(b), and 11. To make that clear, the Committee Note should say that this requirement is essential to establish the "constitutional minimum of standing."

Robert Johnston & Gary Feldon (0028): This rule does not go far enough to cull meritless cases. PFS practice and census practice is really just discovery. Though discovery helps the parties develop valid claims, there should be a showing up front that the claims before the court are indeed valid. This sort of showing in a products case should require preliminary proof of (1) use of the specific product; (2) alleged injuries due to use of the product; (3) the date of plaintiff's injury and the date on which plaintiff had notice of defendant's allegedly wrongful conduct; and (4) releases authorizing defendant to collect relevant records from third parties.

Washington Legal Foundation (0030): The rule should require early vetting of claims." Data shows that between 30% and 50% of all claims in MDLs are unsupportable." There is little cost to plaintiffs in filing claims, but defendants must pay for discovery and other costs. Often they also must report the existence of these claims to the Food and Drug Administration and to their shareholders. The rule should provide a tool to end this activity.

Hon. Charles Breyer (N.D. Cal.) (0031): I have conducted more than a dozen MDL proceedings. A "one size fits all" approach to MDL proceedings is inefficient and unjust. "For example, it may be appropriate in one case to address jurisdictional concerns at the outset, before additional resources are expended; in another case, a court may wish to address the legal sufficiency of the claims, or statute of limitations issues, in advance of costly merits litigation. In non-MDL cases, judges routinely balance these concerns. There is no reason to dictate to judges the order, or necessity, of adjudicating these concerns in MDL cases."

Judges of the Complex Civil Litigation Program, L.A. Superior Court (0032): We have experience under the California state court procedure (Cal. Code Civ. Pro. § 404.1 et seq.) with mass torts involving wildfires, pharmaceutical products, defective medical devices, and public nuisances arising from novel liability theories. "The Rule might suggest that the transferee judge in mass tort personal injury cases require attorneys to go further than basic Rule 11(b)(3) representations to the court and to certify within a short period of time post-filing that counsel has undertaken a diligent review of the plaintiff's available medical records, exposure information, and information about the use of the item or drug. The goal of such order is to eliminate baseless claims derived from mass marketing. The Rule should prompt judges to consider adopting initial mandatory discovery disclosures before party-driven discovery." The transferee judge may identify non-meritorious claim early in the litigation's life-cycle using plaintiff fact sheets and may require certification of pre-filing due diligence.

John Rosenthal and Jeff Wilkerson (0035): "There is consensus – among judges, defense practitioners, and even many plaintiffs' lawyers – that mass filing of unexamined claims is occurring in large MDLs." In the Roundup litigation, Judge Chhabria established a "wave" process to move cases through the MDL. But despite that many cases were moved into later and later waves, and then eventually voluntarily dismissed, often because plaintiffs' counsel did not have any ability to show that these plaintiffs had the relevant medical diagnosis or any meaningful exposure to this product. "The existence of such unvetted claims increases the cost, and slows the pace, of discovery." It also hampers the ability of both sides to assess the potential exposure and thus renders settlement more difficult. The mass filing of claims "can make the traditional Rule 12 process impractical and prohibitively expensive." But the rule not only fails to set forth required procedures to deal with these problems, it does not even provide guidance about the nature of the problem. Many will read the Committee Note as suggesting nothing more than bilateral discovery. We urge that the draft be changed to stress that this provision is not merely about discovery, but early vetting of claims.

Judge Casey Rodgers (N.D. Fla.) (0036): Based on my experience with the 3M Combat Arms Earplug MDL, the largest MDL in history, I oppose any mandatory rule governing the vetting of claims in an MDL.

> While it is true that mass filings of unvetted clams plague many MDLs, in my view, mandatory rules governing how and when to address the issue would not be an effective solution. Beyond that, a mandatory rule in general is unnecessary and would have negative, albeit unintended, consequences.

In the 3M MDL, an early vetting rule would have been impossible to comply with or enforce. Nearly 99% of the needed records were in the possession and control of the Department of Defense and/or the V.A. In the view of those agencies, a "filed action" was required to obtain such records. We eventually were able to devise an administrative docket for nearly 300,000 claimants, and with that in place the needed information could be obtained. Using that information led to dismissal of more than 90,000 claims. "This could not have happened 'early' in the litigation. And, importantly, the 3M experience demonstrates that proper and effective vetting can – and does – occur in the absence of a mandatory rule, even with unprecedented numbers." A rule mandating early vetting cannot account for critical variables in different MDL proceedings. Such a rule "would only serve to frustrate and stifle creative case management in the very litigation needing it most."

New York City Bar (0037): "Proposed Rule 16.1(c)(4) provides a valuable mechanism to ensure early exchange of information to prevent insufficient claims and defenses from clogging the MDL. The proposed rule reflects the current practice in many MDLs and is designed to protect all parties and the court from the burden of insufficient claims and defenses." But we believe it should be made clear in the Note that this provision is not itself designed to weed out insufficient claims, and instead clarify that this is a form of early discovery. The rule should not implicitly or explicitly alter the pleading or dismissal standards. "Such a substantive change should not be buried in a case management rule and should not be unique to MDLs." "As currently proposed, Rule 16.1(c)(4) does not appear to alter either pleading or dismissal standards, and the City Bar supports that aspect of the provision."

Melissa Payne (0042): This proposal adds an extra burden on plaintiffs. "Often faced with filing deadlines, plaintiffs would be faced with the added expense of expediting orders for medical records to meet the early discovery rule."

American Ass'n for Justice (0043): The defense bar's push to include a provision addressing claim insufficiency should be rejected. The Advisory Committee has already considered and rejected the requirement of fact sheets at the outset of every MDL. LCJ's proposal to amend (c)(4) to address "claim sufficiency," is a step backwards. this issue is highly contentious, and the term is often featured in so-called tort reform proposals pushed by the defense bar. The rule should instead set the framework for managing the entire MDL. Consolidation can occur very quickly, while proof of product use takes time. It is impracticable – if not impossible – to require proof of product use up front.

A. Layne Stackhouse (0046): The suggestion that the court should address "unsupportable claims" is unwarranted. For one thing, statutes of limitation mean that attorneys sometimes have to file before the complete a full workup of a case. And determining which claims are not supportable is difficult or impossible before discovery. And there are already effective tools available: "Plaintiffs' counsel can voluntarily dismiss these claims, defense counsel can move to have them dismissed, and Rule 11 already provides the court with the requisite power to deal with bad actors and to deter inappropriate behavior."

Warren Burns, Daniel Charest & Korey Nelson (0048): Adding an early bout of fact discovery about the proof available for individual plaintiffs' claims will mainly create additional paperwork burdens. The better way to proceed is to select some cases for bellwether trials and work up those cases with case-specific discovery. This way defendants will receive the individual information they say the need. "Plaintiffs who cannot provide that basis as part of discovery will either dismiss their cases or have them dismissed. If a case settles before discovery reaches that point, plaintiffs will have to provide that information as part of the claims process." And implications that the presence of some claims for plaintiffs who do not qualify for an award suggests inadequate pre-filing investigation is simply wrong. The challenge of obtaining health care records, even on behalf of the patient, is quite daunting and time-consuming.

Lawyers for Civil Justice (0053): "Empirical data demonstrate that insufficient claims are prevalent in mass-tort MDLs." This should be "the bullseye of the Committee's rulemaking effort." But proposed (c)(4) is not a solution, or even an improvement over the status quo. It may even be a step backward. A few modest changes to the rule would solve the problem. "Despite the

general consensus of the problem, data regarding insufficient claims are hard to find." We propose that dismissals of claims asserted in MDLs be used as data to prove the existence and extent of the problem. At pp. 3-6, the submission cites 7 specific federal MDLs (and one California consolidated proceeding and a bankruptcy court proceeding) in which the percentage of dismissals (some after summary judgment rulings) ranged from 15% to 75%. But (c)(4) is "written as a flexible menu rather than a mandatory rule." The current proposal is inadequate because it uses "exchange" and refers to "defenses" as well as claims. It should be rewritten as follows:

> (4) how and when sufficient ~~the parties will exchange~~ information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim, including facts establishing the use of any products involved in the MDL proceeding, and the nature and time frame of each plaintiff's alleged injury ~~about the factual bases for their claims and defenses~~.

In addition, the Committee Note should state that Rules 8(a) and 9(b) apply in MDL proceedings, as does Rule 11. These revisions would make dismissal a ministerial task and obviate motion practice.

In-house counsel at 33 corporations (0056): Enforcement of the requirements of FRCP 3, 7, 8, 9, 10, 11 and 12 can ensure that the constitutional requirements of Article III standing are satisfied. But these rules are ineffective in mass tort MDLs. The solution is to revise (c)(4) as follows:

> how and when sufficient ~~the parties will exchange~~ information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim, including facts establishing the use of any products involved in the MDL proceeding, and the nature and time frame of each plaintiff's alleged injury ~~about the factual bases for their claims and defenses~~.

This language would not require a claim-by-claim compliance process, but requiring a discussion of the disclosure process would provide assurance that judges and parties will secure better information for making early case management decisions.

Andrew Trask (0066): The testimony and written comments "have conclusively demonstrated the widespread existence of unsupported claims * * * and the availability of simple, appropriate solutions." Any suggestion that this is not a problem unless proved by empirical study ignores the reports from federal judges who have identified these problems in their MDLs. Usually the information needed to show that the plaintiff has a genuine claim is in the plaintiff's hands, not the defendant's hands. But mass tort lawyers do not vet their cases. If there really is a timing problem for plaintiff's lawyer to obtain such information, the lawyer can seek a good faith extension of time. "[B]ecause the mass filing of unsupported claims is a creation of the MDL process it is bet addressed by changes to the rules governing MDLs."

16.1(c)(5) – Consolidated Pleadings

Alex Dahl (LCJ) & 0004: The rules should not invite "pleadings" that are not authorized by Rule 7(a). As evidenced by the 2007 amendment to Rule 7(a), the Committee views this rule strictly. Rule 7(a) only contemplates judicial authority to require one additional pleading besides those the rules require – a reply to an answer if ordered by the court. But the use of the word "pleadings" in (c)(5) creates the presumption that the word has the same meaning as in other rules. If the notion of "consolidated pleadings" is introduced into the rules, that is certain to generate litigation about its meaning. In Gelboim v. Bank of America, 574 U.S. 405, 413 n.3 (2015), the Court expressly questioned the legal effect of such documents; they should not be installed in the rules.

Kaspar Stoffelmayr & 0008: This is my no. 2 concern (after aggressive vetting of claims). The rules say there are not pleadings beyond those listed in Rule 7(a). So when an MDL transferee court endorses a "master complaint" there is nothing to explain what that is or how the defendants can challenge it. Rule 12(b)(6) is nullified because nobody can realistically move to dismiss. And "short form" complaints usually contain almost no facts or particulars about the given plaintiff.

Chris Campbell: 16.1(c)(5) conflicts with Rule 7(a), which does not mention "consolidated pleadings" and says that the only permitted pleadings are those listed in 7(a).

Gregory Halperin: At a minimum, the Note should emphasize that when there is a master complaint and short-form complaints, the two together must satisfy Rule 8(a)(2) [and perhaps Rule 9], and that the defendant can challenge their adequacy using Rue 12(b)(6). The Note must make it clear that (c)(5) does not excuse compliance with these basic requirements in every case. Large MDL proceedings often substitute a "master complaint" and "short-form complaints" with allegations about each plaintiff. This process undoubtedly introduces efficiencies, as plaintiffs need not draft full individualized complaints and defendants are absolved of the need to serve individualized answers. But there is no "MDL exception" to the Federal Rules, and a complaint is not a mere box-checking exercise. There must be an opportunity for the defendants, before they undergo costly or burdensome discovery, to challenge the legal sufficiency of the claims. The Committee Note should explain that if a master complaint is employed, together with the short-form complaints it provides the information defendants need to make motions to dismiss. Otherwise the master complaint process is fundamentally at odds with the pleading rules. But some courts have permitted plaintiffs pleading fraud (covered by Rule 9(b)) to make extremely vague allegations. For example, in the J&J Talcum Powder MDL plaintiffs needed only aver that they experienced "a talcum powder product(s) injury" without specifying what that injury was. It is important that the Committee Note say that using master complaints and short-form complaints must satisfy Rule 7(a)(1) requirements for complaints. "If the Federal Rules are going to encourage consideration of 'consolidated pleadings,' the Advisory Committee Notes should clarify that those consolidated pleadings are not immune from challenge under Rule 12(b)(6) or subject to a standard of review that is different from any other complaint filed in federal court."

Jan. 16, 2024 Online hearing

Jeanine Kenney: In class actions, this is provision risks confusion. The issue is in mass tort cases, not class actions. Suggesting a "consolidated complaint" in a class action MDL is

worrisome. Indeed, neither the Note nor the proposed rule provides any guidance on what types of MDLs present the sort of management challenges that call for employing its provisions.

Dena Sharp: This provision would not fit a class action, where the class action complaint "serves the critical purpose of aggregating all the class's claims into a single pleading." The master complaint in a mass tort MDL, by contrast, often serves the distinct purpose of providing a single complaint defendants may move against through "cross-cutting" Rule 12 motions. I would add the following to the Note: "Cases proceeding under Rule 23 may, for example, require only a consolidated complaint which supersedes individual class action complaints failing with the class or classes defined in the consolidated complaint."

Feb. 6, 2024, Online Hearing

Kellie Lerner (President, Committee to Support the Antitrust Laws): In a class action, the consolidated complaint often is the work of interim class counsel, who selects the factual allegations, causes of action, and class representatives that are included in the consolidated amended complaint, which becomes the single operative pleading for the MDL. "Only interim class counsel is empowered to make decisions for the class and litigate the action."

Written Comments

Amy Keller (0053): The idea of a "consolidated complaint" has little application in class action MDLs. Instead, in those proceedings what matters is a "superseding" complaint, setting forth (among other things) the proposed class representatives who would satisfy the adequacy requirement of Rule 23(a)(4).

16.1(c)(6) – Discovery Plan

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: The Note should be fortified with the following: "Information on methods to handle discovery efficiently can address, for example, the following: (i) common-issue discovery; (ii) procedures for handling already-completed common-issue discovery in pre-MDL cases; (iii) establishment of early ESI protocols; (iv) overall time limits on each side's number of deposition hours; (vi) necessary early protective orders; and (vii) procedures to handle privilege disputes."

16.1(c)(7) – Likely Pretrial Motions

Written Comments

Robert Johnston & Gary Feldon (0028): This rule fails to provide genuine guidance to transferee courts. These courts should not abuse their discretion over the remand decision by having cases sit, warehoused in the MDL, when efficient remand for trial is possible. Instead, the court and parties should be focused from the outset on setting a schedule for efficiently pushing cases toward resolution by motion or trial.

16.1(c)(8) – Additional Management Conferences

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0026: At lines 313-14, the Note should mention that courts often conduct management conferences online so that counsel from around the country can participate. Highlighting this possibility could be useful.

16.1(c)(9) – Facilitate Settlement

Oct. 16, 2023, Washington, D.C. Hearing

Alex Dahl (LCJ) & 0004: Tips for facilitating settlement do not belong in the rules because good litigation management is the key to success, not settlement promotion. The draft "escalates settlement into a top priority in MDLs." The words "settle" and "settlement" appear 12 times in the draft rule and note. The draft Note says that "[i]t is often important that the court be regularly apprised of developments regarding potential settlement," but many federal judges would disagree with that assertion. The over-emphasis on settlement is inappropriate because it fosters a presumption of liability, conveys that the judge has an agenda, is inconsistent with the MDL statute' focus on pre-trial preparation and puts the cart of settlement before the horse of litigating the claims. The proposal "furthers the misperception that an MDL is primarily a vehicle for paying – rather than adjudicating – claims." Suggesting that MDL courts immediately focus on settlement at the initial management conference does not encourage sound management of such proceedings. Instead, settlements are usually the by-product of case management focused on resolving merits issues.

Chris Campbell: 16.1(c)(9) improperly promotes settlement as a top priority. It is noted 12 times on the draft, and the rule even suggests that the MDL court provide "measures to facilitate settlement."

James Shepherd: Early consideration of settlement is a bad idea. The purpose of the MDL statute is to coordinate pretrial proceedings, not to resolve litigations via settlement. This attitude presupposes liability and hinders the real purpose of MDL combination.

Fred Haston (Int'l Assoc. of Defense Counsel): The draft overemphasizes MDL as a settlement device. This emphasis exacerbates the docket explosion we have seen. The emphasis should be on procedures for resolving cases on their merits, not on promoting settlement.

Harley Ratliff: MDLs should not be viewed as simply a mechanism for transferring money from the defendant to the attorneys who have filed suit. "In my experience, MDL judges may often view liability as a foregone conclusion and the only (or easiest) solution to the problem is early resolution." This rule provision implies that settlement is the first step in the litigation, not the last. That makes MDLs a magnet for dubious filings.

Jan. 16, 2024, Hearing

Tobi Milrood: "The fact that AAJ agrees with LCJ that topics 16.1(c)(9) and (12) should be removed from the list is a strong indicator that these topics should be excised from the proposed rule.

John Rabiej (Rabiej Litigation Center) (0005) & 0026: The phrase "at the appropriate time" should be added to the Note. Adding this phrase could eliminate unnecessary controversy about whether the MDL serves solely or mainly as a method to obtain overall settlement. It fortifies a point already made – the decision to settle is ultimately an individual one.

Emily Acosta: The rule calls for discussion of settlement too early in the proceeding. That can be harmful to the plaintiffs.

Lee Mickus: Settlement is mentioned frequently in the Committee Note. That topic would ordinarily be premature at the time of the initial management conference. The plaintiff and defendant "sides" are aligned on the proposition that including settlement on the list is risky. But this rule perpetuates the notion that MDL is really a resolution device, not a way to streamline pretrial preparations (which is what Congress intended in 1968). Most of the time, this is a cul-de-sac.

Written Comments

Robert Johnston & Gary Feldon (0028): We agree with other commenters that it is premature to address settlement at the initial management conference.

John Rosenthal and Jeff Wilkerson (0035): The draft places undue emphasis on settlement and could suggest a presumption that settlement is an appropriate or expected outcome of all MDLs.

16.1(c)(10) – Manage New Filings

Oct. 16, 2023, Washington, D.C. Hearing

Alex Dahl (LCJ) & 0004: Inserting the idea of "direct filing" orders into the rules could be "a radical decision because direct filing is inconsistent with Rule 3, which 'governs the commencement of all action.'" It also contradicts the MDL statute, which commands that all transfer decisions must be made by the Judicial Panel, not the transferee judge. In addition, several courts have held that MDL courts lack subject-matter jurisdiction over direct-filed actions. Such orders require defendants to waive objections to personal jurisdiction and introduce uncertainty about choice of law questions. The result would be to "set up MDL judges for unrealistic expectations about waivers and unintended complications when claims are not filed in the appropriate venue. (c)(10) should be removed from the proposal.

Kaspar Stoffelmayr & 0008: Direct filing orders are contrary to defendant's rights to insist they cannot be sued in a jurisdiction in which venue is improper or they are not subject to personal jurisdiction with regard to this claim. "We are forced to do this." Direct filing creates severe problems of personal jurisdiction and choice of law. Sometimes we are forced to waive service of process.

Chris Campbell: 16.1(c)(10) prompts consideration of direct filing orders. That would conflict with Rule 3 and contradicts § 1407. It also provokes questions related to personal jurisdiction, venue, and choice of law.

Fred Haston (Int'l Assoc. of Defense Counsel): The rule should not seed direct filings. What you say will be used, and there is no need to mention this possibility. They are contrary to Rule 3 and the MDL statutory framework. Adopting this provision will frustrate the promise of this new rule. Under Rule 3, cases are supposed to be filed in the correct court. Only the Panel can decide whether to add them to an MDL proceeding.

John Guttmann: Under the statute, the protocol is that the JPML rules of procedure require that counsel notify the Panel of potential tag-along actions, and then the Panel may decide whether to transfer them or not to transfer them. That is not up to the MDL court, but rather a decision by the Panel.

Jan. 16, 2024, Hearing

John Rabiej (Rabiej Litigation Center) (0005): The Note should be revised as follows: "identifying the appropriate transfer district for transfer ~~at the end of the pretrial phase~~ on remand . . ." This clarification could be helpful.

16.1(c)(11) – Actions in Other Courts

Jan. 16, 2024, Online Hearing

John Rabiej (Rabiej Litigation Center) (0005): The Note should be revised as follows: "If the court is considering adopting a common benefit fund, it should consider~~ation~~ the relative importance of the various proceedings ~~may be important~~ to ensure a fair arrangement and be aware of the unsettled law regarding assessing common benefit fees on lawyers involved in related state-court actions, with or without their consent." If the goal of the current Note is to address Judge Chhabria's concerns about such funds, the language is opaque. The suggested language clarifies the intent.

Frederick Longer (0019): Though the rule is about whether related actions have been filed or are expected, the Note veers into avoiding overlapping discovery and a "fair arrangement" about common benefit funds. I think those tangential and speculative concerns should be removed from the Note.

16.1(c)(12) – Reference to Master/Magistrate Judge

Alex Dahl (LCJ) & 0004: There is little if any utility to suggesting that MDL courts obtain the parties' views on appointment of a magistrate judge or a master. We already have rules dealing with such appointments, and adding (c)(12) to the rules will cause confusion by communicating an explicit endorsement of appointing masters, contrary to the Committee Note for Rule 53. Inserting this provision into 16.1 creates a risk of "perpetuating a misconception that the raison d'etre of an MDL proceeding (almost literally from day one) is to steer the litigation toward settlement."

Chris Campbell: 16.1(c)(12) contradicts Rule 53, which says use of masters should be the "exception not the rule," and that they should be appointed only in "limited circumstances." It raises issues with delaying resolution of cases, lack of transparency in selection of masters, the cost of using masters, and the authority they may wield.

Written Comments

Federal Magistrate Judges Association (0018): "The FMJA Rules Committee members strongly endorse the recognition that Magistrate Judges can be of great assistance with respect to discovery, conduct of bellwether trials and settlement." These judicial officers are selected by District Judges and often provide experience and skills to expedite resolution of MDL proceedings. "Indeed, empirical studies show that MDLs with special masters lasted 66 percent longer than those managed within the court, regardless of size and complexity. * * * Magistrate Judges also comply with the Judicial Code of Ethics such that use of Magistrate Judges obviates any concerns about self-dealing or bias of a privately funded special master, as well as that judicial authority is being unnecessarily delegated. In fact, Federal Rule of Civil Procedure 53, which authorizes appointments of a special master, establishes a presumption in favor of the assignment of a Magistrate Judge to assist with the management of complex cases, including MDLs. Finally, Magistrate Judges enjoy working on complex cases and often come to the court with a background litigating such cases and have a strong knowledge of ediscovery issues."

John Rosenthal and Jeff Wilkerson (0035): We are concerned about the inclusion of this item in the proposed rule. For one thing, there are already rules regarding the appointment and use of special masters, particularly Rule 53. Our experience is that masters have been broadly used in the MDL context, and sometimes assumed broad responsibility for the pretrial conduct of a case. "We believe that the inclusion of this provision could be read as an endorsement for appointing masters, which is contrary to the current Federal Rules." Including masters might erode the presumption in favor of appointing magistrate judges instead. With masters, there is a concern about transparency. "All too often, parties have a special master foisted upon them with little chance to suggest candidates, vet candidates, and/or object to their appointment." The Committee Note should be revised to emphasize (a) that appointment of a master is the exception, not the rule, that a referral to a master should be clearly defined and limited in nature, and that "broad delegation of pretrial proceedings to a master" is not appropriate.

16.1(d) – Initial Management Order

Jan. 16, 2024, Online Hearing

John Rabiej (Rabiej Litigation Law Center) & 0005 & 0016: Rule 16.1(d) should be revised as follows: " After the conference, the court should enter and initial ~~MDL~~ management order addressing the matters addressed in the report or at the initial management conference ~~designated under Rule 16.1(c)~~." The present language is ambiguous about whether the lawyers must address all the matters in 16.1(c), or only the ones selected by the judge. And the current version may be read to omit reference to items that the lawyers themselves raise independently. The rule should not be read to exclude matters raised by the lawyers. In addition, the Note should be revised as follows: "Because active judicial management of MDL proceedings must be flexible, the court should ~~be open to~~ anticipate modifying its management order . . . ."

Written Comments

Robert Johnston & Gary Feldon (0028): There is "little point in the Potemkin exercise of creating a rule without content." The draft does not instruct courts to follow the approach contemplated by Rule 16.1. The rule itself should instruct the court to "be open to modifying its initial management order in light of subsequent developments in the MDL proceedings." That appears in the Note, but should be in the rule.

TAB 8

8. Discovery Subcommittee Report

Since the October 2023 meeting, the Subcommittee (and particularly its attorney members) have been heavily occupied with the public comment period on the privilege log proposed amendments and the proposed addition of Rule 16.1 to address MDL proceedings in the Civil Rules. Largely as a result, the Subcommittee has had limited time to address the other matters it presented during the October 2023 meeting. One of them – cross-border discovery – is now being addressed by a new Cross-Border Discovery Subcommittee chaired by Judge Shah. Its report is elsewhere in this agenda book.

The other two matters are presented below much as they were presented last October. They were also presented to the Standing Committee, but there was limited time for discussion of these topics during the Standing Committee's January 2024 meeting.

(1) Manner of service of a 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 rulings on whether this direction is satisfied even though in-person 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 on the requirements for serving a subpoena in the state courts, which might provide insights. This memo was included in the agenda book for the October 2023 meeting. Unfortunately, it did not show that there is any consistent thread of service requirements in state courts that could provide useful guidance for Rule 45. Some were quite distinctive, like one or more that authorized service by phone call from the sheriff or coroner.

The Subcommittee concluded 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-person service in every instance (as some courts have concluded is required under the current rule) would not be a good idea.

Requiring the "traditional" mode of service can certainly cause unjustified difficulties. A recent example is Susana v. NY Waterway, 662 F.Supp.3d 477 (S.D.N.Y. 2023), in which defendants sent their process server to serve a deposition subpoena on plaintiff's daughter six times at plaintiff's address. The court observed that it "does not find credible [the daughter's] excuse that she 'has been staying at [a different address] and has not occupied [Plaintiff's address] where

the subpoena was directed,' given that she and Plaintiff have averred multiple times that they live together." Id. at 481 n.1. Another recent example is Brewer v. Town of Eagle, 663 F.Supp.3d 939 (E.D. Wis. 2023), in which plaintiffs tried to serve the witness at his home 23 times, including hiring a private investigation firm to serve the subpoena. The investigator made multiple attempts to serve at the witness's home. Though the lights were on several such occasions and vehicles were in the driveway, nobody came to the door. See id. at 942.

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, it offered 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 Rule 4(d) 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 identified in the Rules Law Clerk survey of state practices. 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.

One question that has been raised is whether Rule 4(i), dealing with serving the United States, one of its agencies, or a U.S. officer or employee, should be included on the Rule 45(b)(1) list if this amendment approach is adopted. Although concerns about including Rule 4(i) were raised at the October Advisory Committee meeting, we have since been informed that the Department of Justice no longer has concerns about including Rule 4(i) on the list of alternative methods of service.

The proposed 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 inside this country, so perhaps explicit authority in Rule 45 for such a court order would be desirable.

Even without a rule provision authorizing a court order, it seems that litigants do resort to alternative means to serve subpoenas. An example is again provided by the recent *Brewer* case, cited above, in which plaintiffs hired a private investigator to serve the witness at his home, and eventually to "stake out" the witness's home in an effort to effect service. Plaintiffs then served a new subpoena by mailing it to the witness's home by certified mail, but it was not accepted. At the same time, they also sent the subpoena by FedEx, and tracking indicated it was delivered (including an image of the item on the doorstep). Plaintiffs also rehired the private investigator, who posted the subpoena on the front door of the witness's home and noted that the FedEx parcel had been removed from the doorstep. Plaintiffs also sent a copy of the subpoena to the witness by email. [As noted below, despite all these efforts, the court concluded that service was ineffective because plaintiff did not tender the witness fee, as required by the rule.]

More generally, it could be said that the analogy between service of summons and complaint and service of a subpoena is imperfect. 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.

An additional wrinkle with a subpoena is that the rule says that if the subpoena requires the witness's attendance "tendering the fees for 1 day's attendance and the mileage allowed by law" is also required. In the *Brewer* case, mentioned above, even after 23 failed attempts at service, including using a private investigator who "staked out" the home of the witness, having FedEx deliver the subpoena and having the private investigator attach it to the front door, the court denied plaintiffs' motion to compel because plaintiffs did not succeed in tendering the witness fee:

> The law is not clear on this point. The question is essentially whether Plaintiffs (or rather, the process servers they hired) were required to leave the witness fee and mileage payment physically with the subpoena itself, or simultaneously tender the payment electronically. It appears that they were so required.

663 F.Supp.3d at 944. If the rule is amended, it might be possible to address this point as well as the more general issue of manner of service.

At the same time, it is also worth noting that invoking the entirety of Rule 4 in Rule 45(b)(1) would likely be overbroad. For example, Rules 4(a) and (b) (dealing with the contents of the summons and issuance of the summons by the clerk) do not apply in the subpoena setting, since Rule 45(a) has its own pertinent provisions. Rule 4(g) deals with serving a minor or incompetent person and calls for following state law if that person is located within this country. Rule 4(j) deals with serving a foreign, state, or local government. Rule 4(k) deals with the territorial limits of service of a summons, but Rule 45(c) has its own limits on where a response to a subpoena may be required. Rules 4(l), (m) and (n) also seem inapplicable to the Rule 45.

Whether scofflaws or witnesses who don't actually learn they have been subpoenaed are more common when subpoenas are not honored is impossible to determine, but one might speculate that judges would be more receptive to arguments by witnesses who did not receive notice, particularly if the event for which the subpoena was needed is a deposition. Indeed, except for scofflaws one might assume the solution is to reschedule the deposition.

The possible invocation of the due process standard "reasonably calculated to give notice" in braces above 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. The phrase is derived from Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), which held that due process requires use of means of notice reasonably calculated to give actual notice. Presumably the due process limits would apply by their own force, without the need for inclusion in the rule, and including such a phrase in the rule might suggest that it is independent of, or in addition to, what due process requires. 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. Rule 45 is a multipurpose rule, in that it applies to testimony for a pretrial deposition as well as testimony in court for a trial or pretrial hearing such as a motion for a preliminary injunction.

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. And since some subpoenas may demand attendance at court hearings or trials on short notice care should be taken if a time feature is built into Rule 45.

The Discovery Subcommittee intends to continue its work on the subpoena-service project and invites further thoughts and reactions at the Advisory Committee's meeting in April 2024.

(2) Filing under seal

The Advisory 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, the Discovery Subcommittee 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 [or permitted] {authorized} 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.[2]

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"

[2] The bracketed addition "or permitted" was suggested during the Advisory Committee's October 2023 meeting, to reflect the possibility that federal law might permit such filing without directing that it occur. It might be better to say "authorized," so that possibility is also included in the above sketch.

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." As noted below, Rule 5.2(d) also authorizes court orders for filing under seal to protect privacy. Rule 5.2(h) provides that if a person entitled to protection regarding personal information under Rule 5.2(a) does not file under seal, the protection is waived.

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, the party claiming privilege protection 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 per court order. 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. In 2021, 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. In early 2023, 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.

The Subcommittee is hoping to receive some feedback from the Federal Magistrate Judges Association and also – with the assistance of our Clerk Liaison – from court clerks. It cannot be gainsaid that at least some proposed measures identified below could create logistical difficulties. As with the service of subpoena matter, the Subcommittee invites the full Committee to identify any concerns it should be addressing going forward.

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. One example is provided by Rule 5.2(d), which calls for a court order to authorize sealing to protect personal privacy.

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 it 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. For example, a seven-day waiting period would seem to dilute the authority Rule 5.2(d) provides for a court order authorizing filing personal identifying information under seal. The filing of a redacted version of the materials sought to be sealed may sometimes provide some measure of public access, however.

(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 of 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., 80 F.4th 571 (5th Cir. 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.

A 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.

The question what is a "final termination of the action" might create uncertainty. At least in the district court, that might be said to be the entry of judgment. But not all judgments end the

litigation in the district court. For one thing, Rule 54(a) says that "'[j]udgment' as used in these rules includes a decree and any order from which an appeal lies." So a partial final judgment under Rule 54(b) would seem to be included. And under 28 U.S.C. § 1292 a variety of interlocutory decisions are reviewable immediately. In addition, Rule 23(f) permits a party displeased with a ruling on class certification to seek immediate discretionary review of that decision in the court of appeals. Presumably the filed materials may not be retrieved until the appeal is resolved if one is filed.

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.

Discussions during the Advisory Committee's October 2023 meeting stressed the reality that many litigations involve highly confidential technical and competitive information; making filing under seal more difficult could prove very troublesome.

But attorney members of the committee stressed the extreme variety of practices in different districts, sometimes making the lawyers' work much more difficult. Some districts have very elaborate local provisions on filing under seal, and others have few or almost no provisions dealing with the topic. But it was also noted that this divergence might in some instances reflect the sorts of cases that are customary in different districts. There was discussion of the tension between recognizing the need for local latitude in dealing with handling these problems and also recognizing that concerns about perceptions of excessive sealing of court records have continued.

Suggestions during the Advisory Committee meeting included trying to consult with districts that have particular views on these subjects and ensuring that clerk's offices are involved because they are "essential players" in the day-to-day handling of such problems.

* * * * *

As noted above, the Subcommittee will be grateful for any further guidance the full Advisory Committee can provide on these issues.

TAB 9

9. Rule 41 Subcommittee Report

The Rule 41 Subcommittee continues its work considering amendments that would resolve differing interpretations among the circuits, particularly with respect to how much of a case may be voluntarily dismissed. The Subcommittee was formed in October 2022 in response to two submissions (21-CV-O, 22-CV-J) that pointed out a circuit split regarding whether the rule permits unilateral voluntary dismissal of only an entire "action" or something less, such as all claims against a single defendant, or one of several claims against a defendant.[1]

Currently, the rule allows a plaintiff to dismiss "an action." Some courts conclude that "action" means the entire case: all claims against all defendants. Other courts hold that the rule permits dismissal of all claims against a party. Still other courts have concluded that the rule permits voluntary dismissal of one or more claims. Over the course of the last year, the subcommittee has met with representatives from Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. The Subcommittee also sought feedback from federal judges, via a letter, attached, to the Federal Judges Association. The request elicited eight responses. These responses were somewhat ambivalent, as some judges had never encountered the issue and others expressed hesitation about upsetting the applecart with an amendment.

After this substantial outreach and research, the subcommittee has reached a consensus that the rule should be revised to explicitly increase the flexibility of parties to dismiss one or more claims from the case, whether unilaterally before the filing of an answer or motion for summary judgment, by stipulation, or by court order. The subcommittee believes that such a change would be consistent with both prevailing district-court practice and the policy running throughout the rules in favor of narrowing the issues in the case throughout the litigation. As a result, the subcommittee intends to propose an amendment for the fall meeting changing the references in Rule 41(a) to "an action" to "a claim," with an explicit statement in the committee note that this language allows voluntary dismissal of one or more claims asserted in the complaint.

The subcommittee is, however, considering additional changes to the rule to resolve some other differences among the courts regarding other aspects of the rule, as described in the attached memorandum. For instance, a stipulation of voluntary dismissal under Rule 41(a)(1)(A)(ii) requires that the stipulation be "signed by all parties who have appeared." Most courts have interpreted this language to mean that all parties *currently* in the litigation must sign the stipulation; those who are no longer parties need not sign. In the Eleventh Circuit, however, all those who were *ever* parties to the litigation must sign such a dismissal, a conclusion perhaps more consistent with the text of the rule. The subcommittee still is investigating several options, including leaving the language as is, amending to clarify that only extant parties need to sign such a stipulation, or

[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.

amending to allow dismissal by stipulation signed only by the parties to the claim(s) to be dismissed. The subcommittee intends to discuss these possibilities, including draft note language in its next meeting.

The subcommittee does not currently intend to change the time limit for a unilateral voluntary dismissal from "before the opposing party serves either an answer or a motion for summary judgment." There has been some discussion that the deadline for a notice of dismissal be moved up to the filing of a Rule 12 motion. The subcommittee is of the tentative opinion that the current time limit is workable, but it has not fully taken off the table the possibility of a change. That, too, will be discussed at the next meeting.

Finally, the subcommittee has consensus that a revised rule should not change the current presumptions regarding whether a dismissal is with or without prejudice. Preclusive effects of a dismissal are a matter for the applicable rules of preclusion, not the direct effect of the rule. *See Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-06 (2001).

MEMORANDUM

From: Andrew Bradt

To: Judge Rosenberg
Judge Bissoon
Rick Marcus
Ed Cooper
File

Re: Rule 41 Preliminary Revision Drafts

Date: January 15, 2024

Introduction

Over the course of the last year or so, this subcommittee has been focused on whether an amendment to Rule 41(a) is necessary in light of differing interpretations across the circuit and district courts. The subcommittee's research, outreach, and internal deliberations have persuaded it that amendment is likely appropriate, both to achieve uniformity and effectuate a policy of more flexibility when it comes to narrowing claims during pretrial proceedings. The subcommittee did consider another route to uniformity by revising the rule to make clear that a plaintiff may dismiss only the "entire action," or all claims against all defendants. Such a revision would be more consistent with the current text (and those circuits that have interpreted the rule's ambit narrowly), but the subcommittee's work has revealed that such a requirement would reduce efficiency and be out of step with the flexibility embodied in the Federal Rules as a whole, and the practice of many district judges who tend to winnow claims through other mechanisms, formal or informal, with the agreement of the parties. As a result, the subcommittee has turned its attention to more flexible alternatives, of which there are several.

Rule 41(a), as presently constructed, has several moving parts that could be adjusted, including most pertinently:

- *How much* of an action the plaintiff may unilaterally dismiss without a court order or by stipulation.
- Whether such a dismissal may be effectuated by *any* plaintiff or whether it must be asserted by *all* plaintiffs (somewhat similar to the requirement for dismissal by court order, which (currently) must be signed by all parties who have appeared).
- The *deadline* for dismissing without a court order.
- Whether the stipulation must be *signed* by "all parties who have appeared" or something less (such as "all current parties to the litigation").
- The *effect* of a unilateral dismissal, i.e., whether it is dismissed with or without prejudice as discussed in Rule 41(a)(1)(B). The subcommittee's tentative inclination, as I read it, is to leave that part of the rule alone. Such a revision might implicate *Semtek*, and the normal rules of claim preclusion seem to operate well in the background here. A committee note could mention Rule 18 and that the rule says nothing about whether claim or issue

preclusion might limit the plaintiff's pursuit of dismissed claims after entry of a final judgment in this action.

- Whether dismissal *by court order* should be available to the same degree as unilateral dismissal or dismissal by stipulation.
- The *effect* of a court-ordered dismissal. Again, my current sense is that the subcommittee does not want to change the rule with respect to when a voluntary dismissal would operate as a judgment on the merits.

There are, of course, other aspects of Rule 41 that could be looked at, should the subcommittee want to make more wholesale changes. Examples include: the effect of voluntary dismissal on counterclaims under Rule 41(a)(2); involuntary dismissal under Rule 41(b); dismissal of a counterclaim/crossclaim/third-party claim under Rule 41(c); and the assignment of costs to the plaintiff of previous voluntarily dismissed action in a new case. My current sense, though, is that the subcommittee is not terribly concerned about these aspects of the rule. Instead, the big-ticket item is *how much* of a case a plaintiff may voluntarily dismiss, unilaterally or by court order. That aspect of the Rule, I believe, could be adjusted without changing the other aspects of the Rule, unless the subcommittee considers further adjustment to be necessary. It would also be possible to consider other rules that affect the expansion or narrowing of claims, such as Rule 15.

As a reminder, Rule 41(a) currently provides:

Rule 41. Dismissal of Actions

***

(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.

The Most Flexible Approach

The simplest available alternative would be to focus only the word "action." This is the word in the rule that currently causes the most mischief because the meaning of action is interpreted so differently. The question is what to replace it with, in order to ensure the optimal amount of flexibility for plaintiffs. Without going into great detail here, the subcommittee has concluded that limiting voluntary dismissal to only the entire action is not only inefficient, it creates unnecessary legal questions (as in the Eleventh Circuit's appellate-jurisdiction cases), and it is out of step with the flexible case management of multiparty, multiclaim cases embodied in other aspects of the Federal Rules.

The simplest approach (albeit one not adopted thus far by any circuit, but some districts) would be to change the word "action" to "claim" and to make clear that the option is available to any plaintiff:

> **(A)** *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, ~~the~~ **a** [any][2] plaintiff[3] may dismiss ~~an action~~ **a** [any] **claim** without a court order by filing . . . .

Perhaps an additional benefit to this approach is that is parallels other parties' ability to dismiss "any counterclaim, crossclaim, or third-party claim" under Rule 41(c).

The Current Majority Approach

The majority approach in the circuits is to construe the word "action" to mean all claims against some but not all defendants. An open question is whether this interpretation of the rule is superior as a matter of policy; most of the decisions adopting this view are motivated by the use of the term "action" in the current rule. With that word excised, there may not be a reason to prefer this interpretation of the rule over one that allows a plaintiff to dismiss any claim. On the other hand, perhaps there is an argument that plaintiffs should be allowed only to voluntarily dismiss a *defendant* from the action by dismissal all claims against him. This version is a little bit harder to articulate. One possibility might be to retain the word action but attempt to clarify that the word "action" should be read to mean "all claims against one or more defendants":

[2] Under current style conventions "a" is regarded as including "any," but in this case, the committee may conclude that "any" is more appropriate, perhaps in both places where "a" is suggested above.

[3] An alternative would be "a plaintiff." If the subcommittee were of the view that such a dismissal must be agreed to by *all* plaintiffs, the language may need to be more extensive, such as "all plaintiffs may agree [by signed stipulation] to dismiss a claim". The subcommittee has not yet focused on this issue. My own preliminary view is that adding this requirement to a *unilateral dismissal* would add an unnecessary layer of complexity without additional benefit, but additional discussion may be worthwhile.

(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~~ **a** [any] plaintiff may dismiss an action **as to a** [any] **defendant** without a court order by filing . . .

The problem, in my view, with this version of the rule is that it does not sufficiently address the ambiguity of the term "action." Keeping the word "action" in the rule could also perpetuate the existing confusion about how much of a case may be dismissed by court order under Rule 41(a)(2). A committee note could make clear that the intent of the committee is to allow the dismissal of all claims against a single defendant. Given the current enthusiasm for textualism, however, I am leery of relying on a committee note to address the ambiguity in the rule.

A somewhat different approach may read:

(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~~ **a** [any] plaintiff may dismiss **a** [any] **defendant from the case** without a court order by filing:

(i) a notice ~~of dismissal~~ **dismissing all claims against a defendant** before ~~the opposing party~~ **the defendant to be dismissed** serves either an answer or a motion for summary judgment; or . . .

Changing the Deadline for Unilateral Voluntary Dismissal

As we have discussed, the primary impetus for Rule 41(a) in the original Federal Rules was to override state and local rules that allowed unilateral voluntary dismissal later in the proceedings, in some cases at trial. The goal was to permit voluntary dismissal only at an early stage of the litigation in order to balance the plaintiff's interest in going forward in a different forum against the defendant's interest in avoiding the costs of litigating pretrial, only to have the rug pulled out from under them before a final judgment on the merits and having to start from square one in another forum. The rule selects service of an answer or motion for summary judgment as the appropriate deadline for unilateral voluntary dismissal.[4]

During our outreach to LCJ, some lawyers expressed a desire that the deadline be moved back earlier, to the filing of an answer or a Rule 12 motion to dismiss. Their concern was that defendants sometimes spend significant effort preparing Rule 12 motions, and plaintiffs' being able to dismiss after the filing of such a motion was unfair. Perhaps there is something to this.

[4] The original 1938 version of the rule allowed for unilateral voluntary dismissal until the service of an answer. As explained in the committee note, the addition of the summary-judgment motion deadline was added in 1946 because a "motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval."

Motion practice under Rule 12 (particularly with respect to personal jurisdiction and failure to state a claim) has become more common and complex in recent years.

That said, the committee could not move the deadline back to a Rule 12 motion unless it was also prepared to amend Rule 15(a)(1)(B), which permits the filing of an amended complaint once as a matter of course within 21 days of service of a Rule 12 motion. Amendment once as a matter of course after service of a Rule 12 motion has always been allowed since before the Federal Rules; the 21-day deadline was added to the rule in 2009 to conform the previously existing 21-day deadline for an amendment following service of an answer. It is worth consulting to Ed, Rick, and others about how controversial that new deadline was in 2009.

Perhaps it is time to consider doing away with the right to amend the complaint without leave of court after service of a Rule 12 motion, but it would be a rather significant change to longstanding practice. The purpose of Rule 15's allowing an amendment as a matter of course is to:

> force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Eliminating this provision, coupled with barring voluntary dismissal after service of a Rule 12 motion, will severely inhibit this goal. The benefit would perhaps be to require the plaintiff to consider more closely the initial complaint with the knowledge that any amendment after a Rule 12 motion will require leave of court. And perhaps that is an appropriate tradeoff for an expanded right to dismiss something less than an entire action. But significant further research on Rule 15(a)(1)(A) would be required.

If the subcommittee were to go down this road, though, an amended rule would look something like:

> **(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~~ **a motion under Rule 12(b), (e), or (f),** an answer**,** or a motion for summary judgment; or ...

Signing of a Stipulation of Dismissal by All Parties

Currently, Rule 41(a)(1)(B) provides that an action may be voluntarily dismissed by filing "a stipulation of dismissal signed by all parties who have appeared." The Eleventh Circuit has interpreted this language strictly to require that such a stipulation must be signed by all parties who have *ever* appeared in the litigation, including those who are no longer in the case. Although the

Eleventh Circuit's interpretation of Rule 41 is somewhat inconsistent, it appears to subscribe to the view that the rule permits a plaintiff to dismiss all claims against one or more defendants. If a plaintiff takes advantage of this opportunity, say by settling all claims with one of multiple defendants, and later wants to settle or dismiss claims against one or more remaining defendants, then the parties must obtain consent from the defendant no longer in the case. This may prove difficult in some cases or create an opportunity for long-departed defendants to prevent the dismissal or settlement of other claims.

A narrow way to solve this problem would be to amend the rule to require signatures only by those parties currently in the case:

> **(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:
>
> ***
>
> **(ii)** a stipulation of dismissal signed by all **current** parties ~~who have appeared~~ **to the case**.

One question the subcommittee has not considered is whether the requirement of stipulation by all parties remains necessary at all. With the increase in multiparty litigation, and the ability of parties to obtain voluntary dismissal by court order under Rule 41(a)(2), perhaps the requirement of any parties to sign a stipulation other than the plaintiff or defendant to the particular claim(s) to be dismissed. A rule *could* provide that dismissal could be obtained by filing:

> **(ii)** a stipulation of dismissal signed by ~~all parties who have appeared~~ **the parties to the claim sought to be dismissed**.

Dismissal by Court Order

Rule 41(a)(2), which provides for dismissal by court order on terms the court considers proper, replicates the ambiguity created by the term "action." Currently, the rule (in pertinent part) states:

> 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.

In courts that construe "action" to mean all claims against all defendants, a court order under this rule may achieve only that and not dismissal of anything less. Should the committee decide to change the word "action" in Rule 41(a)(1)(A), it may carry that change forward in parallel fashion to Rule 41(a)(2). One could, however, consider the possibility that the latitude to dismiss by court

order should be greater than the latitude to dismiss unilaterally or by stipulation (e.g., that the parties may choose to dismiss only the entire case, but the judge should have the latitude to dismiss less than that, given her wholistic understanding of the case). The subcommittee has not considered that possibility thus far, but it could. What follows are draft amendments to 41(a)(2) that would mirror amendments to 41(a)(1), but the committee could decide to keep (a)(1) the way it is and make only (a)(2) more flexible.

If the subcommittee sought to allow dismissal of any claims, while preserving the defendant's ability to object if he has asserted a counterclaim and the presumption that the counterclaim will remain in the case, Rule 41(a)(2) could be amended to read:

> Except as provided in Rule 41(a)(1), ~~an action~~ **a claim** may be dismissed at ~~the~~ **a** [any] plaintiff's request only by court order, on terms that the court considers proper. If **the plaintiff seeks to dismiss all claims against** a defendant **that** has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, ~~the action~~ **that defendant** may be dismissed over ~~the~~ **that** 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.

Should the subcommittee prefer the current majority approach of the circuits, allowing only dismissal of all claims against a defendant, the rule could read:

> Except as provided in Rule 41(a)(1), ~~an action~~ **a defendant** may be dismissed ~~at~~ **pursuant** the plaintiff's request **to dismiss all claims against that defendant** only by court order, on terms that the court considers proper. If ~~a~~ **that** defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the ~~action~~ **defendant** may be dismissed over ~~the defendant's~~ **its** 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.

Effects of a Dismissal

The subcommittee has thus far not expressed interest in changing the circumstances under which voluntary dismissals are presumptively with or without prejudice. Currently, a dismissal by notice or stipulation under Rule 41(a)(1) is without prejudice unless the notice or stipulation says otherwise; a dismissal by court order under Rule 41(a)(2) is presumptively without prejudice unless the order states otherwise. Under Rule 41(a)(1)(B), however, "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." In other words, if the federal case the plaintiff now seeks to voluntarily dismiss is a second bite at the apple, then the Rule defines the dismissal as an adjudication on the merits, which would typically preclude refiling in a third court. This provision operates mostly cleanly if the plaintiff is limited to dismissing only an entire action; subsequent refiling of any action including the same claim, as defined by the rules of claim preclusion, is barred. It gets a little more complicated, if a plaintiff can dismiss less than an entire action, but as Ed pointed out at the last meeting, the normal rules of claim preclusion are likely to work out the same way.

Unless the subcommittee believes that the "effect" of a dismissal should be altered, or there are as yet unconsidered consequences to other changes, the cleanest route to accomplishing the committee's objectives of uniformity and increased flexibility are likely best served by leaving them alone. The subcommittee may, however, wish to consider the question further.

TAB 9A

National Employment Lawyers Association

December 20, 2023

Hon. Cathy Bissoon
Joseph F. Weis, Jr. Courthouse
700 Grant Street
Pittsburgh, PA 15219

Re: *Fed. R. Civ. P.* 41

Dear Judge Bissoon,

Thank you for reaching out to the National Employment Lawyers Association (NELA) concerning its views on Rule 41. The members of NELA are familiar with the rule and welcome this opportunity to present our viewpoint and comments concerning potential amendments to the Rule.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA and its 69 circuit, state, and local affiliates have a membership of more than 4,000 attorneys who are committed to working on behalf of those who have faced illegal treatment in the workplace. NELA has appeared as *amicus curiae* before the United States Supreme Court and various federal Courts of Appeal regarding the proper interpretation of federal civil rights and worker protection laws. NELA also comments regularly on relevant proposed rules.

Our members represent employees in every federal jurisdiction in the United States and its territories. They experience every iteration of the voluntary dismissal conundrum: how best to dismiss without prejudice[1] one or more defendants or one or more claims. These questions frequently arise late in the litigation, either at or around summary judgment or before trial. While Rule 15, allowing a plaintiff to amend her complaint to remove a claim or party, is frequently proffered as the solution to this problem, that rule has its own complications, as noted in the subcommittee's report to the October 16, 2023 meeting of the Advisory Committee.

The Subcommittee's report fully describes the varying interpretations that the courts have given to Rule 41. NELA believes the jurisprudence interpreting the rules of procedure should be true to the text of those rules. But beyond that, NELA believes that Rule 41—like all rules—should achieve the

[1] We understand that one issue being considered by the Subcommittee concerns voluntary dismissal without prejudice. Nevertheless, dismissal with prejudice of some claims or parties raises the same textual issues under Rule 41(a), although the "finality trap" problems, discussed below, may be obviated by such a dismissal.

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speedy and inexpensive determination of every action, while minimizing the problems that can be created by the current version of the rule.[2]

NELA believes that Rule 41(a) should be amended to permit as much flexibility to dismiss claims or parties as is practicable. Unreasonable limits on the ability to streamline and simplify a case are not consistent with the goal of the rules to secure the just, speedy, and inexpensive determination of every action and proceeding. *Fed. R. Civ. P.* 1. Our reasons for supporting amendment are based, in part, upon the nature of the claims which we litigate.

Generally, when our clients approach us for representation, they are at a disadvantage. While the employee can explain what happened to her, the employer usually has the most complete pool of evidence relevant to the employee's potential claims. Further, our clients do not always approach us before filing charges with the EEOC or similar administrative agencies.[3] They often do not approach an attorney until after the administrative charges have been dismissed and they are facing a short statute of limitations.[4] Given that proceedings before the administrative agencies seldom result in the disclosure of all relevant evidence, counsel for employment plaintiffs are often compelled by their ethical duties to represent their clients competently and diligently to include all potentially viable claims in their complaints. That is particularly so when the underlying facts implicate multiple federal and state laws. Frequently, it is not until the close of discovery that plaintiff's counsel will have sufficient relevant information to determine that a claim, originally asserted in good faith, may no longer be viable, or that a party should no longer be included in the case. An amended Rule 41(a) along the lines of our proposal would streamline the process so that the parties can focus on the viable claims and relevant parties, without the costs, expenses, and confusion that preparing and submitting amended pleadings can cause. *See, Interfaces Inc. v. Hirobi,* No. 22-CV-2259, 2023 WL 4137886, at *2 (N.D. Ill. June 7, 2023).

NELA suggests that Rule 41(a) be revised as shown below (a "clean" version is followed by a "red-lined" one):

Rule 41. Dismissal of Actions, Claims, or Parties.

(a) Voluntary Dismissal.

(1) By the Plaintiff.

[2] One problem that our research revealed was the so-called "finality" trap, more fully described below. Our proposed amendments to Rule 41 include an attempt to resolve that trap.
[3] Many employment law claims require the exhaustion of administrative remedies as a precondition to suit.
[4] Title VII and related statutes require an aggrieved individual to file suit within ninety days of the receipt of a notice of right to sue, issued when the administrative procedures have been exhausted.

(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, one or more parties, or one or more claims without a court order by filing:

(i) a notice of dismissal within twenty-one days after the opposing party serves a motion under Rule 12(b), (e), or (f); an answer; a motion for summary judgment; or a motion for sanctions under Rule 11; or

(ii) a stipulation of dismissal signed by all parties who have appeared and have not been dismissed.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. A dismissal without prejudice under this Rule does not prevent an otherwise final order or judgment from being final for purposes of enforcing a judgment or appeal. 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, one or more parties, or one or more claims may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. Those terms may include that a dismissal without prejudice does not prevent an otherwise final order or judgment for being final for purposes of enforcing a judgment or appeal. 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.

The red-lined version:

Rule 41. Dismissal of Actions, <u>Claims, or Parties</u>.

(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, <u>one or more parties, or one or more claims</u> without a court order by filing:

(i) a notice of dismissal ~~before~~ within twenty-one days after the opposing party serves ~~either~~ a motion under Rule 12(b), (e), or (f); an answer; ~~or~~ a motion for summary judgment; or a motion for sanctions under Raule 11; or

(ii) a stipulation of dismissal signed by all parties who have appeared and have not been dismissed.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. A dismissal without prejudice under this Rule does not prevent an otherwise final order or judgment from being final for purposes of enforcing a judgment or appealing. 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, one or more parties, or one or more claims may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. Those terms may include that a dismissal without prejudice does not prevent an otherwise final order or judgment for being final for purposes of enforcing a judgment or appeal. 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.

The proposed change to R. 41(a)(1)(A) reflects NELA's belief that the courts and the litigants would be better served if the Rules encouraged plaintiffs to concentrate on their most viable claims.

The proposed changes to Rule 41(a)(i) would import the 21-day period for amending a complaint as of right, under Rule 15(a), and the similar time-period under Rule 11, giving plaintiffs or counterclaimants a chance for a second look that could avoid or at least mitigate the necessity for motion practice. (We also note that the filing of a motion under the time standard described in the paragraph would tend to concentrate the pleader's mind in the manner that Samuel Johnson described). While the pleader would have somewhat more time to dismiss without the court's approval than is now the case, NELA believes, for the reasons stated above, that the change would benefit the entire civil justice system.

The suggested change to Rule 41(a)(1)(ii) would make clear that parties who are no longer part of a case have no further role in it. While some courts have held that such parties must assent to a stipulation dismissing a matter (or, if the change stated above is adopted, a claim), *see* Harvey *Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105, 108 (2nd Cir. 1953), we know of no good reason why that should be so. There can be no benefit to the remaining parties, to the court or the civil

justice system from such a requirement and requiring all original parties to assent can obstruct those remaining in the case from achieving a result they all desire, *e.g.* when an individual defendant has disappeared, or a small corporation has gone out of business. There is no good reason to require the parties still in the case to undertake a search for that defendant, or for them to be required to involve the court, as would be required if a motion to accept the stipulated outcome is required.

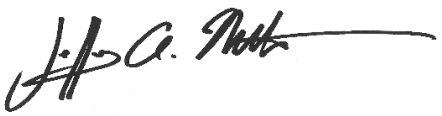
Additional language is proposed for Rule 41(a)(1)(B) in order to eliminate the "finality trap," in which a foregone claim nonetheless prevents a dismissal of the remaining claims with prejudice from being final and appealable without additional court proceedings under Rules 15, 21 or 54, which can be a substantial burden. *See Williams v. Taylor Seidenbach, Inc.* 958 F.3d 341 (Fifth Cir. 2020). The injustice of the finality trap may be illustrated by this example: Suppose two employees have claims for discrimination and retaliation arising out of the same incident. Employee A files a complaint with both claims, but decides quickly that the discrimination claim will be hard or even impossible to prove, so she dismisses it without prejudice under Rule 41. Employee B's counsel, seeking simplicity or perhaps just trying to reduce the amount of work required, eschews the discrimination claim and files only for retaliation. If both cases are dismissed on summary judgment, employee B may appeal immediately, but employee A will have to jump through hoops to take the same step. Again, the interests of judicial economy and clarity counsel in favor of a rule that permits appeals from both cases to go forward at the same time.

The proposed changes to Rule 41(a)(2) would make explicit that Rule 41 may be used to dismiss claims, and not just an entire action, and incorporates the suggested language from Rule 41(a)(1)(B) to make clear that the court may avoid the finality trap.

NELA believes that the proposal outlined above would bring Rule 41 more in line with the reality of current practice and pleading and would have significant advantages over the current Rules and protocols in terms of clarity, fairness, efficiency and judicial economy.

Thank you for your attention. If you have any additional questions, please do not hesitate to contact us at jmittman@nelahq.org.

Sincerely,



Jeffrey A. Mittman (he/him)
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TAB 10

10. Rule 7.1 Subcommittee Report

The Rule 7.1 Subcommittee, chaired by Justice Jane N. Bland, has continued its work and met most recently, via Zoom, on February 23, 2024. Since it was formed at the March 2023 Advisory Committee meeting, this subcommittee has been investigating the concern that the current disclosure requirement in the rule may not adequately inform judges of beneficial ownership interests in a corporate party so judges may evaluate whether that interest requires recusal under statutory or ethical obligations. The subcommittee is not yet to the point of circulating a proposed rule amendment (nor has it concluded that an amendment would be prudent). But the subcommittee has made substantial progress and would benefit from feedback from the full Committee.

Currently, Rule 7.1(a) requires a "nongovernmental corporate party or a nongovernmental corporation that seeks to intervene" to disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock." The goal of the rule is to ensure that district judges can comply with their duty to recuse when they know that they have "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 requirement is perhaps even stricter than it appears at first glance since the statute defines "financial interest" as "ownership of a legal or equitable interest, however small," with some exceptions for mutual funds and other investment vehicles. *Id.* §455(d)(4). Canon 3C(1)(c) of the Code of Conduct for United States Judges echoes the language of § 455(b)(4).

Because the statute requires recusal for both legal ownership and indirect equitable ownership, the current rule does not require that parties disclose appropriate information for judges to evaluate their statutory obligation in some kinds of cases. One example, noted in a suggestion by Judge Erickson (8th Cir.) (22-CV-H), is the "grandparent problem"; a party must disclose a "parent corporation" but that parent might itself have a parent that is not disclosed (such as a holding company, like Berkshire Hathaway), but in which a judge may own an interest, and the grandparent's interest in the parent is an equitable one that can compel legal title in the party or direct other corporate action by the party. As a result, a judge may unknowingly have a basis to evaluate whether the judge has a "financial interest in a party to the proceeding," as defined by the statute. Moreover, the current disclosure requirement is limited to "any parent corporation and any publicly held corporation" owning 10% or more of a party's stock. Of course, there are other kinds of business associations that may hold a substantial interest in a party that are neither corporations nor publicly held.

One inherent challenge in drafting appropriate amendments to the rule is that it is difficult to capture all possible corporate relationships that might reveal a financial interest "however small". Arguably, this problem continually gets more difficult in a commercial landscape that includes many large actors that do not fall into the category of "nongovernmental corporations," such as LLCs, limited partnerships, and other business associations. In addition, an unduly broad disclosure rule of all affiliated corporate structures (to include ones in which the interest is too removed to constitute an equitable ownership in the party) would become both unacceptably burdensome and unlikely to reveal an entity in which a judge would realistically have any previously unknown ownership stake.

Both the current rule and the guidance provided to judges by the Codes of Conduct Committee recognize that it is impractical for a disclosure rule to ensure complete information for evaluating recusal in every possible instance. The Rule 7.1 Committee 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).

The Codes of Conduct Committee provides guidance to judges through Advisory Opinions, in this case Advisory Opinion No. 57, which was recently updated in February 2024 (appended to this memo). In both its old and new versions, the opinion's benchmark for a financial interest in a party is a corporate affiliate's "control" of that party. That is, if the judge has a financial interest in a parent that "controls" a party, that judge has a financial interest requiring recusal. The new guidance elaborates on this idea. If a judge holds a stake in a parent that owns a majority stake in a party, the judge must recuse. Drawing on Rule 7.1 (along with Fed. R. App. P. 26.1, Fed. R. Bankr. P. 7007.1, and Fed. R. Bankr. P. 8012), the opinion advises that if the judge has a stake in a parent that owns 10% or more of the stock of a party, but less than a majority, there is a rebuttable presumption of control, and therefore a rebuttable requirement to recuse. The opinion is silent about a parent that owns *less* than 10% of the stock in a party. One could plausibly read this silence to mean that a judge need not be concerned about having an interest in an entity with such a small ownership stake in the party, as it is unlikely to be an equitable interest in the party itself, or that such a small stake creates a rebuttable presumption that recusal is not necessary.

The opinion makes clear, however, that regardless of a financial interest, a judge must recuse if the judge holds "any other interest that could be substantially affected by the outcome of the proceeding." Examples include "ownership of a mutual fund that owns 10% or more of a party's stock if the judge's interest in the mutual fund could be affected substantially by the outcome of the proceeding" and investment in a "in a 'sector' or 'industry' fund . . . if the outcome of the proceeding could substantially affect the value of the judge's interest in the fund." On the other hand, "in the case of large holding companies invested in a wide range of corporations, a [holding company's] share [of] greater than 10% in a single enterprise may not represent a significant portion of its overall portfolio," meaning that a holding company could potentially exercise control over a party, but a judge's ownership of shares in the holding company may not be substantially affected by the result of the proceeding. In such cases, recusal would apparently be discretionary.

The updated conduct committee guidance endorses the current 10% ownership figure as a still-appropriate proxy for a parent's control of a party for use in evaluating whether a judge's investment in a parent demands recusal. The guidance provides valuable insight into when an

investment in a holding company requires recusal, but it does not suggest a disclosure framework that would reveal a "grandparent problem." A judge who holds an interest in Berkshire Hathaway, for instance, still should evaluate Berkshire's stake in the party, even if indirect, to follow the guidance. An ideal disclosure framework would inform the judge of this information.

For its part, the subcommittee has been focusing on possible alternatives, looking first at the myriad local rules many districts have adopted to supplement Rule 7.1. Prior Rules Law Clerk Christopher Pryby prepared a comprehensive memo collecting these local rules. The subcommittee found that the local rules tend to follow one of three approaches: (1) broadening the definition of what corporate relationships must be disclosed through use of a broad term, such as "affiliate"; (2) a list of specific relationships entities might have with a party that must be disclosed, such as an insurer; and (3) lowering the percentage ownership of a party's stock that triggers disclosure, such as from 10% to 5%.

With respect to broad, catch-all terms like "affiliate," the subcommittee is concerned that such a requirement could be onerous and disclose immaterial information, and perhaps not be complied with in many cases, a concern raised at the January Standing Committee meeting. Moreover, as the current committee note recognizes, there is a concern that a judge might be so swamped by information in a disclosure that the judge might miss the only pertinent bit. With respect to a mandated disclosure list of relationships, the subcommittee noted the perennial "danger of lists" being over or underinclusive. And, finally, with respect to lowering the 10% ownership percentage in the current rule, there is a sense of some arbitrariness of any figure (including the current one). The updated guidance from the Codes of Conduct Committee continues to use the 10% figure, as do the relevant provisions of the Appellate and Bankruptcy Rules.

Leaving those approaches aside, the subcommittee plans to focus more on an amendment that would capture aspects of control that the current disclosure rule does not capture. It is investigating another promising model focusing on requiring a party, alongside the current 10% ownership requirement, to disclose any entity that exercises substantial control over it. Disclosure of both owners of more than 10% of stock *and* any entity with substantial control may go a long way toward providing judges with the information necessary to comply with the Code of Conduct Committee's guidance. The inspiration for this idea was the Corporate Transparency Act of 2022, codified at 31 U.S.C. § 5336.

Under the law, a beneficial owner (with some exceptions) is defined as "any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company." 31 C.F.R. § 1010.380(d). The relevant regulations define "substantial control" to include serving as a senior officer, having authority over the appointment or removal of any senior officer, or a majority of the board of directors, directing, determining, or having substantial influence over important decisions made by the reporting company, or "any other form of substantial control" *Id.* § 1010.380(d)(1).

The subcommittee is continuing research on other possibilities, including perhaps some alternatives borrowed from state law. Mindful of the new guidance about sector related investment

funds, the subcommittee also is discussing whether the disclosure rule should incorporate subsidiary ownership disclosure. The subcommittee is of course eager for any reactions or feedback the full committee may have.

TAB 10A

Committee on Codes of Conduct Advisory Opinion
No. 57: Disqualification Based on a Parent-Subsidiary Relationship

This opinion considers recusal issues arising out of parent-subsidiary relationships between corporations.

Canon 3C(1) of the Code of Conduct for United States Judges provides that:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's 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 affected substantially by the outcome of the proceeding.

Canon 3C(3)(c) defines a "financial interest" as "ownership of a legal or equitable interest, however small." The provision enumerates exceptions to the definition, including ownership in a mutual or common investment fund; the proprietary interest of a policy-holder in a mutual insurance company, or a similar proprietary interest, where the outcome of the proceeding could not substantially affect the value of the interest; and ownership of government securities, where the outcome of the proceeding could not substantially affect the value of the securities. None of these exceptions are applicable to parent-subsidiary relationships, which present materially different issues.

If a parent corporation owns all or a majority of stock in a subsidiary that is a party, the Committee advises that a judge who owns stock in the parent then has a financial interest in the subsidiary, requiring recusal.

The issue is less clear where the parent holds less than a majority interest. The Committee concludes that under the Code the owner of stock in a parent corporation has a financial interest in a subsidiary that the parent controls. Therefore, when a corporation does not own all or a majority of stock in a party, the judge should determine whether the corporation has control of the party. *See* Black's Law Dictionary (11th ed. 2019) (defining "parent corporation" as "[a] corporation that has a controlling interest in another corporation"). The Committee advises that the 10% disclosure requirement in the Federal Rules (e.g., Fed. R. App. P. 26.1, Fed R. Civ. P. 7.1, Fed. R. Bankr. P. 7007.1, and Fed. R. Bankr. P. 8012) creates a threshold rebuttable presumption of control for recusal purposes. Whether that presumption may be rebutted or not depends on other indicia of control, such as board representation or wide dispersion of the remainder of the stock, which are relevant to the influence

wielded by a 10% interest. To determine if one entity controls another, a judge may exercise his or her discretion to seek information from the parties or their attorneys; a judge also may review publicly available sources, such as Securities and Exchange Commission filings. When a judge concludes that a party is controlled by a corporation in which the judge owns stock, the judge must recuse.

Whether recusal is necessary when a party discloses that a mutual fund company or holding company owns 10% or more of its stock warrants additional elaboration. Ordinarily, because a judge who invests in a mutual fund does not have a financial interest in the mutual fund management company, or the securities held in the fund, unless the judge participates in the fund's management, the judge does not have a financial interest in a subsidiary and there is no need for the judge to determine whether the mutual fund company exercises control. *See* Canon 3C(3)(c)(i); Advisory Opinion No. 106 ("Mutual or Common Investment Funds"); *see also* Black's Law Dictionary (11th ed. 2019) (defining "mutual fund" as "[a]n investment company that invests its shareholders' money in a usu[ally] diversified selection of securities"). In the case of holding companies, the necessary inquiry is once again the percentage of ownership interest, with 10% the relevant threshold. But, as explained above, this threshold creates a rebuttable presumption and is not an absolute line, because in practical terms the specific percentage of ownership may fluctuate over time based simply on market conditions without affecting whether the holding company has control over the party. *See* Black's Law Dictionary (11th ed. 2019) (holding company is a "company formed to control other companies, usu[ally] confining its role to owning stock and supervising management").

Regardless of control, a judge must recuse if the company in which the judge owns stock could be substantially affected by the outcome of the proceeding. For example, recusal would be required if the value of the party's stock is likely to be affected by the outcome of the proceeding, and the value of the company in which the judge owns stock would in turn be affected substantially by the change in the party's stock price. The Committee notes that the 10% disclosure requirement in the Federal Rules "assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal." Fed. R. App. P. 26.1, 1998 Advisory Committee Note. But although a 10% ownership interest in a party may raise a threshold presumption that a company could be substantially affected by litigation, in the case of large holding companies invested in a wide range of corporations, a share greater than 10% in a single enterprise may not represent a significant portion of its overall portfolio.

Even in the case of mutual funds, a judge may, in rare circumstances, be required to recuse based on ownership of a mutual fund that owns 10% or more of a party's stock if the judge's interest in the mutual fund could be affected substantially by the outcome of the proceeding. While a judge is not required to monitor the underlying investments in a mutual fund, Canon 3C(1)(c) requires a judge to recuse if the judge knows that his or her interest in a mutual fund could be substantially affected by the

outcome of a case. *See* Advisory Opinion No. 106. A judge who invests in a "sector" or "industry" fund, for example, must recuse from a case involving that particular sector or industry if the outcome of the proceeding could substantially affect the value of the judge's interest in the fund. *Id.*

If a judge owns stock in the subsidiary rather than the parent corporation, and the parent corporation appears as a party in a proceeding, the judge must recuse if the value of the judge's interest in the subsidiary could be substantially affected by the proceeding. As the Committee has explained in other contexts, it is not the size of the judge's interest that matters, but rather whether the interest could be substantially affected.

In closing, the Committee notes that recusal decisions are also governed by the recusal statutes, 28 U.S.C. §§ 455 and 144, and the case law interpreting them. Although the Committee is not authorized to render advisory opinions interpreting §§ 455 and 144, Canon 3C of the Code closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.

February 2024

TAB 11

11. Cross-Border Discovery Subcommittee Report

During the Advisory Committee's October 2023 meeting, a Cross-Border Discovery Subcommittee was created. The Chair is Judge Shah, and the members are Judge Boal, Professor Clopton, Judge McEwen (liaison to the Bankruptcy Rules Committee), and Joshua Gardner of the DOJ.

The Subcommittee was created to address issues raised by Judge Baylson and Prof. Gensler in a recent article in Judicature that was included in the agenda book for the October 2023 meeting and is included in this agenda book. Judge Baylson also attended the Committee's October 2023 meeting and discussed his proposal that the Committee initiate a project to address cross-border discovery issues.

A starting point is that U.S.-style discovery is unknown in the rest of the world, where depositions are very rare and document discovery is available only on court order. Moreover, in many parts of the world a court will order production only when the requesting party can show that the other side has this exact document, that the requesting party cannot otherwise obtain the document, and that it has a strong need for that specific document to prepare its case. That approach is obviously very different from document requests under Rule 34, which often seek all documents that "relate or refer" to a potentially relevant issue, and do not require advance court approval. (Until 1970, a court order was required to obtain document production, but that requirement was removed by amendment, based in part on the experience that production regularly occurred without court order by stipulation.)

This is not to say that there is something wrong with the American approach. To the contrary, particularly in an era of heavy reliance on digital communication, it often happens that a party has no advance knowledge of what the opposing party's emails, texts, etc., will reveal about the case. And practice in other countries appears to be evolving toward the American model. Thus, the old Roman maxim *nemo tenetur edere contra se* (no party has to assist the opposing party by providing adverse evidence) has been substantially relaxed.

At the same time, however, privacy concerns seem more frequently important in much of the rest of the world when discovery is in issue. To take a prominent example, the General Data Privacy Regulation (GDPR) of the European Union might inhibit production of much information of a sort routinely discoverable in this country.

In addition, outside this country some view American discovery as an adjunct to overly aggressive application of American substantive law, such as antitrust law. That may explain, in part, the existence of "blocking statutes" in some places that forbid local discovery to obtain evidence for use in American courts. This antagonism to American discovery goes back to the 19th century. See, e.g., Richard Marcus, Retooling American Discovery for the Twenty-First Century: Toward a New World Order?, 7 Tulane J. Int'l & Compar. L. 153, 158 (1999) (describing formal German diplomatic notes of protest about American discovery in the 1870s).

In short, these issues can be contentious, and sometimes even involve diplomatic concerns. 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. 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 "first resort" arguments that they would have to use the Convention discovery methods rather than those provided by the Federal Rules to obtain cross-border discovery. There were counter-arguments that the Convention's procedures were cumbersome and slow, making 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. A copy of the *Aerospatiale* decision is included in this agenda book.

Insisting on discovery American style could present serious problems. On that, consider a pre-Convention case, Societe International 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 foreign 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).

Subcommittee Planning Meeting

On Jan. 30, 2024, the Subcommittee held an online meeting to develop an initial focus for its immediate activities. It reached several tentative conclusions, reported below, and has begun some information-gathering, which it hopes to continue after the April 9 Advisory Committee meeting:

(1) For the present, the focus will not be on discovery in this country under § 1782. That initial focus does not mean that issues about domestic discovery under § 1782 are unimportant or straightforward. But they were not the main focus of the submission from Judge Baylson and Professor Gensler, and addressing those issues seems sufficiently challenging for the present.

(2) Regarding discovery seeking information from parties to American cases, there are many issues to be considered. One can argue that obtaining information for accurate resolution of American cases is more important to American litigation than the procuring evidence in this country for use in litigation outside this country.

(3) A variety of issues regarding § 1781 and the Hague Convention that appear to be of potential importance was identified, including the following:

(a) Have the lower courts interpreted the Supreme Court's decision in *Aerospatiale* in ways that produced difficulties? Relatedly, have 30+ years of experience under the factors the Court introduced in that case indicated that it may be time to recalibrate the Court's view of whether there should be a preference for attempting in the first instance to use Convention methods? (This might resemble Justice Blackmun's views.)

(b) Has experience indicated that insisting on discovery abroad pursuant to American methods sometimes produced delays that might have been avoided by first resort to Convention methods?

(c) Have Convention methods produced undue delays or costs that bear on whether to use American methods to obtain discovery from parties to American litigation?

(d) Does cross-border discovery from nonparties present special challenges?

(e) What American discovery efforts produce the most difficulties? For example, is document discovery (Rule 34) more likely to produce problems that deposition discovery (Rule 30) or interrogatories (Rule 33)?

Initial outreach on the issues above seemed a first step, and efforts are under way to obtain informal first reactions from the Federal Magistrates Judges Association and the United States. It may be possible to report on the feedback at the April meeting.

(4) Additional issues were also identified:

(a) Is it agreed whether materials sought through U.S. discovery are located "outside" the U.S.? Rule 34 provides for discovery of materials within the possession, custody or control of a litigant to a case in a federal court. Does it matter where these materials are "located"?

(b) Would it be desirable to add cross-border discovery to the list of topics the parties must discuss in developing their discovery plan under Rule 26(f) and their report to the court under Rule 16(b)? Have parties been discussing cross-border discovery in Rule 26(f) conferences? Have courts addressed such issues in their 16(b) orders?

(c) The Hague Convention was drafted at a time when it was simpler to say where evidence – particularly documentary evidence – was located. Do those assumptions continue to apply? If not, could a rule help?

(d) Has the GDPR, or other non-U.S. privacy doctrines, significantly impeded efforts to obtain needed evidence for U.S. proceedings. Could protective orders under Rule 26(c) ameliorate those privacy concerns?

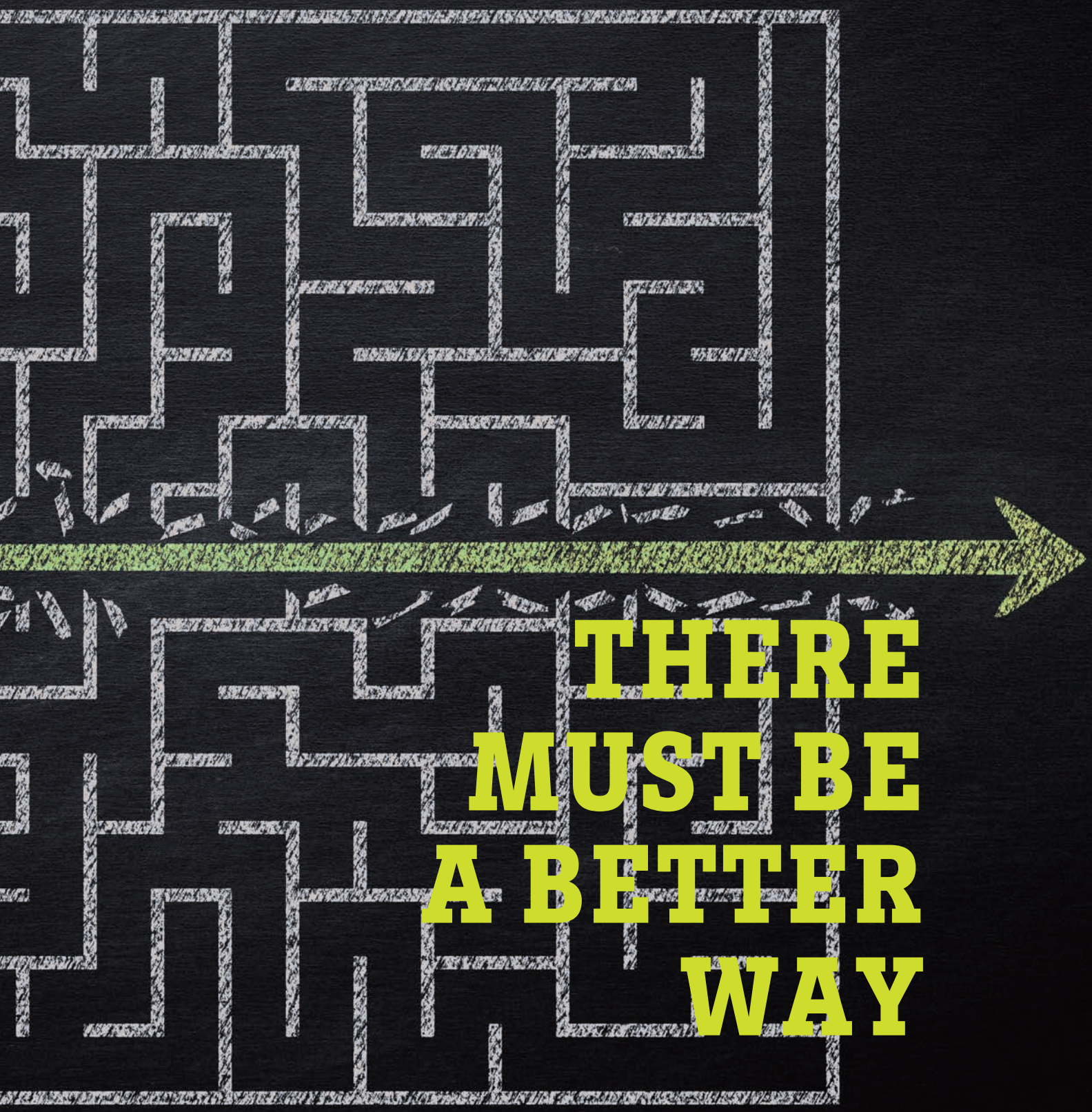
(e) Are there special requirements U.S. courts should seek to ensure in relation to evidence-gathering abroad to make it admissible in the U.S.? With regard to depositions, for example, does questioning under the Convention procedures produce a transcript admissible in an American court?

* * * * *

The Subcommittee is just beginning its work, and it has a lot to learn. The foregoing is at best an introduction to some of the things it hopes to learn. It invites insights from Committee members on these topics and on whether additional topics should be added to its list.

In addition, we invite suggestions of sources that might provide helpful guidance about answering these questions. Judge Baylson has already offered to make a presentation to the Subcommittee, and the Sedona Conference (which has put out publications about some of these topics) has also volunteered to advise (see 23-CV-H, dated March 3, 2023).

TAB 11A



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] & STEVEN S. GENSLER

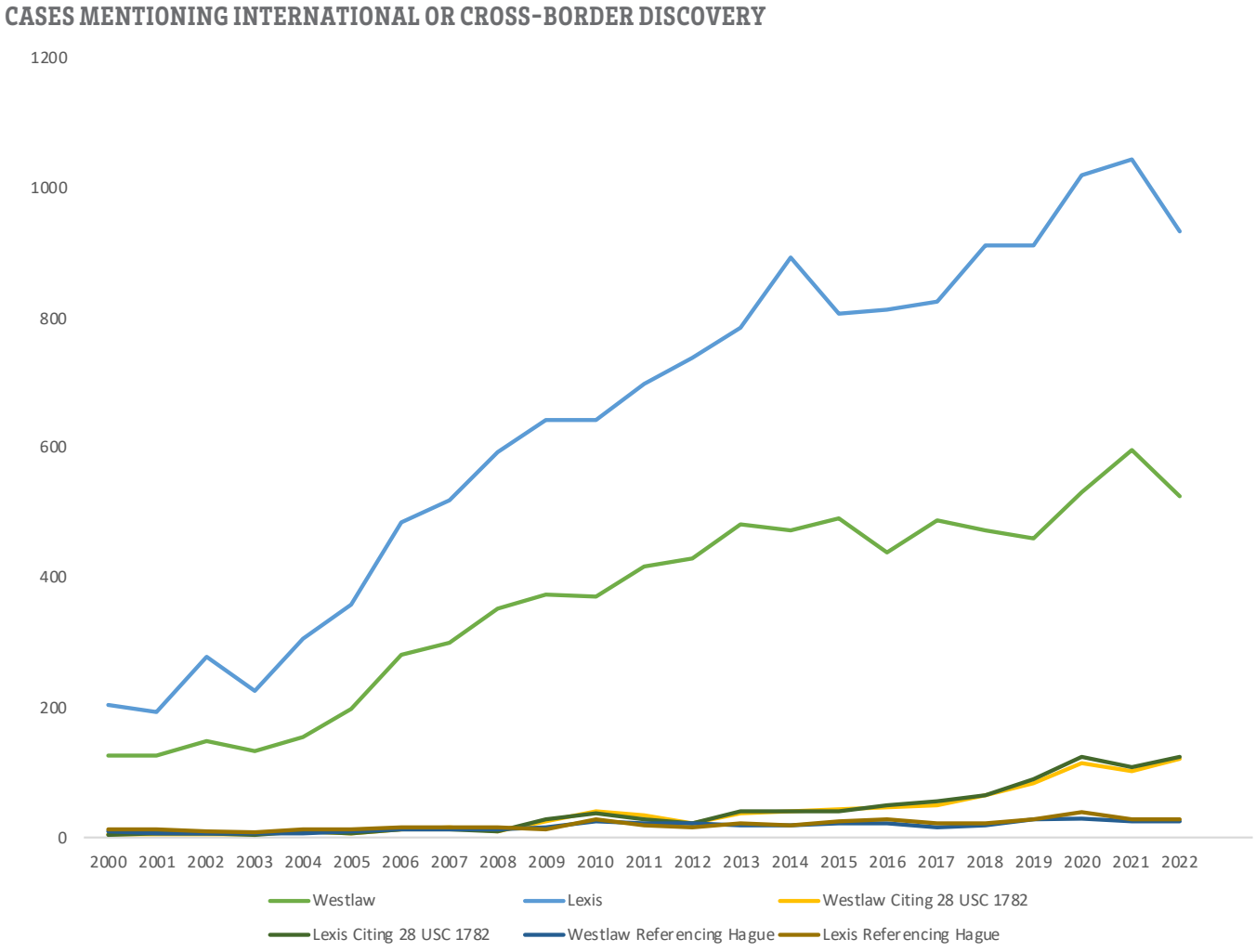
In today's world of borderless commerce, digital documents, and cloud storage, information relevant to U.S. litigation frequently is located outside of the United States. When discovery in a U.S. case crosses the border to reach that non-U.S. information, the lawyers and judges face a complex web of 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 ▸



discovery. As the timeline graph above shows, case references to those terms have risen significantly and steadily 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 U.S. 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 United States. 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 for-

eign 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 discovery 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.

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. We have no doubt that the bench, bar, and academy can and will help rule-makers identify potential contact points and puzzle through possible solutions.

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 United States. 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's 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 United States. 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 preexisting 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 United States 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 pro- ▸

> cedures 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]

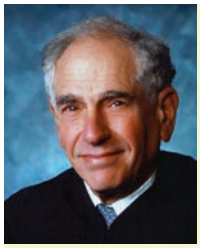
Longtime followers of the rule-making process may recall that the civil rules committee considered just such an amendment to Rule 26 in 1988, publishing a proposal to require parties to use treaty-based methods unless they "afford discovery that is inadequate."[33] The proposal was modified in response 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*, The 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 to 1993 amendment (noting that the term "letter of request" has been substituted 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 11B

107 S.Ct. 2542
Supreme Court of the United States

SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE and Société de Construction d'Avions de Tourisme, Petitioners
v.
UNITED STATES DISTRICT COURT FOR the SOUTHERN DISTRICT OF IOWA, etc.

No. 85–1695
|
Argued Jan. 14, 1987.
|
Decided June 15, 1987.

Synopsis

Plaintiffs in personal injury action arising out of crash of airplane made in France brought action against manufacturer. After the United States District Court for the Southern District of Iowa denied motion for protective order, French manufacturer sought mandamus. The Court of Appeals for the Eighth Circuit, 782 F.2d 120, denied relief and certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) Hague Evidence Convention applied to request for information from foreign national which was a party to the litigation; (2) Hague Evidence Convention did not provide exclusive and mandatory procedure for obtaining documents and information located within territorial foreign signatory; (3) first resort to Hague Convention was not required; and (4) Hague Convention did not deprive district court of jurisdiction it otherwise possessed to order foreign national party before it to produce evidence physically located within a foreign signatory nation.

Vacated and remanded.

Justice Blackmun filed an opinion concurring in part and dissenting in part in which Justice Brennan, Justice Marshall, and Justice O'Connor joined.

West Headnotes (15)

[1] **Federal Civil Procedure** Discovery and Production of Documents and Other Tangible Things

Hague Evidence Convention does not provide the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

106 Cases that cite this headnote

[2] **Federal Civil Procedure** Rules of Civil Procedure

Federal Civil Procedure Depositions and Discovery

International Law Evidence and discovery

Both the Federal Rules of Civil Procedure and the Hague Evidence Convention are the law of the United States. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

160 Cases that cite this headnote

[3] **Federal Civil Procedure** Discovery and Production of Documents and Other Tangible Things

Not only is the Hague Evidence Convention not the exclusive means for obtaining documents and information located within territory of foreign signatory, but also it does not require that its procedures be used first. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

74 Cases that cite this headnote

[4] **Federal Civil Procedure** Depositions and Discovery

Hague Evidence Convention does not modify the law of any contracting state, require any contracting state to use the Convention procedures either in requesting evidence or in responding to those requests, nor compel any contracting state to change its own evidence gathering procedures. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

31 Cases that cite this headnote

[5] **Federal Civil Procedure** Depositions and Discovery

Hague Evidence Convention was intended to establish optional procedures that would facilitate the taking of evidence abroad. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

68 Cases that cite this headnote

[6] **Federal Civil Procedure** Discovery and Production of Documents and Other Tangible Things

Hague Evidence Convention did not deprive federal district court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

75 Cases that cite this headnote

[7] **Federal Civil Procedure** Depositions and Discovery

Hague Evidence Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves, and does not purport to draw any sharp line between evidence that is abroad and evidence that is within the control of a party subject to the jurisdiction of the requesting court. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

13 Cases that cite this headnote

[8] **Federal Civil Procedure** Depositions and Discovery

Optional procedures of the Hague Evidence Convention are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention, and the Convention "applies" to the production of evidence in a litigant's possession in the sense that it is one of the methods of seeking evidence that a court may elect to employ. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

46 Cases that cite this headnote

[9] **Federal Civil Procedure** Discovery and Production of Documents and Other Tangible Things

American court should not refuse to make use of Hague Evidence Convention procedures merely because of concern that court might ultimately find it necessary to order production of evidence which a foreign tribunal has previously permitted a party to withhold. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

40 Cases that cite this headnote

[10] **Federal Civil Procedure** Depositions and Discovery

First resort to Hague Evidence Convention procedures is not required whenever discovery is sought from foreign litigant. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

152 Cases that cite this headnote

[11] **Federal Civil Procedure** Depositions and Discovery

Foreign nation's "blocking statute" precluding disclosure of evidence does not deprive American court of power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate the foreign blocking statute.

117 Cases that cite this headnote

[12] **Federal Civil Procedure** Depositions and Discovery

Fact that foreign nation has adopted a "blocking statute" does not require American courts to engraft a rule of first resort under the Hague Evidence Convention or otherwise to provide nationals of such a country with a preferred status in American courts, and American courts are not required to adhere blindly to the directions of such a statute. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

33 Cases that cite this headnote

[13] **Federal Civil Procedure** Depositions and Discovery

American courts, in supervising pretrial proceedings involving foreign nationals, should exercise special vigilance to protect foreign litigants from the danger that unnecessary or unduly burdensome discovery may place them in a disadvantageous position, and judicial supervision of discovery should always seek to minimize its cost and inconvenience and to prevent improper uses of discovery request.

111 Cases that cite this headnote

[14] **Federal Civil Procedure** Grounds and Objections

Objections to "abusive" discovery made by foreign litigant should receive the most careful consideration.

23 Cases that cite this headnote

[15] **Federal Civil Procedure** Discovery and Production of Documents and Other Tangible Things

District court may require, in appropriate situations, that party producing evidence located in foreign country bear the burden of providing translations and detailed descriptions of relevant documents that are needed to assure prompt and complete production pursuant to the terms of the Hague Evidence Convention. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Art. 1 et seq., 28 U.S.C.A. § 1781 note.

46 Cases that cite this headnote

****2544** *Syllabus* [*]

***522** The United States, France, and 15 other countries have acceded to the Hague Evidence Convention, which prescribes procedures by which a judicial authority in one contracting state may request evidence located in another. Plaintiffs brought suits (later consolidated) in Federal District Court for personal injuries resulting from the crash of an aircraft built and sold by petitioners, two corporations owned by France. Petitioners answered the complaints without questioning the court's jurisdiction, and engaged in initial discovery without objection. However, when plaintiffs served subsequent discovery requests under the Federal Rules of Civil Procedure, petitioners filed a motion for a protective order, alleging that the Convention dictated the exclusive procedures that must be followed since petitioners are French and the discovery sought could only be had in France. A Magistrate denied the motion, and the Court of Appeals denied petitioners' ****2545** mandamus petition, holding, *inter alia,* that when a district court has jurisdiction over a foreign litigant, the Convention does not apply even though the information sought may be physically located within the territory of a foreign signatory to the Convention.

Held:

1. The Convention does not provide exclusive or mandatory procedures for obtaining documents and information located in a foreign signatory's territory. The Convention's plain language, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish optional procedures for obtaining evidence abroad. Its preamble speaks in nonmandatory terms, specifying its purpose to "facilitate" discovery and to "improve mutual judicial co-operation." Similarly, its text uses permissive language, and does not expressly modify the law of contracting states or require them to use the specified procedures or change their own procedures. The Convention does not deprive the District Court of its jurisdiction to order, under the Federal Rules, a foreign national party to produce evidence physically located within a signatory nation. Pp. 2548–2553.

***523** 2. The Court of Appeals erred in concluding that the Convention "does not apply" to discovery sought from a foreign litigant that is subject to an American court's jurisdiction. Although they are not mandatory, the Convention's procedures are available whenever they will facilitate the gathering of evidence, and "apply" in the sense that they are one method of seeking evidence that a court may elect to employ. P. 2554.

3. International comity does not require in all instances that American litigants first resort to Convention procedures before initiating discovery under the Federal Rules. In many situations, Convention procedures would be unduly time consuming and expensive, and less likely to produce needed evidence than direct use of the Federal Rules. The concept of comity requires in this context a more particularized analysis of the respective interests of the foreign and requesting nations than a blanket "first resort" rule would generate. Thus, the determination whether to resort to the Convention requires prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that such resort will prove effective. Pp. 2554–2557.

782 F.2d 120 (CA8 1986), vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, POWELL, and SCALIA, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and O'CONNOR, JJ., joined, *post,* p. ——.

Attorneys and Law Firms

John W. Ford argued the cause for petitioners. With him on the briefs were Stephen C. Johnson, Lawrence N. Minch, and William L. Robinson.

Jeffrey P. Minear argued the cause for the United States et al. as amici curiae. With him on the brief were Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Lauber, Deputy Assistant Attorney General Spears, David Epstein, Abraham D. Sofaer, and Daniel L. Goelzer.

Richard H. Doyle IV argued the cause for respondent. With him on the brief were Verne Lawyer, Roland D. Peddicord, and Thomas C. Farr.*

* Briefs of amici curiae urging reversal were filed for the Government of the United Kingdom of Great Britain and Northern Ireland by Douglas E. Rosenthal, Willard K. Tom, and Bruno A. Ristau; for the Republic of France by George J. Grumbach, Jr.; for the Federal Republic of Germany by Peter Heidenberger; for the Government of Switzerland by Robert E. Herzstein; for Anschuetz & Co., GmbH, et al. by James S. Campbell, David Westin, Carol F. Lee, Neal D. Hobson, Andrew N. Vollmer, and Gerhard Nagorny; and for the Motor Vehicle Manufacturers Association of the United States, Inc., et al. by Michael Hoenig, Herbert Rubin, William H. Crabtree, and Edward P. Good.

Paul A. Nalty, Derek A. Walker, and Kenneth J. Servay filed a brief for Compania Gijonesa de Navigacion, S.A., as amicus curiae urging affirmance.

Richard L. Mattiaccio and David A. Botwinik filed a brief for the Italy-America Chamber of Commerce, Inc., as amicus curiae.

Opinion

***524** Justice STEVENS delivered the opinion of the Court.

The United States, the Republic of France, and 15 other Nations have acceded to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.[1] This Convention—sometimes referred to as the "Hague Convention" or the "Evidence Convention"—prescribes certain procedures by which a judicial authority in one contracting state may request evidence located ****2546** in another contracting state. The question presented in this case concerns the extent to which a federal district court

must employ the procedures set forth in the Convention when litigants seek answers to interrogatories, the production of documents, and admissions from a French adversary over whom the court has personal jurisdiction.

I

The two petitioners are corporations owned by the Republic of France.[2] They are engaged in the business of designing,manufacturing, ***525** and marketing aircraft. One of their planes, the "Rallye," was allegedly advertised in American aviation publications as "the World's safest and most economical STOL plane."[3] On August 19, 1980, a Rallye crashed in Iowa, injuring the pilot and a passenger. Dennis Jones, John George, and Rosa George brought separate suits based upon this accident in the United States District Court for the Southern District of Iowa, alleging that petitioners had manufactured and sold a defective plane and that they were guilty of negligence and breach of warranty. Petitioners answered the complaints, apparently without questioning the jurisdiction of the District Court. With the parties' consent, the cases were consolidated and referred to a Magistrate. See 28 U.S.C. § 636(c)(1).

Initial discovery was conducted by both sides pursuant to the Federal Rules of Civil Procedure without objection.[4] When plaintiffs[5] served a second request for the production of documents pursuant to Rule 34, a set of interrogatories pursuant to Rule 33, and requests for admission pursuant to Rule 36, however, petitioners filed a motion for a protective order. App. 27–37. The motion alleged that because petitioners are "French corporations, and the discovery sought ***526** can only be found in a foreign state, namely France," the Hague Convention dictated the exclusive procedures that must be followed for pretrial discovery. App. 2. In addition, the motion stated that under French penal law, the petitioners could not respond to discovery requests that did not comply with the Convention. *Ibid.*[6]

****2547** The Magistrate denied the motion insofar as it related to answering interrogatories, producing documents, and making admissions.[7] After reviewing the relevant cases, the Magistrate explained:

> "To permit the Hague Evidence Convention to override the Federal Rules of Civil Procedure would frustrate the courts' interests, which particularly arise in products liability ***527** cases, in protecting United States citizens from harmful products and in compensating them for injuries arising from use of such products." App. to Pet. for Cert. 25a.

The Magistrate made two responses to petitioners' argument that they could not comply with the discovery requests without violating French penal law. Noting that the law was originally " 'inspired to impede enforcement of United States antitrust laws,' "[8] and that it did not appear to have been strictly enforced in France, he first questioned whether it would be construed to apply to the pretrial discovery requests at issue.[9] *Id.,* at 22a–24a. Second, he balanced the interests in the "protection of United States citizens from harmful foreign products and compensation for injuries caused by such products" against France's interest in protecting its citizens "from intrusive foreign discovery procedures." The Magistrate concluded that the former interests were stronger, particularly because compliance with the requested discovery will "not have to take place in France" and will not be greatly intrusive or abusive. *Id.,* at 23a–25a.

Petitioners sought a writ of mandamus from the Court of Appeals for the Eighth Circuit under Federal Rule of Appellate Procedure 21(a). Although immediate appellate review of an interlocutory discovery order is not ordinarily available, see ***528** *Kerr v. United States District Court,* 426 U.S. 394, 402–403, 96 S.Ct. 2119, 2123–2124, 48 L.Ed.2d 725 (1976), the Court of Appeals considered that the novelty and the importance of the question presented, and the likelihood of its recurrence, made consideration of the merits of the petition appropriate. 782 F.2d 120 (1986). It then held that "when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention." *Id.,* at 124. The Court of Appeals disagreed with petitioners' argument that this construction would render the entire Hague Convention "meaningless," noting that it would still serve the purpose of providing an improved procedure for obtaining evidence from nonparties. *Id.,* at 125. The court also rejected petitioners' contention that considerations of international comity required plaintiffs to resort to Hague Convention procedures as an initial matter

("first use"), and correspondingly to invoke the federal discovery rules only if the treaty procedures turned out to be futile. The Court of Appeals believed that the potential overruling of foreign tribunals' denial of discovery would **2548 do more to defeat than to promote international comity. *Id.,* at 125–126. Finally, the Court of Appeals concluded that objections based on the French penal statute should be considered in two stages: first, whether the discovery order was proper even though compliance may require petitioners to violate French law; and second, what sanctions, if any, should be imposed if petitioners are unable to comply. The Court of Appeals held that the Magistrate properly answered the first question and that it was premature to address the second.[10] The court *529 therefore denied the petition for mandamus. We granted certiorari. 476 U.S. 1168, 106 S.Ct. 2888, 90 L.Ed.2d 976 (1986).

II

[1] In the District Court and the Court of Appeals, petitioners contended that the Hague Evidence Convention "provides the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory." 782 F.2d, at 124.[11] We are satisfied that the Court of Appeals correctly rejected this extreme position. We believe it is foreclosed by the plain language of the Convention. Before discussing the text of the Convention, however, we briefly review its history.

The Hague Conference on Private International Law, an association of sovereign states, has been conducting periodic sessions since 1893. S.Exec. Doc. A, 92d Cong., 2d Sess. p. V (1972) (S.Exec. Doc. A). The United States participated in those sessions as an observer in 1956 and 1960, and as a member beginning in 1964 pursuant to congressional authorization.[12] In that year Congress amended the Judicial Code to grant foreign litigants, without any requirement of reciprocity, special assistance in obtaining evidence in the *530 United States.[13] In 1965 the Hague Conference adopted a Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention), 20 U.S.T. 361, T.I.A.S. No. 6638, to which the Senate gave its advice and consent in 1967. The favorable response to the Service Convention, coupled with the longstanding interest of American lawyers in improving procedures for obtaining evidence abroad, motivated the United States to take the initiative in proposing that an evidence convention be adopted. Statement of Carl F. Salans, Deputy Legal Adviser, Department of State, Convention on Taking of Evidence **2549 Abroad, S.Exec.Rep. No. 92–25, p. 3 (1972). The Conference organized a special commission to prepare the draft convention, and the draft was approved without a dissenting vote on October 26, 1968. S.Exec. Doc. A, at p. V. It was signed on behalf of the United States in 1970 and ratified by a unanimous vote of the Senate in 1972.[14] The 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. Amram, Explanatory Report on the Convention on the Taking of EvidenceAbroad *531 in Civil or Commercial Matters, in S.Exec. Doc. A, p. 11.

In his letter of transmittal recommending ratification of the Convention, the President noted that it was "supported by such national legal organizations as the American Bar Association, the Judicial Conference of the United States, the National Conference of Commissions on Uniform State Laws, and by a number of State, local, and specialized bar associations." S.Exec. Doc. A., p. III. There is no evidence of any opposition to the Convention in any of those organizations. The Convention was fairly summarized in the Secretary of State's letter of submittal to the President:

> "The willingness of the Conference to proceed promptly with work on the evidence convention is perhaps attributable in large measure to the difficulties encountered by courts and lawyers in obtaining evidence abroad from countries with markedly different legal systems. Some countries have insisted on the exclusive use of the complicated, dilatory and expensive system of letters rogatory or letters of request. Other countries have refused adequate judicial assistance because of the absence of a treaty or convention regulating the matter. The substantial increase in litigation with foreign aspects arising, in part, from the unparalleled expansion of international trade and travel in recent decades had intensified the need for an effective international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad.
>
> "Civil law countries tend to concentrate on *commissions rogatoires,* while common law countries take testimony on notice, by stipulation and through commissions to consuls or commissioners. Letters of request for judicial assistance from courts abroad in securing needed evidence have been

the exception, rather than the rule. The civil law technique results normally in a résumé of ***532** the evidence, prepared by the executing judge and signed by the witness, while the common law technique results normally in a verbatim transcript of the witness's testimony certified by the reporter.

"Failure by either the requesting state or the state of execution fully to take into account the differences of approach to the taking of evidence abroad under the two systems and the absence of agreed standards applicable to letters of request have frequently caused difficulties for courts and litigants. To minimize such difficulties in the future, the enclosed convention, which consists of a preamble and forty-two articles, is designed to:

"1. Make the employment of letters of request a principal means of obtaining evidence abroad;

"2. Improve the means of securing evidence abroad by increasing the powers of consuls and by introducing in the civil law world, on a limited basis, the concept of the commissioner;

"3. Provide means for securing evidence in the form needed by the court where the action is pending; and

"4. Preserve all more favorable and less restrictive practices arising from internal law, internal rules of procedure and bilateral or multilateral conventions.

****2550** "What the convention does is to provide a set of minimum standards with which contracting states agree to comply. Further, through articles 27, 28 and 32, it provides a flexible framework within which any future liberalizing changes in policy and tradition in any country with respect to international judicial cooperation may be translated into effective change in international procedures. At the same time it recognizes and preserves procedures of every country which now or hereafter may provide international cooperation in the taking of evidence on more liberal and less restrictive bases, whether this is effected by supplementary agreements or by municipal law and practice." *Id.,* VI.

***533** III

[2] In arguing their entitlement to a protective order, petitioners correctly assert that both the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States. Brief for Petitioners 31. This observation, however, does not dispose of the question before us; we must analyze the interaction between these two bodies of federal law. Initially, we note that at least four different interpretations of the relationship between the federal discovery rules and the Hague Convention are possible. Two of these interpretations assume that the Hague Convention by its terms dictates the extent to which it supplants normal discovery rules. First, the Hague Convention might be read as requiring its use to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court. Second, the Hague Convention might be interpreted to require first, but not exclusive, use of its procedures. Two other interpretations assume that international comity, rather than the obligations created by the treaty, should guide judicial resort to the Hague Convention. Third, then, the Convention might be viewed as establishing a supplemental set of discovery procedures, strictly optional under treaty law, to which concerns of comity nevertheless require first resort by American courts in all cases. Fourth, the treaty may be viewed as an undertaking among sovereigns to facilitate discovery to which an American court should resort when it deems that course of action appropriate, after considering the situations of the parties before it as well as the interests of the concerned foreign state.

In interpreting an international treaty, we are mindful that it is "in the nature of a contract between nations," *Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243, 253, 104 S.Ct. 1776, 1783, 80 L.Ed.2d 273 (1984), to which "[g]eneral rules of construction apply." *Id.,* at 262, 104 S.Ct., at 1788. See *Ware v. Hylton,* 3 Dall. 199, 240–241, 1 L.Ed. 568 (1796) ***534** opinion of Chase, J.). We therefore begin "with the text of the treaty and the context in which the written words are used." *Air France v. Saks,* 470 U.S. 392, 397, 105 S.Ct. 1338, 1341, 84 L.Ed.2d 289 (1985). The treaty's history, " 'the negotiations, and the practical construction adopted by the parties' " may also be relevant. *Id.,* at 396, 105 S.Ct., at 1341 (quoting *Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431–432, 63 S.Ct. 672, 677–678, 87 L.Ed. 877 (1943)).

[3] **[4]** We reject the first two of the possible interpretations as inconsistent with the language and negotiating history of the Hague Convention. The preamble of the Convention specifies its purpose "to facilitate the transmission and

execution of Letters of Request" and to "improve mutual judicial co-operation in civil or commercial matters." 23 U.S.T., at 2557, T.I.A.S. No. 7444. The preamble does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices.[15] The text of the **2551 Evidence Convention itself does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures.[16]

*535 The Convention contains three chapters. Chapter I, entitled "Letters of Requests," and chapter II, entitled "Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners," both use permissive rather than mandatory language. Thus, Article 1 provides that a judicial authority in one contracting state "may" forward a letter of request to the competent authority in another contracting state for the purpose of obtaining evidence.[17] Similarly, Articles 15, 16, and 17 provide that diplomatic officers, consular agents, and commissioners "may ... without compulsion," take evidence under certain conditions.[18] The absence of any command that a contracting state must use Convention procedures when they are not needed is conspicuous.[19]

[5] *536 Two of the Articles in chapter III, entitled "General Clauses," buttress our conclusion that the Convention was intended as a permissive supplement, not a pre-emptive replacement, for other means **2552 of obtaining evidence located abroad.[20] Article 23 expressly authorizes a contracting state to declare that it will not execute any letter of request in aid of pretrial discovery of documents in a common-law country.[21] Surely, if the Convention had been intended to replace completely the broad discovery powers that the common-law courts in the United States previously exercised over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common-law contracting parties to agree to *537 Article 23, which enables a contracting party to revoke its consent to the treaty's procedures for pretrial discovery.[22] In the absence of explicit textual support, we are unable to accept the hypothesis that the common-law contracting states abjured recourse to all pre-existing discovery procedures at the same time that they accepted the possibility that a contracting party could unilaterally abrogate even the Convention's procedures.[23] Moreover, Article 27 plainly states that *538 the Convention does not prevent a contracting state from using more liberal methods of rendering evidence than those authorized by the Convention.[24] Thus, the text of the **2553 Evidence Convention, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish optional procedures that would facilitate the taking of evidence abroad. See Amram, The Proposed Convention on the Taking of Evidence Abroad, 55 A.B.A.J. 651, 655 (1969); President's Letter of Transmittal, Sen. Exec. Doc. A, p. III.

[6] *539 An interpretation of the Hague Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court hearing a case involving a national of a contracting state to the internal laws of that state. Interrogatories and document requests are staples of international commercial litigation, no less than of other suits, yet a rule of exclusivity would subordinate the court's supervision of even the most routine of these pretrial proceedings to the actions or, equally, to the inactions of foreign judicial authorities. As the Court of Appeals for the Fifth Circuit observed in *In re Anschuetz & Co., GmbH,* 754 F.2d 602, 612 (1985), cert. pending, No. 85–98:

> "It seems patently obvious that if the Convention were interpreted as preempting interrogatories and document requests, the Convention would really be much more than an agreement on taking evidence abroad. Instead, the Convention would amount to a major regulation of the overall conduct of litigation between nationals of different signatory states, raising a significant possibility of very serious interference with the jurisdiction of United States courts.
>
> . . .
>
> "While it is conceivable that the United States could enter into a treaty giving other signatories control over litigation instituted and pursued in American courts, a treaty intended to bring about such a curtailment of the rights given to all litigants by the federal rules would surely state its

> intention clearly and precisely identify crucial terms."

The Hague Convention, however, contains no such plain statement of a pre-emptive intent. We conclude accordingly that the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign ***540** national party before it to produce evidence physically located within a signatory nation. [25]

****2554** IV

While the Hague Convention does not divest the District Court of jurisdiction to order discovery under the Federal Rules of Civil Procedure, the optional character of the Convention procedures sheds light on one aspect of the Court of Appeals' opinion that we consider erroneous. That court concluded that the Convention simply "does not apply" to discovery sought from a foreign litigant that is subject to the jurisdiction of an American court. 782 F.2d, at 124. Plaintiffs argue that this conclusion is supported by two considerations. First, the Federal Rules of Civil Procedure provide ***541** ample means for obtaining discovery from parties who are subject to the court's jurisdiction, while before the Convention was ratified it was often extremely difficult, if not impossible, to obtain evidence from nonparty witnesses abroad. Plaintiffs contend that it is appropriate to construe the Convention as applying only in the area in which improvement was badly needed. Second, when a litigant is subject to the jurisdiction of the district court, arguably the evidence it is required to produce is not "abroad" within the meaning of the Convention, even though it is in fact located in a foreign country at the time of the discovery request and even though it will have to be gathered or otherwise prepared abroad. See *In re Anschuetz & Co., GmbH,* 754 F.2d, at 611; *In re Messerschmitt Bolkow Blohm GmbH,* 757 F.2d 729, 731 (CA5 1985), cert. vacated, 476 U.S. 1168, 106 S.Ct. 2887, 90 L.Ed.2d 975 (1986); No. 85–99; *Daimler-Benz Aktiengesellschaft v. United States District Court,* 805 F.2d 340, 341–342 (CA10 1986).

[7] **[8]** Nevertheless, the text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves; nor does it purport to draw any sharp line between evidence that is "abroad" and evidence that is within the control of a party subject to the jurisdiction of the requesting court. Thus, it appears clear to us that the optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention. Although these procedures are not mandatory, the Hague Convention does "apply" to the production of evidence in a litigant's possession in the sense that it is one method of seeking evidence that a court may elect to employ. See Briefs of *Amici Curiae* for the United States and the SEC 9–10, the Federal Republic of Germany 5–6, the Republic of France 8–12, and the Government of the United Kingdom and Northern Ireland 8.

V

[9] Petitioners contend that even if the Hague Convention's procedures are not mandatory, this Court should adopt a rule ***542** requiring that American litigants first resort to those procedures before initiating any discovery pursuant to the normal methods of the Federal Rules of Civil Procedure. See, *e.g., Laker Airways, Ltd. v. Pan American World Airways,* 103 F.R.D. 42 (DC 1984); *Philadelphia Gear Corp. v. American Pfauter Corp.,* 100 F.R.D. 58 (ED Pa.1983). The Court of Appeals rejected this argument because it was convinced that an American court's order ultimately requiring discovery that a foreign court had refused under Convention procedures ****2555** would constitute "the greatest insult" to the sovereignty of that tribunal. 782 F.2d, at 125–126. We disagree with the Court of Appeals' view. It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions, and we are satisfied that foreign tribunals will recognize that the final decision on the evidence to be used in litigation conducted in American courts must be made by those courts. We therefore do not believe that an American court should refuse to make use of Convention procedures because of a concern that it may ultimately find it necessary to order the production of evidence that a foreign tribunal permitted a party to withhold.

[10] Nevertheless, we cannot accept petitioners' invitation to announce a new rule of law that would require first resort to Convention procedures whenever discovery is sought from a foreign litigant. Assuming, without deciding, that we have the lawmaking power to do so, we are convinced that such a general rule would be unwise. In many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the

Federal Rules.[26] A rule of first resort in all cases would ***543** therefore be inconsistent with the overriding interest in the "just, speedy, and inexpensive determination" of litigation in our courts. See Fed.Rule Civ.Proc. 1.

[11] **[12]** Petitioners argue that a rule of first resort is necessary to accord respect to the sovereignty of states in which evidence is located. It is true that the process of obtaining evidence in a civil-law jurisdiction is normally conducted by a judicial officer rather than by private attorneys. Petitioners contend that if performed on French soil, for example, by an unauthorized person, such evidence-gathering might violate the "judicial sovereignty" of the host nation. Because it is only through the Convention that civil-law nations have given their consent to evidence-gathering activities within their borders, petitioners argue, we have a duty to employ those procedures whenever they are available. Brief for Petitioners 27–28. We find that argument unpersuasive. If such a duty were to be inferred from the adoption of the Convention itself, we believe it would have been described in the text of that document. Moreover, the concept of international comity[27] requires in this context a more particularized analysis of ***544** the respective interests of the foreign nation and the requesting nation than petitioners' proposed ****2556** general rule would generate.[28] We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.[29]

***545** Some discovery procedures are much more "intrusive" than others. In this case, for example, an interrogatory asking petitioners to identify the pilots who flew flight tests in the Rallye before it was certified for flight by the Federal Aviation Administration, or a request to admit that petitioners authorized certain advertising in a particular magazine, is certainly less intrusive than a request to produce all of the "design specifications, line drawings and engineering plans and all engineering change orders and plans and all drawings concerning the leading edge slats for the Rallye type aircraft manufactured by the Defendants." App. 29. Even if a court might be persuaded that a particular document request was too burdensome or too "intrusive" to be granted in full, with or without an appropriate protective order, it might well refuse to insist upon the use of ****2557** Convention procedures ***546** before requiring responses to simple interrogatories or requests for admissions. The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke.

[13] **[14]** **[15]** American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses. For example, the additional cost of transportation of documents or witnesses to or from foreign locations may increase the danger that discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence. Objections to "abusive" discovery that foreign litigants advance should therefore receive the most careful consideration. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. See *Hilton v. Guyot,* 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895). American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication.[30]

***547** VI

In the case before us, the Magistrate and the Court of Appeals correctly refused to grant the broad protective order that petitioners requested. The Court of Appeals erred, however, in stating that the Evidence Convention does not apply to the pending discovery demands. This holding may be read as indicating that the Convention procedures are not even an option that is open to the District Court. It must be recalled, however, that the Convention's specification of duties in executing states creates corresponding rights in requesting states; holding that the Convention does not apply in this situation would deprive domestic litigants of access to evidence through treaty procedures to which the contracting states have assented. Moreover, such a rule would deny the

foreign litigant a full and fair opportunity to demonstrate appropriate reasons for employing Convention procedures in the first instance, for some aspects of the discovery process.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice O'CONNOR join, concurring in part and dissenting in part.

Some might well regard the Court's decision in this case as an affront to the nations ****2558** that have joined the United States in ratifying the Hague Convention on the Taking of Evidence ***548** Abroad in Civil or Commercial Matters, opened for signature, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444. The Court ignores the importance of the Convention by relegating it to an "optional" status, without acknowledging the significant achievement in accommodating divergent interests that the Convention represents. Experience to date indicates that there is a large risk that the case-by-case comity analysis now to be permitted by the Court will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently. I fear the Court's decision means that courts will resort unnecessarily to issuing discovery orders under the Federal Rules of Civil Procedure in a raw exercise of their jurisdictional power to the detriment of the United States' national and international interests. The Court's view of this country's international obligations is particularly unfortunate in a world in which regular commercial and legal channels loom ever more crucial.

I do agree with the Court's repudiation of the positions at both extremes of the spectrum with regard to the use of the Convention. Its rejection of the view that the Convention is not "applicable" at all to this case is surely correct: the Convention clearly applies to litigants as well as to third parties, and to requests for evidence located abroad, no matter where that evidence is actually "produced." The Court also correctly rejects the far opposite position that the Convention provides the *exclusive* means for discovery involving signatory countries. I dissent, however, because I cannot endorse the Court's case-by-case inquiry for determining whether to use Convention procedures and its failure to provide lower courts with any meaningful guidance for carrying out that inquiry. 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 resort first to the Convention ***549** procedures.[1] An individualized analysis of the circumstances of a particular case is appropriate only when it appears that it would be futile to employ the Convention or when its procedures prove to be unhelpful.

I

Even though the Convention does not expressly require discovery of materials in foreign countries to proceed exclusively according to its procedures, it cannot be viewed as merely advisory. The Convention was drafted at the request and with the enthusiastic participation of the United States, which sought to broaden the techniques available for the taking of evidence abroad. The differences between discovery practices in the United States and those in other countries are significant, and "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States." Restatement ****2559** of Foreign Relations Law of the United States (Revised) § 437, Reporters' Note 1, p. 35 (Tent. Draft No. 7, Apr. 10, 1986). Of particular ***550** import is the fact that discovery conducted by the parties, as is common in the United States, is alien to the legal systems of civil-law nations, which typically regard evidence gathering as a judicial function.

The Convention furthers important United States interests by providing channels for discovery abroad that would not be available otherwise. In general, it establishes "methods to reconcile the differing legal philosophies of the Civil Law, Common Law and other systems with respect to the taking of evidence." Rapport de la Commission spéciale, 4 Conférence de La Haye de droit international privé: Actes et documents de la Onzième session 55 (1970) (Actes et documents). It serves the interests of both requesting and receiving countries by advancing the following goals:

> "[T]he techniques for the taking of evidence must be 'utilizable' in the eyes of the State where the lawsuit is pending and must also be 'tolerable' in the eyes of the State where the evidence is to be taken." *Id.,* at 56.

The Convention also serves the long-term interests of the United States in helping to further and to maintain the climate of cooperation and goodwill necessary to the functioning of the international legal and commercial systems.

It is not at all satisfactory to view the Convention as nothing more than an optional supplement to the Federal Rules of Civil Procedure, useful as a means to "facilitate discovery" when a court "deems that course of action appropriate." *Ante,* at 2550. Unless they had expected the Convention to provide the normal channels for discovery, other parties to the Convention would have had no incentive to agree to its terms. The civil-law nations committed themselves to employ more effective procedures for gathering evidence within their borders, even to the extent of requiring some common-law practices alien to their systems. At the time of the Convention's enactment, the liberal American policy, which allowed foreigners to collect evidence with ease in the United States, see *ante,* at 2548, and n. 13, was in place and, because ***551** it was not conditioned on reciprocity, there was little likelihood that the policy would change as a result of treaty negotiations. As a result, the primary benefit the other signatory nations would have expected in return for their concessions was that the United States would respect their territorial sovereignty by using the Convention procedures. [2]

II

By viewing the Convention as merely optional and leaving the decision whether to apply it to the court in each individual case, the majority ignores the policies established by the political branches when they negotiated and ratified the treaty. The result will be a duplicative analysis for which courts are not well designed. The discovery process usually concerns discrete ****2560** interests that a court is well equipped to accommodate—the interests of the parties before the court coupled with the interest of the judicial system in resolving the conflict on the basis of the best available information. When a lawsuit requires discovery of materials located in a foreign nation, however, foreign legal systems and foreign interests ***552** are implicated as well. The presence of these interests creates a tension between the broad discretion our courts normally exercise in managing pretrial discovery and the discretion usually allotted to the Executive in foreign matters.

It is the Executive that normally decides when a course of action is important enough to risk affronting a foreign nation or placing a strain on foreign commerce. It is the Executive, as well, that is best equipped to determine how to accommodate foreign interests along with our own. [3] Unlike the courts, "diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association." *Laker Airways, Ltd. v. Sabena, Belgian World Airlines,* 235 U.S.App.D.C. 207, 253, 731 F.2d 909, 955 (1984). The Convention embodies the result of the best efforts of the Executive Branch, in negotiating the treaty, and the Legislative Branch, in ratifying it, to balance competing national interests. As such, the Convention represents a political determination—one that, consistent with the principle of separation of powers, courts should not attempt to second-guess.

Not only is the question of foreign discovery more appropriately considered by the Executive and Congress, but in addition, courts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own. Although transnational litigation is increasing, relatively few judges are experienced in the area and the procedures of foreign legal systems are often poorly understood. Wilkey, Transnational Adjudication: A View from the Bench, 18 Int'l Lawyer 541, 543 (1984); ***553** Ristau, Overview of International Judicial Assistance, 18 Int'l Lawyer 525, 531 (1984). As this Court recently stated, it has "little competence in determining precisely when foreign nations will be offended by particular acts." *Container Corp. v. Franchise Tax Bd.,* 463 U.S. 159, 194, 103 S.Ct. 2933, 2955, 77 L.Ed.2d 545 (1983). A pro-forum bias is likely to creep into the supposedly neutral balancing process [4] and courts not surprisingly ****2561** often will turn to the more familiar procedures established by their local rules. In addition, it simply is not reasonable to expect the Federal Government or the foreign state in which the discovery will take place to participate in every individual case in order to articulate the broader international and foreign interests that are relevant ***554** to the decision whether to use the Convention. Indeed, the opportunities for such participation are limited. [5] Exacerbating these shortcomings is the limited appellate review of interlocutory discovery decisions, [6] which prevents any effective case-by-case correction of erroneous discovery decisions.

III

The principle of comity leads to more definite rules than the ad hoc approach endorsed by the majority. The Court asserts that the concept of comity requires an individualized analysis of the interests present in each particular case before a court decides whether to apply the Convention. See *ante,* at 2555–2556. There is, however, nothing inherent in the comity principle that requires case-by-case analysis. The Court frequently has relied upon a comity analysis when it has adopted general rules to cover recurring situations in areas such as choice of forum, [7] maritime law, [8] and sovereign ***555** immunity, [9] and the Court offers no reasons for abandoning that approach here.

Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill. See Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and International Law, 76 Am. J. Int'l L. 280, 281–285 (1982); J. Story, Commentaries on the Conflict of Laws §§ 35, 38 (M. Bigelow ed. 1883). [10] As in the choice-of-law analysis, ****2562** which from the very beginning has been linked to international comity, the threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law. When there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime. [11]

***556** In most cases in which a discovery request concerns a nation that has ratified the Convention there is no need to resort to comity principles; the conflicts they are designed to resolve already have been eliminated by the agreements expressed in the treaty. The analysis set forth in the Restatement (Revised) of Foreign Relations Law of the United States, see *ante,* at 2555–2556, n. 28, is perfectly appropriate for courts to use when no treaty has been negotiated to accommodate the different legal systems. It would also be appropriate if the Convention failed to resolve the conflict in a particular case. The Court, however, adds an additional layer of so-called comity analysis by holding that courts should determine on a case-by-case basis whether resort to the Convention is desirable. Although this analysis is unnecessary in the absence of any conflicts, it should lead courts to the use of the Convention if they recognize that the Convention already has largely accommodated all three categories of interests relevant to a comity analysis—foreign interests, domestic interests, and the interest in a well-functioning international order.

A

I am encouraged by the extent to which the Court emphasizes the importance of foreign interests and by its admonition to lower courts to take special care to respect those interests. See *ante,* at 2554, 2556–2557. Nonetheless, the Court's view of the Convention rests on an incomplete analysis of the sovereign interests of foreign states. The Court acknowledges that evidence is normally obtained in civil-law countries by a judicial officer, *ante,* at 2554, but it fails to recognize the significance of that practice. Under the classic view of territorial ***557** sovereignty, each state has a monopoly on the exercise of governmental power within its borders and no state may perform an act in the territory of a foreign state without consent. [12] As explained in the Report of United States Delegation to Eleventh Session of the Hague Conference on Private International Law, the taking of evidence in a civil-law country may constitute the performance of a public judicial act by an unauthorized foreign person:

****2563** "In drafting the Convention, the doctrine of 'judicial sovereignty' had to be constantly borne in mind. Unlike the common-law practice, which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities.

"The act of taking evidence in a common-law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil-law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the

***558** 'judicial sovereignty' of the host country, unless its authorities participate or give their consent." 8 Int'l Legal Materials 785, 806 (1969)8 Int'l Legal Materials 785, 806 (1969). [13]

Some countries also believe that the need to protect certain underlying substantive rights requires judicial control of the taking of evidence. In the Federal Republic of Germany, for example, there is a constitutional principle of proportionality, pursuant to which a judge must protect personal privacy, commercial property, and business secrets. Interference with these rights is proper only if "necessary to protect other persons' rights in the course of civil litigation." See Meessen, The International Law on Taking Evidence From, Not In, a Foreign State, the *Anschutz* and *Messerschmitt* opinions of the United States Court of Appeals for the Fifth Circuit (Mar. 31, 1986), as set forth in App. to Brief for Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH as *Amici Curiae* 27a–28a. [14]

***559** The United States recently recognized the importance of these sovereignty principles by taking the broad position that the Convention "must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it." Brief for United States as *Amicus Curiae* in *Volkswagenwerk Aktiengesellschaft v. Falzon,* O.T. 1983, No. 82–1888, p. 6. Now, however, it appears to take a narrower view of what constitutes an "evidence taking procedure," merely stating that "oral depositions on foreign soil ... are improper without the consent of the foreign nation." Tr. of Oral Arg. 23. I am at a loss to understand why gathering documents or information in a foreign country, even if for ultimate production in the United States, is any less an imposition on sovereignty than the taking of a deposition when gathering documents also is regarded as a judicial function in a civil-law nation.

Use of the Convention advances the sovereign interests of foreign nations because they have given *consent* to Convention procedures ****2564** by ratifying them. This consent encompasses discovery techniques that would otherwise impinge on the sovereign interests of many civil-law nations. In the absence of the Convention, the informal techniques provided by Articles 15–22 of the Convention—taking evidence by a diplomatic or consular officer of the requesting state and the use of commissioners nominated by the court of the state where the action is pending—would raise sovereignty issues similar to those implicated by a direct discovery order from a foreign court. "Judicial" activities are occurring on the soil of the sovereign by agents of a foreign state. [15] These voluntary discovery procedures are a great boon to United States litigants ***560** and are used far more frequently in practice than is compulsory discovery pursuant to letters of request. [16]

Civil-law contracting parties have also agreed to use, and even to compel, procedures for gathering evidence that are diametrically opposed to civil-law practices. The civil-law system is inquisitional rather than adversarial and the judge normally questions the witness and prepares a written summary of the evidence. [17] Even in common-law countries no system of evidence-gathering resembles that of the United States. [18] Under Article 9 of the Convention, however, a foreign court must grant a request to use a "special method or procedure," which includes requests to compel attendance of ***561** witnesses abroad, to administer oaths, to produce verbatim transcripts, or to permit examination of witnesses by counsel for both parties. [19] These methods for obtaining evidence, which largely eliminate conflicts between the discovery procedures of the United States and the laws of foreign systems, have the consent of the ratifying nations. The use of these methods thus furthers foreign interests ****2565** because discovery can proceed without violating the sovereignty of foreign nations.

B

The primary interest of the United States in this context is in providing effective procedures to enable litigants to obtain evidence abroad. This was the very purpose of the United States' participation in the treaty negotiations and, for the most part, the Convention provides those procedures.

The Court asserts that the letters of request procedure authorized by the Convention in many situations will be "unduly time consuming and expensive." *Ante,* at 2554. The Court offers no support for this statement and until the Convention is used extensively enough for courts to develop experience with it, such statements can be nothing other than speculation. [20] Conspicuously absent from the Court's assessment ***562** is any consideration of resort to the Convention's less formal and less time-consuming alternatives—discovery conducted by consular officials or an appointed commissioner. Moreover, unless the costs become prohibitive, saving time and money is not such a high priority in discovery that some additional burden cannot be tolerated

in the interest of international goodwill. Certainly discovery controlled by litigants under the Federal Rules of Civil Procedure is not known for placing a high premium on either speed or cost-effectiveness.

There is also apprehension that the Convention procedures will not prove fruitful. Experience with the Convention suggests otherwise—contracting parties have honored their obligation to execute letters of request expeditiously and to use compulsion if necessary. See, *e.g.,* Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 17 Int'l Legal Materials 1425, 1431,17 Int'l Legal Materials 1425, 1431, § F (1978) ("[r]efusal to execute turns out to be very infrequent ***563** in practice"). By and large, the concessions made by parties to the Convention not only provide United States litigants with a means for obtaining evidence, but also ensure that the evidence will be in a form admissible in court.

There are, however, some situations in which there is legitimate concern that certain documents cannot be made available under Convention procedures. Thirteen nations have made official declarations pursuant to Article 23 of the Convention, which permits a contracting state to limit its obligation to produce documents in response to a letter of request. See *ante,* at 2552, n. 21. These reservations may pose problems that would require a comity analysis in an individual case, but they are not so all-encompassing as the majority implies—they ****2566** certainly do not mean that a "contracting party could unilaterally abrogate ... the Convention's procedures." *Ante,* at 2552. First, the reservations can apply only to *letters of request* for *documents.* Thus, an Article 23 reservation affects neither the most commonly used informal Convention procedures for taking of evidence by a consul or a commissioner nor formal requests for depositions or interrogatories. Second, although Article 23 refers broadly to "pre-trial discovery," the intended meaning of the term appears to have been much narrower than the normal United States usage. [21] The contracting parties for the most part have modified ***564** the declarations made pursuant to Article 23 to limit their reach. See 7 Martindale-Hubbell Law Directory (pt. VII) 14–19 (1986). [22] Indeed, the emerging view of this exception to discovery is that it applies only to "requests that lack sufficient specificity or that have not been reviewed for ***565** relevancy by the requesting court." Oxman, The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention, 37 U. Miami L.Rev., at 777. Thus, in practice, a reservation is not the significant obstacle to discovery under the Convention that the broad wording of Article 23 would suggest. [23]

****2567** In this particular case, the "French 'blocking statute,' " see *ante,* at 2546, n. 6, poses an additional potential barrier to obtaining discovery from France. But any conflict posed by this legislation is easily resolved by resort to the Convention's procedures. The French statute's prohibitions are expressly "subject to" international agreements and applicable laws and it does not affect the taking of evidence under the Convention. See Toms, The French Response to the Extraterritorial Application of United States Antitrust Laws, 15 Int'l Lawyer 585, 593–599 (1981); Heck, Federal Republic of Germany and the EEC, 18 Int'l Lawyer 793, 800 (1984).

The second major United States interest is in fair and equal treatment of litigants. The Court cites several fairness concerns in support of its conclusion that the Convention is not exclusive and apparently fears that a broad endorsement of the use of the Convention would lead to the same "unacceptable asymmetries." See *ante,* at 2553–2554, n. 25. Courts can protect against the first two concerns noted by the majority—that a foreign party to a lawsuit would have a discovery advantage over a domestic litigant because it could obtain the advantages of the Federal Rules of Civil Procedure, and that a foreign company would have an economic ***566** competitive advantage because it would be subject to less extensive discovery—by exercising their discretionary powers to control discovery in order to ensure fairness to both parties. A court may "make any order which justice requires" to limit discovery, including an order permitting discovery only on specified terms and conditions, by a particular discovery method, or with limitation in scope to certain matters. Fed.Rule Civ.Proc. 26(c). If, for instance, resort to the Convention procedures would put one party at a disadvantage, any possible unfairness could be prevented by postponing that party's obligation to respond to discovery requests until completion of the foreign discovery. Moreover, the Court's arguments focus on the nationality of the parties, while it is actually the locus of the evidence that is relevant to use of the Convention: a foreign litigant trying to secure evidence from a foreign branch of an American litigant might also be required to resort to the Convention.

The Court's third fairness concern is illusory. It fears that a domestic litigant suing a national of a state that is not a party to the Convention would have an advantage over a litigant suing a national of a contracting state. This statement

completely ignores the very purpose of the Convention. The negotiations were proposed by the United States in order to *facilitate* discovery, not to hamper litigants. Dissimilar treatment of litigants similarly situated does occur, but in the manner opposite to that perceived by the Court. Those who sue nationals of noncontracting states are disadvantaged by the unavailability of the Convention procedures. This is an unavoidable inequality inherent in the benefits conferred by any treaty that is less than universally ratified.

In most instances, use of the Convention will serve to advance United States interests, particularly when those interests are viewed in a context larger than the immediate interest of the litigants' discovery. The approach I propose is not a rigid *per se* rule that would require first use of the Convention without regard to strong indications that no evidence ***567** would be forthcoming. All too often, however, courts have simply *assumed* that resort to the Convention would be unproductive and have embarked on speculation about foreign procedures and interpretations. See, *e.g., International Society for Krishna Consciousness, Inc. v. Lee,* 105 F.R.D. 435, 449–450 (SDNY 1984); *Graco, Inc. v. Kremlin, Inc.,* 101 F.R.D. 503, 509–512 (ND Ill.1984). When resort to the Convention would be futile, a court has no choice but to resort to a traditional comity analysis. But even then, an attempt to use the Convention will often ****2568** be the best way to discover if it will be successful, particularly in the present state of general inexperience with the implementation of its procedures by the various contracting states. An attempt to use the Convention will open a dialogue with the authorities in the foreign state and in that way a United States court can obtain an authoritative answer as to the limits on what it can achieve with a discovery request in a particular contracting state.

C

The final component of a comity analysis is to consider if there is a course that furthers, rather than impedes, the development of an ordered international system. A functioning system for solving disputes across borders serves many values, among them predictability, fairness, ease of commercial interactions, and "stability through satisfaction of mutual expectations." *Laker Airways, Ltd. v. Sabena, Belgian World Airlines,* 235 U.S.App.D.C., at 235, 731 F.2d, at 937. These interests are common to all nations, including the United States.

Use of the Convention would help develop methods for transnational litigation by placing officials in a position to communicate directly about conflicts that arise during discovery, thus enabling them to promote a reduction in those conflicts. In a broader framework, courts that use the Convention will avoid foreign perceptions of unfairness that result when United States courts show insensitivity to the interests ***568** safeguarded by foreign legal regimes. Because of the position of the United States, economically, politically, and militarily, many countries may be reluctant to oppose discovery orders of United States courts. Foreign acquiescence to orders that ignore the Convention, however, is likely to carry a price tag of accumulating resentment, with the predictable long-term political cost that cooperation will be withheld in other matters. Use of the Convention is a simple step to take toward avoiding that unnecessary and undesirable consequence.

IV

I can only hope that courts faced with discovery requests for materials in foreign countries will avoid the parochial views that too often have characterized the decisions to date. Many of the considerations that lead me to the conclusion that there should be a general presumption favoring use of the Convention should also carry force when courts analyze particular cases. The majority fails to offer guidance in this endeavor, and thus it has missed its opportunity to provide predictable and effective procedures for international litigants in United States courts. It now falls to the lower courts to recognize the needs of the international commercial system and the accommodation of those needs already endorsed by the political branches and embodied in the Convention. To the extent indicated, I respectfully dissent.

All Citations

482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461, 55 USLW 4842, 7 Fed.R.Serv.3d 1105

Footnotes

* 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 Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499 (1906).

1 The Hague Convention entered into force between the United States and France on October 6, 1974. The Convention is also in force in Barbados, Cyprus, Czechoslovakia, Denmark, Finland, the Federal Republic of Germany, Israel, Italy, Luxemburg, the Netherlands, Norway, Portugal, Singapore, Sweden, and the United Kingdom. Office of the Legal Adviser, United States Dept. of State, Treaties in Force 261–262 (1986).

2 Petitioner Société Nationale Industrielle Aérospatiale is wholly owned by the Government of France. Petitioner Société de Construction d'Avions de Tourisme is a wholly owned subsidiary of Société Nationale Industrielle Aérospatiale.

3 App. 22, 24. The term "STOL," an acronym for "short takeoff and landing," "refers to a fixed-wing aircraft that either takes off or lands with only a short horizontal run of the aircraft." *Douglas v. United States,* 206 Ct.Cl. 96, 99, 510 F.2d 364, 365, cert. denied, 423 U.S. 825, 96 S.Ct. 40, 46 L.Ed.2d 41 (1975).

4 Plaintiffs made certain requests for the production of documents pursuant to Rule 34(b) and for admissions pursuant to Rule 36. App. 19–23. Apparently the petitioners responded to those requests without objection, at least insofar as they called for material or information that was located in the United States. App. to Pet. for Cert. 12a. In turn, petitioners deposed witnesses and parties pursuant to Rule 26, and served interrogatories pursuant to Rule 33 and a request for the production of documents pursuant to Rule 34. App. 13. Plaintiffs complied with those requests.

5 Although the District Court is the nominal respondent in this mandamus proceeding, plaintiffs are the real respondent parties in interest.

6 Article 1A of the French "blocking statute," French Penal Code Law No. 80–538, provides:

> "Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith."

> "*Art.* 1er bis.—Sous réserve des traités ou accords internationaux et des lois et règlements en vigueur, il est interdit à toute personne de demander, de rechercher ou de communiquer, par écrit, oralement ou sous toute autre forme, des documents ou renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de proceédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci."

Article 2 provides:

"The parties mentioned in [Article 1A] shall forthwith inform the competent minister if they receive any request concerning such disclosures.

"*Art.* 2. Les personnes visées aux articles 1er et 1er *bis* sont tenues d'informer sans délai le ministre compétent lorsqu'elles se trouvent saisies de toute demande concernant de telles communications." App. to Pet. for Cert. 47a–50a.

7 *Id.,* at 25a. The Magistrate stated, however, that if oral depositions were to be taken in France, he would require compliance with the Hague Evidence Convention. *Ibid.*

8 His quotation was from Toms, The French Response to Extraterritorial Application of United States Antitrust Laws, 15 Int'l Law. 585, 586 (1981).

9 He relied on a passage in the Toms article stating that "the legislative history [of the Law] shows only that the Law was adopted to protect French interests from abusive foreign discovery procedures and excessive assertions of extraterritorial jurisdiction. Nowhere is there an indication that the Law was to impede litigation preparations by French companies, either for their own defense or to institute lawsuits abroad to protect their interests, and arguably such applications were unintended." App. to Pet. for Cert. 22a–23a (citing Toms, *supra,* at 598).

10 "The record before this court does not indicate whether the Petitioners have notified the appropriate French Minister of the requested discovery in accordance with Article 2 of the French Blocking Statute, or whether the Petitioners have attempted to secure a waiver of prosecution from the French government. Because the Petitioners are corporations owned by the Republic of France, they stand in a most advantageous position to receive such a waiver. However, these issues will only be relevant should the Petitioners fail to comply with the magistrate's discovery order, and we need not presently address them." 782 F.2d, at 127.

11 The Republic of France likewise takes the following position in this case:

"THE HAGUE CONVENTION IS THE EXCLUSIVE MEANS OF DISCOVERY IN TRANSNATIONAL LITIGATION AMONG THE CONVENTION'S SIGNATORIES UNLESS THE SOVEREIGN ON WHOSE TERRITORY DISCOVERY IS TO OCCUR CHOOSES OTHERWISE." Brief for Republic of France as *Amicus Curiae* 4.

12 See S.Exec. Doc. A, p. V; Pub.L. 88–244, 77 Stat. 775 (1963).

13 As the Rapporteur for the session of the Hague Conference which produced the Hague Evidence Convention stated: "In 1964 Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781 and 1782 were amended to offer to foreign countries and litigants, without a requirement of reciprocity, wide judicial assistance on a unilateral basis for the obtaining of evidence in the United States. The amendments named the Department of State as a conduit for the receipt and transmission of letters of request. They authorized the use in the federal courts of evidence taken abroad in civil law countries, even if its form did not comply with the conventional formalities of our normal rules of evidence. No country in the world has a more open and enlightened policy." Amram, The Proposed Convention on the Taking of Evidence Abroad, 55 A.B.A.J. 651 (1969).

14 118 Cong.Rec. 20623 (1972).

15 The Hague Conference on Private International Law's omission of mandatory language in the preamble is particularly significant in light of the same body's use of mandatory language in the preamble to the Hague

Service Convention, 20 U.S.T. 361, T.I.A.S. No. 6638. Article 1 of the Service Convention provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Id.,* at 362, T.I.A.S. No. 6638. As noted, *supra,* at 7, the Service Convention was drafted before the Evidence Convention, and its language provided a model exclusivity provision that the drafters of the Evidence Convention could easily have followed had they been so inclined. Given this background, the drafters' election to use permissive language instead is strong evidence of their intent.

16 At the time the Convention was drafted, Federal Rule of Civil Procedure 28(b) clearly authorized the taking of evidence on notice either in accordance with the laws of the foreign country or in pursuance of the law of the United States.

17 The first paragraph of Article 1 reads as follows:

"In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act." 23 U.S.T., at 2557, T.I.A.S. 7444.

18 Thus, Article 17 provides:

"In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

"(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

"(b) he complies with the conditions which the competent authority has specified in the permission.

"A Contracting State may declare that evidence may be taken under this Article without its prior permission." *Id.,* at 2565, T.I.A.S. 7444.

19 Our conclusion is confirmed by the position of the Executive Branch and the Securities and Exchange Commission, which interpret the "language, history, and purposes" of the Hague Convention as indicating "that it was not intended to prescribe the exclusive means by which American plaintiffs might obtain foreign evidence." Brief for United States as *Amicus Curiae* 9 (citation omitted). "[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 184–185, 102 S.Ct. 2374, 2379, 72 L.Ed.2d 765 (1982); see also *O'Connor v. United States,* 479 U.S. 27, 33, 107 S.Ct. 347, ——, 93 L.Ed.2d 206 (1986). As a member of the United States delegation to the Hague Conference concluded:

"[The Convention] makes no major changes in United States procedure and requires no major changes in United States legislation or rules. On the other front, it will give the United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants." Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S.Exec. Doc. A, at pp. 1, 3.

20 In addition to the Eighth Circuit, other Courts of Appeals and the West Virginia Supreme Court have held that the Convention cannot be viewed as the exclusive means of securing discovery transnationally. See *Société Nationale Industrielle Aérospatiale v. United States District Court,* 788 F.2d 1408, 1410 (CA9 1986); *In re Messerschmitt Bolkow Blohm GmbH,* 757 F.2d 729, 731 (CA5 1985), cert. vacated, 476 U.S.

468, 106 S.Ct. 2887, 90 L.Ed.2d 975 (1986); *In re Anschuetz & Co., GmbH,* 754 F.2d 602, 606–615, and n. 7 (CA5 1985), cert. pending, No. 85–98; *Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher,* 328 S.E.2d 492, 497–501 (W.Va.1985).

21 Article 23 provides:

"A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." 23 U.S.T., at 2568, T.I.A.S. 7444.

22 Thirteen of the seventeen signatory states have made declarations under Article 23 of the Convention that restrict pretrial discovery of documents. See 7 Martindale-Hubbell Law Directory (pt. VII) 15–19 (1986).

23 "The great object of an international agreement is to define the common ground between sovereign nations. Given the gulfs of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters." *Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243, 262, 104 S.Ct. 1776, 1788, 80 L.Ed.2d 273 (1984) (STEVENS, J., dissenting). The utter absence in the Hague Convention of an exclusivity provision has an obvious explanation: The contracting states did not agree that its procedures were to be exclusive. The words of the treaty delineate the extent of their agreement; without prejudice to their existing rights and practices, they bound themselves to comply with any request for judicial assistance that did comply with the treaty's procedures. See Carter, Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures, 13 Int'l Law. 5, 11, n. 14 (1979) (common-law nations and civil-law jurisdictions have separate traditions of bilateral judicial cooperation; the Evidence Convention "attempts to bridge" the two traditions.)

The separate opinion reasons that the Convention procedures are not optional because unless other signatory states "had expected the Convention to provide the normal channels for discovery, [they] would have had no incentive to agree to its terms." *Post,* at 2559. We find the treaty language that the parties have agreed upon and ratified a surer indication of their intentions than the separate opinion's hypothesis about the expectations of the parties. Both comity and concern for the separation of powers counsel the utmost restraint in attributing motives to sovereign states which have bargained as equals. Indeed, Justice BLACKMUN notes that "the Convention represents a political determination—one that, consistent with the principle of separation of powers, courts should not attempt to second guess." *Post,* at ——. Moreover, it is important to remember that the evidence-gathering procedures implemented by the Convention would still provide benefits to the signatory states even if the United States were not a party.

24 Article 27 provides:

"The provisions of the present Convention shall not prevent a Contracting State from—

"(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

"(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

"(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." 23 U.S.T., at 2569, T.I.A.S. 7444.

Thus, for example, the United Kingdom permits foreign litigants, by a letter of request, to "apply directly to the appropriate courts in the United Kingdom for judicial assistance" or to seek information directly from parties in the United Kingdom "if, as in this case, the court of origin exercises jurisdiction consistent with accepted norms of international law." Brief for the Government of the United Kingdom and Northern Ireland as *Amicus Curiae* 6 (footnote omitted). On its face, the term "Contracting State" comprehends both the requesting state and the receiving state. Even if Article 27 is read to apply only to receiving states, see, *e.g., Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher,* 328 S.E.2d, at 499–500, n. 11 (rejecting argument that Article 27 authorizes more liberal discovery procedures by requesting as well as executing states), the treaty's internal failure to authorize more liberal procedures for obtaining evidence would carry no pre-emptive meaning. We are unpersuaded that Article 27 supports a "negative inference" that would curtail the pre-existing authority of a state to obtain evidence in accord with its normal procedures.

25 The opposite conclusion of exclusivity would create three unacceptable asymmetries. First, within any lawsuit between a national of the United States and a national of another contracting party, the foreign party could obtain discovery under the Federal Rules of Civil Procedure, while the domestic party would be required to resort first to the procedures of the Hague Convention. This imbalance would run counter to the fundamental maxim of discovery that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor,* 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947).

Second, a rule of exclusivity would enable a company which is a citizen of another contracting state to compete with a domestic company on uneven terms, since the foreign company would be subject to less extensive discovery procedures in the event that both companies were sued in an American court. Petitioners made a voluntary decision to market their products in the United States. They are entitled to compete on equal terms with other companies operating in this market. But since the District Court unquestionably has personal jurisdiction over petitioners, they are subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors. A general rule according foreign nationals a preferred position in pretrial proceedings in our courts would conflict with the principle of equal opportunity that governs the market they elected to enter.

Third, since a rule of first use of the Hague Convention would apply to cases in which a foreign party is a national of a contracting state, but not to cases in which a foreign party is a national of any other foreign state, the rule would confer an unwarranted advantage on some domestic litigants over others similarly situated.

26 We observe, however, that in other instances a litigant's first use of the Hague Convention procedures can be expected to yield more evidence abroad more promptly than use of the normal procedures governing pre-trial civil discovery. In those instances, the calculations of the litigant will naturally lead to a first-use strategy.

27 Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states. This Court referred to the doctrine of comity among nations in *Emory v. Grenough,* 3 Dall. 369, 370, n., 1 L.Ed. 640 (1797) (dismissing appeal from judgment for failure to plead diversity of citizenship, but setting forth an extract from a treatise by Ulrich Huber (1636–1694), a Dutch jurist):

" 'By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens.

. . .

" '[N]othing would be more convenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of law....'

" *Ibid.* (quoting 2 U. Huber, Praelectiones Juris Romani et hodiemi, bk. 1, tit. 3, pp. 26–31 (C. Thomas, L. Menke, & G. Gebauer eds. 1725)).

See also *Hilton v. Guyot,* 159 U.S. 113, 163–164, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895):

> " 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

28 The nature of the concerns that guide a comity analysis is suggested by the Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent.Draft No. 7, 1986) (approved May 14, 1986) (Restatement). While we recognize that § 437 of the Restatement may not represent a consensus of international views on the scope of the district court's power to order foreign discovery in the face of objections by foreign states, these factors are relevant to any comity analysis:

"(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; and

"(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." *Ibid.*

29 The French "blocking statute," n. 6, *supra,* does not alter our conclusion. It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute. See *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 204–206, 78 S.Ct. 1087, 1091–1092, 2 L.Ed.2d 1255 (1958). Nor can the enactment of such a statute by a foreign nation require American courts to engraft a rule of first resort onto the Hague Convention, or otherwise to provide the nationals of such a country with a preferred status in our courts. It is clear that American courts are not required to adhere blindly to the directives of such a statute. Indeed, the language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge, forbidding him or her to order any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge. It would be particularly incongruous to recognize such a preference for corporations that are wholly owned by the enacting nation. Extraterritorial assertions of jurisdiction are not one-sided. While the District Court's discovery orders arguably have some impact in France, the French blocking statute asserts similar authority over acts to take place in this country. The lesson of comity is that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign. The blocking statute thus is relevant to the court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material.

The American Law Institute has summarized this interplay of blocking statutes and discovery orders: "[W]hen a state has jurisdiction to prescribe and its courts have jurisdiction to adjudicate, adjudication should (subject to generally applicable rules of evidence) take place on the basis of the best information available.... [Blocking] statutes that frustrate this goal need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States." See Restatement, § 437, Reporter's Note 5, pp. 41, 42. "On the other hand, the degree of friction created by discovery requests ... and the differing perceptions of the acceptability of American-style discovery under national and international law, suggest some efforts to moderate the application abroad of U.S. procedural techniques, consistent with the overall principle of reasonableness in the exercise of jurisdiction." *Id.,* at 42.

30 Under the Hague Convention, a letter of request must specify "the evidence to be obtained or other judicial act to be performed," Art. 3, and must be in the language of the executing authority or be accompanied by a translation into that language. Art. 4, 23 U.S.T., at 2558–2559, T.I.A.S. 7444. Although the discovery request must be specific, the party seeking discovery may find it difficult or impossible to determine in advance what evidence is within the control of the party urging resort to the Convention and which parts of that evidence may qualify for international judicial assistance under the Convention. This information, however, is presumably within the control of the producing party from which discovery is sought. The district court may therefore require, in appropriate situations, that this party bear the burden of providing translations and detailed descriptions of relevant documents that are needed to assure prompt and complete production pursuant to the terms of the Convention.

1 Many courts that have examined the issue have adopted a rule of first resort to the Convention. See, *e.g.,* *Philadelphia Gear Corp. v. American Pfauter Corp.,* 100 F.R.D. 58, 61 (ED Pa.1983) ("avenue of first resort for plaintiff [is] the Hague Convention"); *Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher,* W.Va., 328 S.E.2d 492, 504–506 (1985) ("principle of international comity dictates first resort to [Convention] procedures"); *Vincent v. Ateliers de la Motobécane, S.A.,* 193 N.J.Super. 716, 723, 475 A.2d 686, 690 (App.Div.1984) (litigant should first attempt to comply with Convention); *Th. Goldschmidt A.G. v. Smith,* 676 S.W.2d 443, 445 (Tex.App.1984) (Convention procedures not mandatory but are "avenue of first resort"); *Pierburg GmbH & Co. KG v. Superior Court,* 137 Cal.App.3d 238, 247, 186 Cal.Rptr. 876, 882–883 (1982) (plaintiffs must attempt to comply with the Convention); *Volkswagenwerk Aktiengesellschaft v. Superior Court,* 123 Cal.App.3d 840, 857–859, 176 Cal.Rptr. 874, 885–886 (1981) ("Hague Convention establishes not a fixed rule but rather a minimum measure of international cooperation").

2 Article 27 of the Convention, see *ante,* at 2552–2553, n. 24, is not to the contrary. The only logical interpretation of this Article is that a state receiving a discovery request may permit less restrictive procedures than those designated in the Convention. The majority finds plausible a reading that authorizes both a requesting and a receiving state to use methods outside the Convention. *Ibid.* If this were the case, Article 27(c), which allows a state to permit methods of taking evidence that are not provided in the Convention, would make the rest of the Convention wholly superfluous. If a requesting state could dictate the methods for taking evidence in another state, there would be no need for the detailed procedures provided by the Convention.

Moreover, the United States delegation's explanatory report on the Convention describes Article 27 as "designed to preserve existing internal law and practice in a Contracting State which provides broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants." S.Exec.Doc. A, 92d Cong., 2d Sess., 39 (1972). Article 27 authorizes the use of alternative methods for gathering evidence "if the internal law or practice of the *State of execution* so permits." *Id.,* at 39–40 (emphasis added).

3 Our Government's interests themselves are far more complicated than can be represented by the limited parties before a court. The United States is increasingly concerned, for example, with protecting sensitive technology for both economic and military reasons. It may not serve the country's long-term interest to establish precedents that could allow foreign courts to compel production of the records of American corporations.

4 One of the ways that a pro-forum bias has manifested itself is in United States courts' preoccupation with their own power to issue discovery orders. All too often courts have regarded the Convention as some kind of threat to their jurisdiction and have rejected use of the treaty procedures. See, *e.g.,* *In re Anschuetz & Co., GmbH,* 754 F.2d 602, 606, 612 (CA5 1985), cert. pending, No. 85–98. It is well established that a court has the *power* to impose discovery under the Federal Rules of Civil Procedure when it has personal jurisdiction over the foreign party. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 204–206, 78 S.Ct. 1087, 1091–1092, 2 L.Ed.2d 1255 (1958). But once it is determined that the Convention does not provide the *exclusive* means for foreign discovery, jurisdictional power is not the issue. The relevant question, instead, becomes whether a court should forgo exercise of the full extent of its power to order discovery. The Convention, which is valid United States law, provides an answer to that question by establishing a strong policy in favor of self-restraint for the purpose of furthering United States interests and minimizing international disputes.

There is also a tendency on the part of courts, perhaps unrecognized, to view a dispute from a local perspective. “[D]omestic courts do not sit as internationally constituted tribunals.... The courts of most developed countries follow international law only to the extent it is not overridden by national law. Thus courts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests.” *Laker Airways, Ltd. v. Sabena, Belgian World Airlines,* 235 U.S.App.D.C. 207, 249, 731 F.2d 909, 951 (1984) (footnotes omitted); see also *In re Uranium Antitrust Litigation,* 480 F.Supp. 1138, 1148 (ND Ill.1979).

5 The Department of State in general does not transmit diplomatic notes from foreign governments to state or federal trial courts. In addition, it adheres to a policy that it does not take positions regarding, or participate in, litigation between private parties, unless required to do so by applicable law. See Oxman, The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention, 37 U.Miami L.Rev. 733, 748, n. 39 (1983).

6 See *Kerr v. United States District Court,* 426 U.S. 394, 402–405, 96 S.Ct. 2119, 2123–2125, 48 L.Ed.2d 725 (1976); see also *Boreri v. Fiat S.P.A.,* 763 F.2d 17, 20 (CA1 1985) (refusing to review on interlocutory appeal District Court order involving extra-territorial discovery).

7 See, *e.g.,* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 630, 105 S.Ct. 3346, 3355, 87 L.Ed.2d 444 (1985); *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 516–519, 94 S.Ct. 2449, 2455–2457, 41 L.Ed.2d 270 (1974); *The* *Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 12–14, 92 S.Ct. 1907, 1914–15, 32 L.Ed.2d 513 (1972).

8 See, *e.g.,* *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 382–384, 79 S.Ct. 468, 475, 3 L.Ed.2d 368 (1959); *Lauritzen v. Larsen,* 345 U.S. 571, 577–582, 73 S.Ct. 921, 925–928, 97 L.Ed. 1254 (1953); *Berizzi Bros. Co. v. The Pesaro,* 271 U.S. 562, 575, 46 S.Ct. 611, 613, 70 L.Ed. 1088 (1926); *Wildenhus's Case,* 120 U.S. 1, 12, 7 S.Ct. 385, 387, 30 L.Ed. 565 (1887); *The Belgenland,* 114 U.S.

355, 363–364, 5 S.Ct. 860, 863–864, 29 L.Ed. 152 (1885); *The Scotia,* 14 Wall. 170, 187–188, 20 L.Ed. 822 (1872); *Brown v. Duchesne,* 19 How. 183, 198, 15 L.Ed. 595 (1857); *The Schooner Exchange v. McFaddon,* 7 Cranch 116, 137, 3 L.Ed. 287 (1812).

9 See, *e.g., First National City Bank v. Banco Para el Comercio Exterior de Cuba,* 462 U.S. 611, 626–627, 103 S.Ct. 2591, 2599–2600, 77 L.Ed.2d 46 (1983) (presumption that for purposes of sovereign immunity "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such" on the basis of respect for "principles of comity between nations").

10 Justice Story used the phrase "comity of nations" to "express the true foundation and extent of the obligation of the laws of one nation within the territories of another." § 38. "The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return." § 35.

11 Choice-of-law decisions similarly reflect the needs of the system as a whole as well as the concerns of the forums with an interest in the controversy. "Probably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states." Restatement (Second) of Conflict of Laws § 6, Comment *d,* p. 13 (1971).

12 Chief Justice Marshall articulated the American formulation of this principle in *The Schooner Exchange v. McFaddon,* 7 Cranch, at 136, 3 L.Ed. 287:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction....

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

13 Many of the nations that participated in drafting the Convention regard nonjudicial evidence taking from even a willing witness as a violation of sovereignty. A questionnaire circulated to participating governments prior to the negotiations contained the question, "Is there in your State any legal provision or any official practice, based on concepts of sovereignty or public policy, preventing the taking of voluntary testimony for use in a foreign court without passing through the courts of your State?" Questionnaire on the Taking of Evidence Abroad, with Annexes, Actes et documents 9, 10. Of the 20 replies, 8 Governments—Egypt, France, West Germany, Italy, Luxembourg, Norway, Switzerland, and Turkey—stated that they did have objections to unauthorized evidence taking. Résponses des Gouvernements au Questionnaire sur la réception des dépositions à l'étranger, Actes et documents 21–46; see also Oxman, 37 U.Miami L.Rev., at 764, n. 84.

14 The Federal Republic of Germany, in its diplomatic protests to the United States, has emphasized the constitutional basis of the rights violated by American discovery orders. See, *e.g.,* Diplomatic Note, dated Apr. 8, 1986, from the Embassy of the Federal Republic of Germany. App. A to Brief for Federal Republic of Germany as *Amicus Curiae* 20a.

15 See Edwards, Taking of Evidence Abroad in Civil or Commercial Matters, 18 Int'l & Comp.L.Q. 618, 647 (1969). A number of countries that ratified the Convention also expressed fears that the taking of evidence by consuls or commissioners could lead to abuse. *Ibid.*

16 According to the French Government, the overwhelming majority of discovery requests by American litigants are "satisfied willingly ... before consular officials and, occasionally, commissioners, and without the need for involvement by a French court or use of its coercive powers." Brief for Republic of France as *Amicus Curiae* 24. Once a United States court in which an action is pending issues an order designating a diplomatic or consular official of the United States stationed in Paris to take evidence, oral examination of American parties or witnesses may proceed. If evidence is sought from French nationals or other non-Americans, or if a commissioner has been named pursuant to Article 17 of the Convention, the Civil Division of International Judicial Assistance of the Ministry of Justice must authorize the discovery. The United States Embassy will obtain authorization at no charge or a party may make the request directly to the Civil Division. Authorization is granted routinely and, when necessary, has been obtained within one to two days. Brief, at 25.

17 For example, after the filing of the initial pleadings in a German court, the judge determines what evidence should be taken and who conducts the taking of evidence at various hearings. See, *e.g.,* Langbein, The German Advantage in Civil Procedure, 52 U.Chi.L.Rev. 823, 826–828 (1985). All these proceedings are part of the "trial," which is not viewed as a separate proceeding distinct from the rest of the suit. *Id.,* at 826.

18 "In most common law countries, even England, one must often look hard to find the resemblances between pre-trial discovery there and pre-trial discovery in the U.S. In England, for example, although document discovery is available, depositions do not exist, interrogatories have strictly limited use, and discovery as to third parties is not generally allowed." S. Seidel, Extraterritorial Discovery in International Litigation 24 (1984).

19 In France, the Nouveau Code de Procédure Civile, Arts. 736–748 (76th ed. Dalloz 1984), implements the Convention by permitting examination and cross-examination of witnesses by the parties and their attorneys, Art. 740, permitting a foreign judge to attend the proceedings, Art. 741, and authorizing the preparation of a verbatim transcript of the questions and answers at the expense of the requesting authority, Arts. 739, 748. German procedures are described in Shemanski, Obtaining Evidence in the Federal Republic of Germany: The Impact of The Hague Evidence Convention on German-American Judicial Cooperation, 17 Int'l Lawyer 465, 473–474 (1983).

20 The United States recounts the time and money expended by the SEC in attempting to use the Convention's procedures to secure documents and testimony from third-party witnesses residing in England, France, Italy, and Guernsey to enforce the federal securities laws' insider-trading provisions. See Brief for United States and Securities and Exchange Commission as *Amici Curiae* 15–18. As the United States admits, however, the experience of a governmental agency bringing an enforcement suit is "atypical" and has little relevance for the use of the Convention in disputes between private parties. In fact, according to the State Department, private plaintiffs "have found resort to the Convention more successful." *Id.,* at 18.

The SEC's attempts to use the Convention have raised questions of first impression, whose resolution in foreign courts has led to delays in particular litigation. For example, in *In re Testimony of Constandi Nasser,* Trib. Admin. de Paris, 6éme section—2éme chambre, No. 51546/6 (Dec. 17, 1985), the French Ministry of Justice approved expeditiously the SEC's letter of request for testimony of a nonparty witness. The witness then raised a collateral attack, arguing that the SEC's requests were administrative and therefore outside the scope of the Convention, which is limited by its terms to "civil or commercial matters." The Ministry of Justice ruled against the attack and, on review, the French Administrative Court ruled in favor of the French Government and the SEC. By then, however, the SEC was in the process of settling the underlying litigation and did not seek further action on the letter of request. See Reply Brief for Petitioners 17, and nn. 35, 36.

21 The use of the term "pre-trial" seems likely to have been the product of a lack of communication. According to the United States delegates' report, at a meeting of the Special Commission on the Operation of the Evidence Convention held in 1978, delegates from civil-law countries revealed a "gross misunderstanding" of the meaning of "pre-trial discovery," thinking that it is something used before the *institution* of a suit to search

for evidence that would lead to litigation. Report of the United States Delegation, 17 Int'l Legal Materials 1417, 1421 (1978)17 Int'l Legal Materials 1417, 1421 (1978). This misunderstanding is evidenced by the explanation of a French commentator that the "pre-trial discovery" exception was a reinforcement of the rule in Article 1 of the Convention that a letter of request "shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated" and by his comment that the Article 23 exception referred to the collection of evidence in advance of litigation. Gouguenheim, Convention sur l'obtention des preuves à l'étranger en matière civile et commerciale, 96 Journal du Droit International 315, 319 (1969).

22 France has recently modified its declaration as follows:

"The declaration made by the Republic of France pursuant to Article 23 relating to letters of request whose purpose is 'pre-trial discovery of documents' does not apply so long as the requested documents are limitatively enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation."

"La déclaration faite par la République francaise conformément à l'article 23 relatif aux commissions rogatoires qui ont pour objet la procédure de 'pre-trial discovery of documents' ne s'applique pas lorsque les documents demandés sont limitativement énumérés dans la commission rogatoire et ont un lien direct et précis avec l'objet du litige." Letter from J.B. Raimond, Minister of Foreign Affairs, France, to van den H.H. Broek, Minister of Foreign Affairs, The Netherlands (Dec. 24, 1986).

The Danish declaration is more typical:

"The declaration made by the Kingdom of Denmark in accordance with article 23 concerning 'Letters of Request issued for the purpose of obtaining pre-trial discovery of documents' shall apply to any Letter of Request which requires a person:

"a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, other than particular documents specified in the Letter of Request;

"or

"b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession." Declaration of July 23, 1980, 7 Martindale-Hubbell Law Directory (pt. VII) 15 (1986).

The Federal Republic of Germany, Italy, Luxembourg, and Portugal continue to have unqualified Article 23 declarations, *id.,* at 16–18, but the German Government has drafted new regulations that would "permit pretrial production of specified and relevant documents in response to letters of request." Brief for Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH as *Amici Curiae* 21.

23 An Article 23 reservation and, in fact, the Convention in general require an American court to give closer scrutiny to the evidence requested than is normal in United States discovery, but this is not inconsistent with recent amendments to the Federal Rules of Civil Procedure that provide for a more active role on the part of the trial judge as a means of limiting discovery abuse. See Fed.Rule Civ.Proc. 26(b), (f), and (g) and accompanying Advisory Committee Notes.

TAB 12

MEMORANDUM

To: Advisory Committee Chairs

From: Reporters' Privacy Rules Working Group
H. Thomas Byron III, Chief Counsel, Rules Committee Staff
Zachary Hawari, Rules Law Clerk

Re: Update on Review of Privacy Rules

Date: March 19, 2024

I. Background and Overview

In 2022, Senator Ron Wyden suggested that the Rules Committees reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (suggestions 22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B). The redaction requirements—including the requirement that filers redact all but the last 4 digits of SSNs—are generally consistent across the privacy rules (Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2(a), and Criminal Rule 49.1(a)). See E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A)(ii), 116 Stat. 2914 ("Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.").

The partial SSN redaction requirement in the privacy rules was adopted and retained in large part due to concerns that participants in bankruptcy cases needed the last 4 digits of a debtor's SSN. In light of that history, the Advisory Committees concluded in 2022 that the Bankruptcy Rules Committee should first determine the extent to which that need remains paramount before the Appellate, Civil, and Criminal Rules Committees consider whether any different approach would be warranted in non-bankruptcy cases. The Bankruptcy Rules Committee has tentatively determined that it would not be feasible to require complete redaction of SSNs in all bankruptcy filings, but that committee is considering a range of options that could include eliminating SSNs from some filings. Those issues remain under review and are unlikely to result in a recommendation to publish any proposed amendments to the Bankruptcy Rules before 2025.

The reporters and Rules Committee Staff have been discussing Senator Wyden's suggestion and related issues concerning the privacy rules. We have tentatively concluded that any amendments to the Civil and Criminal Rules concerning the redaction of SSNs should not be considered in isolation but should be part of a more considered review of the privacy rules. The following sections outline possible areas of inquiry that the Rules Committees might consider.

II. Sketch of Rules Amendments Requiring Complete Redaction of SSNs

The Rules Committees could consider amendments that would require complete SSN redaction by amending Civil Rule 5.2(a) and Criminal Rule 49.1(a) along these lines:

> (a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing must [fully] redact the social-security number or taxpayer-identification number and may include only:
>
> (1) ~~the last four digits of the social-security number and taxpayer-identification number;~~
>
> ~~(2)~~ the year of the individual's birth;
>
> (~~3~~2) the minor's initials; and
>
> (4~~3~~) the last four digits of the financial-account number.

The Bankruptcy Rules Committee is considering this suggestion, among other possible approaches to amending the rules governing SSNs in bankruptcy filings.[1]

Several considerations warrant a broader review of the privacy rules before moving forward to consider this or a similar proposal in isolation. First, the Federal Judicial Center is conducting a study of unredacted privacy information—including SSNs—in court filings. That study could help inform the Rules Committees' understanding of whether the privacy rules warrant further review and possible amendment. Second, the Rules Committees have received additional suggestions concerning possible amendments to the privacy rules. While the proposal outlined above could move forward while the committees consider other suggestions, the Rules Committees generally seek to avoid multiple proposed amendments to any individual rule, preferring instead to present a single set of consolidated changes after comprehensive consideration. This approach helps educate courts, litigants, and the public about rules changes, avoiding confusion and the risk of amendment fatigue.

Because the committees will be considering other privacy rule suggestions, as well as the conclusions of the ongoing FJC study, it seems prudent to consider any proposed amendment requiring full redaction of social-security numbers along with any other proposed amendments to the privacy rules that the committees conclude may be warranted after careful review of the issues.

[1] There would likely be no need for an amendment of Appellate Rule 25(a)(5), which specifies that the other privacy rules apply to appellate filings in particular categories of cases.

III. Other Privacy Rule Issues

A. The Bankruptcy Rules Committee is considering suggestions to streamline the caption on many notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J). That committee is considering the suggestions in conjunction with its ongoing consideration of the continuing need and utility of including the last 4 digits of an individual's SSN in bankruptcy filings.

B. The Department of Justice has recently submitted a suggestion to amend Criminal Rule 49.1(a)(3), which currently requires including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestion 24-CR-A). Because similar requirements appear in the Bankruptcy and Civil Rules, and are incorporated in the Appellate Rules, the suggestion has been forwarded to those advisory committees as well (suggestions 24-AP-B, 24-BK-D, 24-CV-C).

C. Nearly 20 years have passed since the Rules Committees initially considered the privacy rules, and this could present a timely opportunity to review the rules and consider whether any amendments might be warranted in light of the passage of time, or whether practice under the rules has identified other areas of concern. For example, the committees could consider whether any other personal information, not included in the redaction requirements, might warrant protection today.

Some issues could concern provisions that are common to the privacy rules. For example, the exemptions from the redaction requirements in subdivision (b) of each of the privacy rules include language that could be ambiguous or overlapping; additional inquiry could identify whether any of these provisions pose a practical problem to litigants or courts. And the waiver provision in subdivision (h) might warrant clarification. Those inquiries should proceed on a coordinated basis, either by continuing the work of the reporters' working group, by designating one advisory committee to take the lead, or by asking the Standing Committee Chair to appoint a joint subcommittee.

Moreover, an Advisory Committee might seek to consider issues solely related to filings in appellate, bankruptcy, civil, or criminal proceedings. For example, the Bankruptcy Rules Committee is already considering such questions. And the Criminal Rules Committee might review several provisions in Criminal Rule 49.1 that address unique concerns, such as arrest or search warrants and charging documents (Rule 49.1(b)(8)-(9)).

* * * *

The Rules Committee Staff will continue to work with the relevant Advisory Committee Chairs and reporters to identify any areas of common concern and to

assist in any necessary coordination. We anticipate that the reporters' advisory group will continue its discussions over the next several months. Each Advisory Committee can also consider whether it wishes to appoint a subcommittee to consider these issues or instead to await further information.

TAB 13

Oral Report on E-Filing by Self-Represented Litigants

Item 13 will be an oral report.

TAB 14

Item 14 will be an oral report.

TAB 15

15. Jury Demand After Removal – Rule 81(c)

During the Committee's October 2023 meeting, members suggested that an amendment of Rule 81(c) be pursued because, as restyled in 2007, it could create confusion about whether a jury trial must be demanded after removal from state court. The original submission came in years ago, but was for a considerable period superseded by a submission by two Standing Committee members to amend Rule 38 in a way that would have mooted the objection to the restyling of the rule. Eventually, the amendment to Rule 38 was dropped from the agenda, and this submission has returned to active consideration. 15-CV-A should be included in this agenda book.

This submission is from attorney Mike Wray, who argues that a change of verb tense made during the "restyling" of the whole set of Civil Rules in 2007 inadvertently produced a change to Rule 81(c) that created a trap for litigants about whether they 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.

Investigation has not revealed the reason for the restyling change in verb tense. But the potential for confusion was noted by Committee members during the October 2023 meeting. As restyled, 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, though the rule seems to have excused jury demands (absent a court order to make a demand) only after removal from state courts in which there is never a requirement to demand a jury trial, and not in instances of removal from a state court in which a jury demand must be made under state practice, but was not yet required as of the time of removal. In that way, it presumes that lawyers in states in which jury demands are required at some point will realize they need to worry about when that is required in federal court after removal. For those unaccustomed to ever having to demand a jury, the requirement that the court set a deadline for such demands is protective in calling their attention to this federal-court requirement. But that was surely clearer before restyling, when the rule required a jury demand after removal if no such demand had been made before removal "[i]f the state law *does* not require an express demand for a jury trial." The change to "did" muddied the waters, at least for Mr. Wray.

The style change could be read to indicate that the question under the restyled rule is whether *at the time of removal* state court practice already required a jury demand. Because there is often a short fuse on removing, which may require that a notice of removal be filed and served before an answer is due in state court (particularly if defendant obtains an extension of time to answer), it may often happen that no jury demand has been made in state court at the time of removal. That was Mr. Wray's problem in the case that prompted this submission. He found that courts in the Ninth Circuit did not treat the style change as changing the meaning of the rule, which the Ninth Circuit had held excuses a demand under Rule 38 (absent a demand before removal) only if the state practice never required such a demand.

At the October meeting, two possible amendment approaches were suggested. The first would simply change the rule back to what it said before 2007 by reverting to the prior verb tense – "does" in place of "did."

The other approach would be to remove all ambiguity about whether a party that has not demanded a jury trial before removal must do so promptly after removal to preserve the right to jury trial, by requiring a post-removal demand unless an express demand has already been made before removal whether or the state courts from which removal occurred ever require a jury demand.

These two approaches are presented below, but first it is important to provide background on state court practice that may bear on choosing between them. Rules Law Clerk Zachary Hawari has provided a memo on state court jury demand practices, which is included in this agenda book. It reveals a number of things that could mean reverting to the pre-2007 verb tense would nonetheless leave lawyers uncertain whether they need to demand a jury in accordance with Rule 38 after removal.

Thus, though some 30 states have jury-demand rules similar to Rule 38 the number of days allowed for making the demand varies from Rule 38's requirement that it be made "no later than 14 days after the last pleading directed to the issue is served." State practices in various states range from 10 days to 30 days to demand a jury trial. (As the Hawari memo notes, however, unless state practice includes an analogue to Rule 6 on weekends or holidays Rule 38's 14-day requirement might be as long as a state court 10-day requirement, or even possibly longer.)

Beyond that, states that require a jury demand based on when pleadings are served trigger that requirement in different ways. Connecticut and Tennessee say that the focus is on the last pleading raising "an issue *of fact*," which might be different from Rule 38's provision.

Moreover, some states do not tie the jury demand requirement to when pleadings are filed. There may also be differences for different levels of state courts in a given state (e.g., district, circuit, municipal, and justice courts may use different jury-trial procedures).

So returning to the pre-2007 rule might not mean that determining whether or when one needs to demand a jury trial after removal is entirely clear in all removal situations.

But returning to the former rule would seem to preserve something it assured – if a given state *never* required a jury trial, lawyers in that state might be surprised to find that after removal they had to make one in federal court. That seems to be the function of the current rule's provision that after removal from the courts of such states "a party need not make [a jury demand] after removal unless the court orders the parties to do so within a specified time." To require a demand in all removed cases, then, would materially change things for lawyers in those states that never require a jury demand.

The Hawari memo shows that there appear to be such states. As indicated on the chart included in the memo, it seems that Arizona, Georgia, Minnesota, Mississippi, Missouri, Nebraska, Oklahoma, and Oregon have no requirement to demand a jury trial to obtain one. (Some of these states seem to require a jury trial in every case unless the parties affirmatively waive jury trial.)

Whether all these states really excuse jury demands is not entirely clear, however. For one thing, it would seem that the clerk's office would need to know whether to summon jurors for a given trial, and sometimes there is a requirement that parties desiring a jury trial post jury fees in advance. For another, inquiry to experienced judges in at least one of these states (Minnesota)

revealed some uncertainty about whether parties could really get jury trials without making a jury demand some time before the day jury selection is to begin.

So this memo offers two alternatives for discussion, but notes at the end that there seems little urgency about trying to get an amendment published for public comment this year. Building on the agenda memo from the Spring 2016 Committee meeting (also presented during the October 2023 meeting), here are the two alternative approaches:

Alternative 1 – Change Back to Present Tense

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.

Committee Note

As restyled in 2007, Rule 81(c) was changed from excusing a jury demand (absent a court order requiring a jury demand) whenever a state court "does" not require an express jury demand to requiring a jury demand unless state court practice "did" not require an express demand. Before 2007, the rule was interpreted to excuse a jury demand upon removal from state courts that never require such a demand, but the change in verb tense might have suggested that no such demand need be made after removal if the time for making a jury demand in the state court had not yet arrived. Removal often must occur very early in a case in state court. See 28 U.S.C. § 146(b)(1). As the Committee Note regarding the 2007 amendment stated, "[t]hese changes are intended to be

stylistic only." In order to avoid confusion on whether a jury demand is required after removal, this amendment changes the verb tense back to what it was before 2007.

Alternative 2 – Demand Always Required

As presented in the agenda book for the Committee's Spring 2016 meeting, the broader question than undoing the 2007 change in verb tense is whether the whole rule is unnecessarily complicated. The complication can be illustrated by looking for the gap.

[from Spring 2016 agenda book]

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 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 the following. And a Committee Note might emphasize that the amendment changes prior practice excusing a demand when a case is removed from a state court system that does not itself require a jury demand.

(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 no such demand as made before removal, Rule 38(b) governs a demand for jury trial. 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.

~~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 14 days after:~~

~~(i) it files a notice of removal; or~~

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

Committee Note

Rule 81(c) is amended to remove uncertainty about when and whether a party to a removed action must demand a jury trial. Prior to 2007, the rule said no demand was necessary if the state court "does" not require a jury demand to obtain a jury trial. State practice on jury demands varies, and it appears that in at least some state courts no demand need be made, although it is uncertain whether those states actually guarantee a jury trial unless the parties affirmatively waive jury trial. In other state courts, a jury demand is required, but only later in the case than the deadline in Rule 38 for demanding a jury trial. A number of states have rules similar to Rule 38, but time limits for making a jury demand different from the time limit in Rule 38.

This amendment is designed to remove uncertainty about whether and when a jury demand must be made after removal. It explicitly preserves the right to jury trial of a party that expressly demanded a jury trial before removal. But otherwise it makes clear that Rule 38 applies to removed cases. If all pleadings have been served at the time of removal, the demand must be made by the removing party within 14 days of the date on which it filed its notice of removal, and by any other party within 14 days of the date on which it was served with a notice of removal. If further pleadings are required, Rule 38(b)(1) applies to the removed case.

The amendment removes the prior exemption from the jury demand requirement in cases removed from state courts in which an express demand for a jury trial is not required. Courts no longer have to order parties to cases removed from such state courts to make a jury demand; the rule so requires.

* * * * *

The foregoing is a first effort on Alternative 2 if it seems worth pursuing. Further work is needed. For example, some of the states that do not require a jury demand also say that there will be a court trial if the parties affirmatively waive a jury. If that has happened before removal (an unlikely thing, perhaps), should this rule somehow revive the right to demand a jury trial?

No doubt other questions will emerge if Alternative 2 is pursued. That would not seem to be true if Alternative 1 is the preferred route, for it would preserve the pre-2007 status quo. But care would need to be taken even with the Committee Note to that change.

Because the bench and bar do not welcome rule amendments every year, and we have just completed a fairly arduous public comment cycle, it seems that this topic can be retained on the Committee's agenda for the Fall 2024 meeting.

Protecting the right to jury trial is important, and care should be employed in pursuing Alternative 2.

TAB 15A

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 Excerpts of Minutes of the Civil Rules Advisory Committee

EXHIBIT 1

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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.

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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

Content that was inadvertently included on pages 389 to 547 was removed on April 5, 2024.

TAB 15B

MEMORANDUM

To: Professor Marcus, Reporter

From: Zachary Hawari, Rules Law Clerk

Re: Rule 81 and State Jury Demand Procedures

Date: February 28, 2024

Jury Demand Procedures in State Courts

The Civil Rules Committee is considering whether to revert a verb tense change made during the restyling to Rule 81. Rule 81(c) provides procedures for state cases removed to federal court, and (c)(3), specifically, relates to jury demands. Under the federal rules, a party waives the right to a jury trial on any issue triable of right by a jury unless the party serves and files a written demand no later than 14 days after service of the last pleading directed to the issue. Fed. R. Civ. P. 38.

I have conducted a brief survey of states' rules and statutes, looking for when, if at all, a jury demand is required under their procedures. The concern is that a party in a removed case might be surprised if the originating state's procedures either presume a jury trial or do not require a jury demand be made until very late in the case. This survey aims only to get a rough sense of state procedures, and it does not reflect judicial opinions interpreting rules and statutes; subject-matter specific procedures; or differences in jury trials among levels of state courts (district, circuit, municipal, and justice courts sometimes use different jury procedures). Additionally, the methods for counting days in a period can vary, and a 10-day period in some states is not always shorter than the 14-day period in the federal rules. *See generally* Fed. R. Civ. P. 6, 2009 advisory committee note.

The full survey results can be found in the chart below.

To summarize, thirty states (plus the District of Columbia) are similar to the federal rule in requiring a jury demand within a certain number of days after service of the last pleading directed to a jury-triable issue.[1] Those states also have a provision roughly analogous to the federal rule's waiver provision. Seventeen states have a 10-

[1] Connecticut and Tennessee refer to the last pleading raising "an issue of fact."

day deadline; eleven states have a 14- or 15-day deadline; Pennsylvania has a 20-day deadline; and Alabama has a 30-day deadline.

Nine states require a jury demand but use a different measuring event. Indiana and Michigan, respectively, require a demand not later than 10 days after the first responsive pleading and not later than 28 days after the filing of the answer or a timely reply. Nevada requires a demand by the order "first setting the case for trial;" Washington requires the demand to be made "[a]t or prior to the time the case is called to be set for trial;" and Wisconsin requires the demand "at or before the scheduling conference or pretrial conference, whichever is held first." Alaska and Texas, respectively, require a demand 20 days and (at least) 30 days before the trial date. Maine requires a jury demand but does not include a specific deadline.

Another eight states either do not require a jury demand or require some affirmative waiver of a jury trial. Some of these states deem it a waiver when a party fails to appear at the trial or enters into a trial before the court without objection.[2]

Finally, California, Illinois, New Hampshire, and New York have procedures that are too unique or complex to categorize here.

[2] Rule text notwithstanding, brief research suggests that courts sometimes require a party to request a jury trial or object to a bench trial. For example, Minnesota courts recognize an obligation to demand a jury sometime prior to trial despite the rule's lack of a hard deadline. Nebraska appellate courts appear to presume that a jury trial was waived when no one objects to a bench trial.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Fed.	Fed. R. Civ. P. 38	(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate. (b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand—which may be included in a pleading—**no later than 14 days after the last pleading** directed to the issue is served; and (2) filing the demand in accordance with Rule 5(d). … (d) Waiver; Withdrawal. **A party waives a jury trial unless its demand is properly served and filed.** A proper demand may be withdrawn only if the parties consent.	14	Y	N
Ala.	Ala. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than thirty (30) days after the service of the last pleading** directed to such issue.	30	Y	N
Alaska	Alaska R. Civ. P. 38	(b) Demand. — Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y	N
Ariz.[4]	Ariz. R. Civ. P. 38	(a) ... On any issue triable of right by a jury, **a party need not file a written demand** or take any other action in order to preserve its right to trial by jury. (b) Waiver. **The parties may be deemed to have waived,** under these rules, a right to trial by jury **only if they affirmatively waive that right by filing a written stipulation, signed by all parties who appear at trial, at any time after the action is commenced, but no later than 30 days before the trial is scheduled to begin.** ...	–	**N**	**Y**

[3] Is there a waiver provision analogous to the Federal Rules? Yes (Y) / No (N) / Roughly (R)

[4] This is apparently a fairly recent change from the demand regime. *See Ansley v. Metro. Life Ins. Co.*, 215 F.R.D. 575, 579 n.7 (D. Ariz. 2003) (deciding whether a jury demand was timely in a removed case under Fed. R. Civ. P. 81 and discussing Ariz. R. Civ. P. 38(b)). The rule contains additional requirements for stipulations.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Ark.	Ark. R. Civ. P. 38	(a) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by filing with the clerk a demand therefor in writing at any time after the commencement of the action and **not later than 20 days prior to the trial date.**	–	Y	N
Cal.[5]	Cal Code Civ Proc § 631	(a) ... In civil cases, a jury may only be waived pursuant to subdivision (f). (b) At least one party demanding a jury on each side of a civil case shall pay a nonrefundable fee of one hundred fifty dollars ($150) ... (c) The fee described in subdivision (b) shall be due on or before the date scheduled for the initial case management conference in the action, except as follows: ... (2) If no case management conference is scheduled in a civil action...the fee shall be due no later than 365 calendar days after the filing of the initial complaint. … (f) A party waives trial by jury in any of the following ways: (1) By failing to appear at the trial. (2) By written consent filed with the clerk or judge. (3) By oral consent, in open court, entered in the minutes. (4) **By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation. ...**	–	R	N
Colo.	C.R. C.P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable by a jury by filing and serving upon all other parties, pursuant to Rule 5 (d), a demand therefor at any time after the commencement of the action but **not later than 14 days after the service of the last pleading** directed to such issue, except [for mandatory arbitration].	14	Y	N

[5] California's rules are unusual. A demand needs to be made around the time the cause is set for trial, but it seems possible for a jury fee to be due sooner than that in some cases. It seems possible that a case could be removed before a party is required to make a jury demand. There are also expedited jury trial procedures.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Conn.	Conn. Practice Book § 14-10	Conn. Practice Book § 14-10: All claims of cases for the jury shall be made in writing, served on all other parties and filed with the clerk within the time allowed by General Statutes § 52-215. ... General Statute Sec. 52-215. When, in any of the above-named cases an issue of fact is joined, the case may, **within ten days after such issue of fact is joined, be entered in the docket as a jury case upon the request of either party made to the clerk**; and any such case may at any time be entered in the docket as a jury case by the clerk, upon written consent of all parties or by order of court.	**10*** [6]	R	N
Del.	Del. Super. Ct. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of an issued triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y	N
Fla.	Fla. R. Civ. P. 1.430	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other party a demand therefor in writing at any time after commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y	N
Ga.[7]	O.C.G.A. § 9-11-39	9-11-39. Consent to trial by court; jury trial on court order. (a) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, **may consent to trial by the court sitting without a jury.**	–	**N**	**Y**
Haw.	Haw. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue...	10	Y	N

[6] It is not clear whether Connecticut's "issue of fact" standard is the same as the "any triable issue" standard used by most other courts.

[7] In Georgia, the various rules of procedure are codified in the Official Code of Georgia Annotated. *See* Title 9: Civil Practice.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Idaho	I.R.C. P. Rule 38	(b) Demand for jury. On any issue triable of right by a jury, a party may demand a jury trial.... The demand may be made by: (1) serving the other parties with a written demand, which may be included in a pleading, **no later than 14 days after the last pleading** directed to the issue is served...	14	Y	N
Ill.	735 Ill. Comp. Stat. 5/2-1105	(a) **A plaintiff** desirous of a trial by jury **must file a demand** therefor with the clerk **at the time the action is commenced**. **A defendant** desirous of a trial by jury must file a demand therefor **not later than the filing of his or her answer.** Otherwise, the party waives a jury. **If an action is filed seeking equitable relief** and the court thereafter determines that one or more of the parties is or are entitled to a trial by jury, **the plaintiff, within 3 days** from the entry of such order by the court, or **the defendant, within 6 days** from the entry of such order by the court, may file his or her demand for trial by jury with the clerk of the court.	** [8]	R	N
Ind.	Ind. Trial R. 38	(B) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by filing with the court and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than ten (10) days after the first responsive pleading** to the complaint, or to a counterclaim, crossclaim or other claim if one properly is pleaded; and if no responsive pleading is filed or required, **within ten (10) days after the time such pleading otherwise would have been required.**	** [9]	Y	N
Iowa	Iowa R. Civ. P. 1.902	Rule 1.902 Demand for jury trial. (2) A party desiring a jury trial of an issue must make written demand therefor **not later than ten days after the last pleading** directed to that issue.	10	Y	N
Kan.	Kan. Stat. Ann. § 60-238	(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by: (1) Serving the other parties with a written demand, which may be included in a pleading, **no later than 14 days after the last pleading** directed to the issue is served; …	14	Y	N

[8] Illinois is very different from the federal system. The plaintiff needs to make a demand very early, but a defendant has until the answer.

[9] Rule 6 says that a "responsive pleading required under these rules, shall be served within twenty [20] days after service of the prior pleading."

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Ky.	Ky. R. Civ. P. 38.02	Rule 38.02. Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y [10]	N
La.	La. C.C.P. Art. 1733	C. The pleading demanding a trial by jury shall be filed **not later than ten days after either the service of the last pleading** directed to any issue triable by a jury**,** or the granting of a motion to withdraw a demand for a trial by jury.	10	R	N
Me.	Me. R. Civ. P. 38	(b) Demand. In an action in the Superior Court, any plaintiff may **demand a trial by jury of any issue triable of right by a jury by filing a demand** and paying the fee therefor as required… (d) Waiver. The failure of a party to make a demand and pay the fee as required by this rule constitutes a waiver by that party of trial by jury; **provided that for any reason other than a party's own neglect or lack of diligence, the court may allow a party to file and serve a demand upon all other parties within such time as not to delay the trial**.	–	R	N [11]
Md.	Md. R. 2-325	(a) Demand. — Any party may elect a trial by jury of any issue triable of right by a jury by filing a demand therefor in writing either as a separate paper or separately titled at the conclusion of a pleading and immediately preceding any required certificate of service.(b) Waiver. — The failure of a party to **file the demand within 15 days after service of the last pleading filed by any party** directed to the issue constitutes a waiver of trial by jury.(c) Actions from district court. — When an action is transferred from the District Court by reason of a demand for jury trial, a new demand is not required.	15	Y	N

[10] Waiver is in Rule 38.04.

[11] A jury demand needs to be made, but it is not clear when the deadline is. A prior version of Me. R. Civ. P. 16(b) apparently provided that a plaintiff had 15 days from service of an answer to file a pretrial scheduling statement, including whether a jury trial is demanded. *Solomon v. Brooklawn Mem'l Park, Inc.*, 600 A.2d 1113, 1114 (Me. 1991).

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Mass.	Mass. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue. ...	10	Y	N
Mich.	MCR 2.508	(B) Demand for Jury. (1) A party may demand a trial by jury of an issue as to which there is a right to trial by jury by filing a written demand for a jury trial **within 28 days after the filing of the answer or a timely reply**. The demand for jury must be filed as a separate document. The jury fee provided by law must be paid at the time the demand is filed.	– [12]	Y	N
Minn.	Minn. R. Civ. P. 38.02	In actions arising on contract, and by permission of the court in other actions, any party thereto may waive a jury trial by: (a) failing to appear at the trial; (b) written consent, by the party or the party's attorney, filed with the court administrator; or (c) oral consent in open court, entered in the minutes. **Neither the failure to file any document requesting a jury trial nor the failure to pay a jury fee shall be deemed a waiver of the right to a jury trial.**	–	**N**	**Y*** [13]
Miss.	M.R.C. P. 38	(b) Waiver of jury trial. — Parties to an action may w**aive their rights to a jury trial by filing with the court a specific, written stipulation that the right has been waived** and requesting that the action be tried by the court. The court may, in its discretion, require that the action be tried by a jury notwithstanding the stipulation of waiver.	–	**N** [14]	**Y**
Mo.	Mo. Rev. Stat. § 510.190; Mo. Sup. Ct. R. 69.01	1. ... In particular, **any issue as to whether a release, composition, or discharge of plaintiff's original claim was fraudulently or otherwise wrongfully procured shall be tried by jury unless waived**. 2. **Parties shall be deemed to have waived trial by jury:** (1) By failing to appear at the trial; (2) By filing with the clerk written consent in person or by attorney; (3) By oral consent in court, entered on the minutes; (4) By entering into trial before the court without objection.	–	**N**	**Y**

[12] The deadline runs from answer or reply, which is somewhat like Indiana.

[13] Notwithstanding the rule, courts have said that a jury demand before the trial day is necessary.

[14] This seems to be one of the stricter affirmative waiver requirements. *Cf.* Missouri.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Mont.	Mont. R. Civ. P. 38	On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand — which may be included in a pleading — **no later than 14 days after the last pleading** directed to the issue is served; and	14	Y	N
Neb.	Neb. Rev. Stat. § 25-1126	The **trial by jury may be waived** by the parties in actions arising on contract and with assent of the court in other actions (1) **by the consent of the party appearing, when the other party fails to appear at the trial** by himself or herself or by attorney, (2) **by written consent**, in person or by attorney, filed with the clerk, and (3) **by oral consent** in open court entered upon the record.	–	**N** [15]	**Y**
Nev.	N.R.C. P. 38	(b) On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand—which may be included in a pleading—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**...	– [16]	Y	N

[15] Where no one objects to a bench trial, the appellate court will presume that a jury trial was waived. *MFA Ins. Cos. v. Mendenhall*, 205 Neb. 430, 432, 288 N.W.2d 270, 272 (1980).

[16] This is also true for justice courts. Nev. JCRCP 38.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
N.H.	N.H. Super. Ct. R. 8, 9; N.H. Cir. Ct. Dist. Div. R. 3.8, 3.9	N.H. Super. Ct. R. Rule 8. (c) A plaintiff entitled to a trial by jury and desiring a trial by jury shall so **indicate upon the first page of the Complaint at the time of filing**, or, if there is a counterclaim, at the time plaintiff files an **Answer to such counterclaim**. Failure to request a jury trial in accordance with this rule shall constitute a waiver by the plaintiff thereof. N.H. Cir. Ct. Dist. Div. R. 3.8. Complaint. (c) A plaintiff against whom a counterclaim is filed and who is entitled to a trial by jury and desiring a trial by jury shall so indicate at the time plaintiff files an Answer to such counterclaim. Failure to request a jury trial in accordance with this rule shall constitute a waiver by the plaintiff thereof. N.H. Super. Ct. R. Rule 9 & N.H. Cir. Ct. Dist. Div. R. 3.9. Answers; defenses; forms of denials. (c) To preserve the right to a jury trial, a defendant entitled to a trial by jury must indicate his or her request for a jury trial upon the first page of the Answer at the time of filing. Failure to request a jury trial in accordance with this rule shall constitute a waiver by the defendant thereof.	** [17]	Y	N
N.J.[18]	N.J. Ct. R. 4:35-1	N.J. Court Rules, R. 1:8-1 (b) Civil Actions. Issues in civil actions triable of right by a jury shall be so tried only if a jury trial is demanded by a party in accordance with R. 4:35-1 or R. 6:5-3, as applicable, and is not thereafter waived. Rule 4:35-1. [Superior Court, Law and Chancery Divisions, the surrogate's courts and the Tax Court] Demand for jury trial. (a) Demand; Time; Manner. Except as otherwise provided by R. 4:67-4 (summary actions), any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y	N

[17] The deadlines seem to go with the complaint/answer. Based on the difference between the Superior Court and Circuit Court rules, it seems that a plaintiff can only get a jury trial in the Superior Court unless there is a counterclaim.

[18] There are slightly different rules for the Law Division of the Superior Court. *See* N.J. Court Rules, R. 6:5-3.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
N.M.[19]	Rule 1-038, NMRA	A. Jury demand. In civil actions any party may demand a trial by jury of any issue triable of right by serving upon the other parties a demand therefor in writing after the commencement of the action and **not later than ten (10) days after service of the last pleading** directed to such issue...	10	Y	N
N.Y.[20]	N.Y. C.P.L.R. 4101-4103 (Consol.)	§ 4101. Issues triable by a jury revealed before trialIn the following actions, the issues of fact shall be tried by a jury unless a jury trial is waived or a reference is directed under section 4317, except that equitable defenses and equitable counterclaims shall be tried by the court: ... § 4102. Demand and waiver of trial by jury; specification of issues(a) Demand. Any party may demand a trial by jury of any issue of fact triable of right by a jury, by serving upon all other parties and filing a note of issue containing a demand for trial by jury. Any party served with a note of issue not containing such a demand may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand in the office where the note of issue was filed **within fifteen days after service of the note of issue**. § 4103. Issues triable by a jury revealed at trial; demand and waiver of trial by juryWhen it appears in the course of a trial by the court that the relief required, although not originally demanded by a party, entitles the adverse party to a trial by jury of certain issues of fact, the court shall give the adverse party an opportunity to demand a jury trial of such issues.	–	R	N

[19] For a magistrate court, NMRA Rule 2-602 provides: "B. Demand. Either party to an action may demand trial by jury. The demand shall be made in the complaint if made by the plaintiff and in the answer if made by the defendant, …"

[20] NY is unique. It appears that a party must filed a "note of issue" after discovery selecting a jury or nonjury trial and, if a nonjury trial, the other parties have 15 days to demand a jury trial. *See Ramirez-Hernandez v. Bloomingdale*, 166 N.Y.S.3d 825, 826 (Sup. Ct.) ("When discovery is complete and the matter is ready for trial any party may file a certificate of readiness with a note of issue to place the matter on the trial calendar. When one party files a note of issue demanding a nonjury trial, court rules require any other party to the matter who desires a jury trial to file such a demand within 15 days. Failure to timely demand a jury trial constitutes a waiver by operation of CPLR 4102 (a) (the right to a trial by jury shall be deemed waived by all parties) and Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (c) (shall constitute a waiver by all parties and the action or special proceeding shall be scheduled for nonjury trial).").

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
N.C.	N.C. Gen. Stat. § 1A-1, R. 38	(b) Demand. — Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	**Y**[21]	N
N.D.	N.D.R. Civ.P. 38	(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand - which may be included in a pleading - **no later than 14 days after the last pleading** directed to the issue is served; and...	10	Y	N
Ohio	Ohio Civ. R. 38	(B) Demand. Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefore at any time after the commencement of the action and **not later than fourteen days after the service of the last pleading** directed to such issue.	14	Y	N
Okla.	12 Okl. St. § 591	The **trial by jury may be waived** by the parties, in actions arising on contract, and with the assent of the court in other actions, **in the following manner:** By the **consent of the party appearing, when the other party fails to appear at the trial** by himself or attorney. **By written consent**, in person or by attorney, filed with the clerk. **By oral consent**, in open court, entered on the journal.	–	**N**	**Y**

[21] N.C. Gen. Stat. § 1A-1, R. 38(c) provides: "Waiver. — **Except in actions wherein jury trial cannot be waived**, the failure of a party to serve a demand as required by this rule … constitutes a waiver by him of trial by jury."

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Or.	ORCP 51; UTCR 6.130	ORCP 51 C. ISSUES OF FACT; HOW TRIED The trial of all issues of fact **shall be by jury unless**: C.(1) The parties or their attorneys of record, by **written stipulation** filed with the court or by an oral stipulation made in open court and entered in the record, **consent to trial without a jury;** or C.(2) The court, upon motion of a party or on its own initiative, finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of this state. Ore. Uniform Trial Court Rules 6.130. **No waiver of trial by jury in civil cases in circuit court shall be deemed to have occurred unless the parties notify the court of such a waiver before 5:00 p.m. of the last judicial day before tria**l. Thereafter, a jury trial may not be waived without the consent of the court. ...	–	**N**	**Y**
Pa.	Pa. R.C.P. No. 1007.1	(a) Demand. In any action in which the right to jury trial exists, that right shall be deemed waived unless a party files and serves a written demand for a jury trial **not later than twenty days after service of the last permissible pleading**.	20	Y	N
R.I.[22]	R.I. Super. Ct. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by: (1) Serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than ten (10) days after the service of the last pleading** directed to such issue; and...	10	Y	N
S.C.	S.C. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue.	10	Y	N
S.D.	S.D. Codified Laws § 15-6-38(b)	Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than ten days after the service of the last pleading** directed to such issue.	10	Y	N

[22] On appeal from the district court to the Superior Court, a party demanding a jury trial shall serve a demand therefor not later than ten (10) days after certification on appeal unless such demand was made in the District Court; a docket notation that the action is a jury case does not suffice. R.I. Super. Ct. R. Civ. P. 81.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Tenn.	Tenn. R. Civ. P. 38.02	Any party may demand a trial by jury of any issue triable of right by jury by demanding the same in any pleading specified in Rule 7.01 or by endorsing the demand upon such pleading when it is filed, or by written demand filed with the clerk, with notice to all parties, **within fifteen (15) days after the service of the last pleading raising an issue of fact.**	**15*** [23]	Y	N
Tex.	Tex. R. Civ. P. 216	Rule 216. [RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS] Request and Fee for Jury Trial. a. Request. No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court **a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.**	–	R	N
Utah	U.R.C. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 14 days after the service of the last pleading** directed to such issue.	14	Y	N
Vt.	Vt. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 14 days after the service of the last pleading** directed to such issue...	14	Y	N
Va.	Va. Sup. Ct. R. 3:21	(b) Demand. — Any party may demand a trial by jury of any issue triable of right by a jury in the complaint or by (1) serving upon other parties a demand therefore in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to the issue...	10	Y [24]	N

[23] It is not clear whether "an issue of fact" is the same as "any issue triable of right by a jury." *See also* Rule 38.03. Demand -- Cases Removed to Trial Court: If the case is removed to chancery or circuit court, a written demand for a jury trial must be filed "within ten (10) days after the papers are filed with the clerk."

[24] Va. Code Ann. § 8.01-336: B. Waiver of jury trial. — In any action at law in which the recovery sought is greater than $20, exclusive of interest, unless one of the parties demands that the case or any issue thereof be tried by a jury, or in a criminal action in which trial by jury is dispensed with as provided by law, the whole matter of law and fact may be heard and judgment given by the court.

Juris-diction	Cite	Text	Due X days after pleading	Waiver[3]	No demand required
Wash.	Wash. Super. Ct. Civ. R. 38	(b) Demand for jury. **At or prior to the time the case is called to be set for trial**, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk...	–	Y	N
W. Va.	W. Va. R. Civ. P. 38	(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 10 days after the service of the last pleading** directed to such issue...	10	Y	N
Wis.	Wis. Stat. 8 05.01	(2) Demand. Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled **at or before the scheduling conference or pretrial conference, whichever is held first**. The demand may be made either in writing or orally on the record.	–	Y	N
Wyo.	Wyo. R. Civ. P. 38	(b)(1) By Whom; Filing. — Any party may demand a trial by jury of any issue triable of right by a jury by (A) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and **not later than 14 days after service of the last pleading** directed to such issue...	14	Y	N
DC	D.C. Super. Court. Civ. R. 38	On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand—which may be included in a pleading—**no later than 14 days after the last pleading** directed to the issue is served…	14	Y	N

TAB 16

16. Random Case Assignment

The Committee has received several suggestions for rulemaking regarding civil case assignment in the district courts. Attention to this issue has increased in recent years due to concerns that in high-profile cases, especially cases seeking nationwide injunctions against executive action, plaintiffs are engaged in "judge shopping" by filing cases in divisions of federal districts with only one judge. At the October 2023 Committee meeting, the Reporters were tasked with researching questions about whether rulemaking on this topic is authorized by the Rules Enabling Act, 28 U.S.C. § 2072. Particular questions included whether a rule on case assignment would be a "general rule[] of practice and procedure . . . for cases in the United States district courts," *id*. § 2072(a), and whether such a rule would occasion an appropriate use of the supersession clause, *id*. § 2072(b).

Use of the supersession clause may be necessary because, since the Judicial Code of 1911, the power to assign business among multiple judges in a district has been statutorily delegated to the districts in the first instance. The current statute was enacted as part of the 1948 revisions to the judicial code, and provides that a district's business "shall be divided among the judges as provided by the rules and orders of the court," and that "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." 28 U.S.C. § 137(a). The statute also provides that if the judges of a district cannot agree on case-assignment rules, "the judicial council of the circuit shall make the necessary orders." *Id*.

Preliminary research conducted since the last Committee meeting reveals that reasonable minds can differ about whether there is rulemaking authority. The Department of Justice submitted a detailed suggestion arguing that a rule that covers assignments in particular kinds of cases would not conflict with § 137 since, in effect, § 137 assumes that any local rules adopted would have to be consistent with any applicable Federal Rules. On the other hand, such assignment (along with general authority over the structure of, and allocation of judges to, the federal districts) has long been a subject of Congressional authority, and there exists enormous diversity among the districts regarding local rules of case assignment, many of which are attuned to the particular geographies and caseloads of the districts.

In any event, subsequent events have perhaps reduced the urgency with which this committee needs to address these issues. At the meeting of the Judicial Conference of the United States on March 12, 2024, the Conference approved a new policy regarding random assignment of some civil cases, as proposed by the Court Administration and Case Management Committee. The new guidance (attached) will be disseminated to all districts. The new policy reads:

District Courts should apply district-wide assignment to:

a. civil actions seeking to bar or mandate statewide enforcement of a state law, including a rule, regulation, policy, or order of the executive branch or a state agency, whether by declaratory judgment and/or any form of injunctive relief; and

b. civil actions seeking to bar or mandate nationwide enforcement of a federal law including a rule, regulation, policy, or order of the executive branch or a federal agency, whether by declaratory judgment and/or any form of injunctive relief.

The Conference's actions are summarized in the press release, included in this agenda book.

In light of this new policy, it may make sense for the Committee to delay any further action in this area until it can assess its impact. Although there are other kinds of cases that may warrant improved case-assignment practices, such as patent cases, those matters may be best left for the time being to the districts to develop local-rule-based approaches.

TAB 16A

GUIDANCE FOR CIVIL CASE ASSIGNMENT IN DISTRICT COURTS[1]

BACKGROUND

The Judicial Conference's longstanding policies supporting the random assignment of cases and ensuring that district judges remain generalists[2] deter both judge-shopping and the assignment of cases based on the perceived merits or abilities of a particular judge.

The tools used to accomplish random case assignment are a court's divisional and judicial case assignment methods employed pursuant to 28 U.S.C. § 137. Under 28 U.S.C. § 137(a), "[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."[3] This statute provides individual courts wide latitude to establish case assignment systems, permitting flexibility in managing their caseloads efficiently and in a manner that best suits the various needs of the district and the communities they serve. The chief judge is "responsible for the observance of such rules and orders" and is charged with "divid[ing] the business and assign[ing] the cases so far as such rules and orders do not otherwise prescribe." The statute also provides that "[i]f 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." Additionally, 28 U.S.C. § 332(d)(1) provides that "each [circuit] judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."

At its March 2024 session, the Judicial Conference, upon recommendation of the Committee on Court Administration and Case Management (CACM), approved the following policy regarding case assignment practices:[4]

District courts should apply district-wide assignment to:

a. civil actions seeking to bar or mandate statewide enforcement of a state law, including a rule, regulation, policy, or order of the executive branch or a state agency, whether by declaratory judgment and/or any form of injunctive relief; and

b. civil actions seeking to bar or mandate nationwide enforcement of a federal law, including a rule, regulation, policy, or order of the executive branch or a federal agency, whether by declaratory judgment and/or any form of injunctive relief.

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[1] Issued March 2024, by the Judicial Conference Committee on Court Administration and Case Management.

[2] *See* JCUS-SEP 1995, p. 46; JCUS-MAR 1999, p. 13; JCUS-MAR 2000, p. 13.

[3] The division of the business of the courts is not solely accomplished through rules and orders. There are a variety of practices and policies utilized to accomplish this objective.

[4] JCUS-MAR 2024, p. __.

The guidance set forth below applies to all civil cases, including patent cases.[5] It does not apply to criminal cases as there are unique factors and considerations applicable to criminal cases that are not implicated in civil cases. Bankruptcy cases were not specifically considered in drafting the guidance. Case assignment in the bankruptcy context remains under study.

GUIDANCE

Courts are encouraged to conduct regular review of their civil case assignment practices, particularly courts with single-Article III judge divisions.

While recognizing the statutory authority and discretion that district courts have with respect to case assignment, and that the division of the business of the district court among the judges is accomplished through various case assignment practices, to assist with developing these practices and aligning them with Judicial Conference policy, the CACM Committee shares the following guidance:

1. Public confidence in the case assignment process requires transparency. Therefore, consider incorporating case assignment practices into rules and orders as opposed to internal plans or policies. To the extent a court currently maintains internal plans or policies, the court should make them accessible to the public on the court's website.

2. In crafting civil case assignment practices, consider various issues that generate concern, such as achieving randomness in assignments; ensuring the district judges remain generalists; balancing caseload among judges in the district; avoiding and addressing recusals, conflicts of interest, and appearances of impropriety; considering potentially disqualifying events impacting assignments, such as injury, illness, or incapacitation of a judge; managing related cases; and promoting the efficiency, convenience, and other benefits of parties' cases being heard by local judges.

3. Regardless of where a case is filed, avoid case assignment practices that result in the likelihood that a case will be assigned to a particular judge, absent a determination that proceeding in a particular geographic location is appropriate.

[5] The CACM Committee presented its "Report on the Patent Case Assignment Study in the District Courts" (Patent Report) to the Judicial Conference at its September 2023 session, and the Secretary of the Judicial Conference transmitted it to Congress on October 3, 2023. The Patent Report concluded that the most effective tools in achieving the shared goal of both Congress and the Judicial Conference of promoting random case assignment are the divisional and judicial case assignment practices and policies employed in dividing the business of a district court as contemplated by 28 U.S.C. § 137, which allows each district court to divide the business of the court in a way that best serves the district. The Patent Report also recognized that district courts utilize various practices and policies in dividing the business of the court to achieve randomness in the divisional and judicial assignment of cases, and specifically in single-Article III judge divisions. Given the complexities associated with case assignment, the CACM Committee concluded that guidance on achieving random case assignment would benefit courts and that regular review of case assignment plans should be encouraged.

4. Employ case assignment practices that successfully avoid the likelihood that a case will be assigned to a particular judge, such as:

   (a) District-wide assignment of all cases;

   (b) District-wide assignment of certain cases based on Nature of Suit code, case categories, or case-type; or

   (c) Shared case assignments between the judge in a single-judge division with a judge or judges in another division or divisions.

5. Judicial Conference policy states that district courts should apply district-wide assignment in civil actions seeking to bar or mandate statewide or nationwide enforcement of a state or federal law, including a rule, regulation, policy, or order of the executive branch or a state or federal agency, whether by declaratory judgment and/or any form of injunctive relief.[6]

   The policy is applicable in instances when the remedy sought has implications beyond the parties before the court and the local community, and the importance of having a case heard by a judge with ties to the local community is not a compelling factor.

   To facilitate assignment and avoid circumvention of a district-wide assignment policy, courts should consider entering a standing or general order, or promulgating a local rule addressing the following:

   (a) If such relief is sought when the case is opened, note on the JS-44 (Civil Cover Sheet) in section "VI. CAUSE OF ACTION" that the remedy sought has implications beyond the parties before the court or that the case seeks to bar or mandate statewide or nationwide enforcement of a state or federal law.

   (b) If such relief is sought after the case is opened, require the party seeking such relief to prominently display such information in the case caption upon filing the motion.

   (c) Include in the court's case assignment practices a provision addressing the filing of an amended complaint. For example, if an amended complaint or motion seeking such relief is filed within thirty (30) days of when the case is opened, or before significant steps have been taken in the action, the judge to whom the case is assigned should transfer the case back to the Clerk of Court for reassignment on the district-wide wheel.

[6] JCUS-MAR 2024, p. __.

CONTACT INFORMATION

Questions or comments concerning this guidance and assistance in its implementation may be directed to Policy Staff to the Committee on Court Administration and Case Management.

TAB 16B

U.S. Department of Justice
Civil Division

23-CV-DD

Office of the Assistant Attorney General

Washington, DC 20044

December 21, 2023

The Honorable Robin Rosenberg
Chair, Advisory Committee on Civil Rules
One Columbus Circle, NW
Washington, D.C. 20544

Re: Random Case Assignment—23-CV-U

Dear Judge Rosenberg:

The United States Department of Justice has been asked to provide its views on the proposal by the Brennan Center for Justice for adoption of a Federal Rule of Civil Procedure to address concerns about case assignments in divisions with just one or two district judges. As discussed below, these divisions create the potential for and the perception of judge-shopping, which can undermine confidence in the judiciary. The Department believes that this issue can be addressed by a rules amendment and that such an amendment would further the public interest.

BACKGROUND

Federal district courts differ in terms of how cases are assigned to different divisions of the court. In some federal districts, there are only one or two judges assigned to a division, and these judges hear every case filed in that division. When a district has this limited distribution of judges and case assignments, a plaintiff filing a case in a particular division can predict which judge will hear their case. A plaintiff that takes advantage of such knowledge creates the perception of judge-shopping and risks undermining confidence in the judiciary.

Currently, no Federal Rule of Civil Procedure governs the initial assignment of cases. Rather, case assignments are governed by local rules or orders, which vary from district to district. As discussed below, some districts use random cross-district assignment regardless of which division a case was filed in, while other districts assign every case filed in a particular division to the judge or judges in that division. It is this latter situation that is the focus of this letter.

DISCUSSION

I. The Need for a Federal Rule of Civil Procedure Addressing Case Assignments

There is a critical need at this time to adopt a new Federal Rule of Civil Procedure addressing case assignments in judicial divisions where litigants can effectively choose their preferred judge. While single-judge divisions are not new, concerns about single-judge divisions and forum shopping have increased in recent years, particularly with respect to litigation against

the federal government seeking nationwide relief, which can affect the rights and obligations of people across the country. This concern has been raised by many outside the Executive Branch. For example, nineteen United States senators recently requested that the Judicial Conference recommend rules to district courts to eliminate the opportunity for such judge-shopping.[1] A report by the Congressional Research Service summarized the problem, noting that "litigants challenging government actions were filing suit in [] divisions" where only one or two active federal judges are assigned—"in an attempt to judge shop."[2] Chief Justice Roberts, in his 2021 Year-End Report on the Federal Judiciary, identified two competing considerations in the process of case assignments. Of course, the judiciary "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."[3] At the same time, Congress established districts and divisions "so that litigants are served by federal judges tied to their communities."[4] As the Chief Justice recognized, "reconciling these values is important to public confidence in the courts…."[5]

A recent *amicus* brief filed with the Supreme Court by Professor Stephen Vladeck notes that the Texas Attorney General had filed at least nineteen cases in the Texas district courts, on behalf of Texas, opposing policies of the Biden administration, and that it had filed those cases "exclusively in . . . small divisions where it can all but guarantee which judge will hear its case."[6] According to Professor Vladeck, Texas has "not fil[ed] a single case [in Austin, TX] where the Texas state government is actually located…."[7]

The Department has recently filed transfer motions in cases where neither the litigants nor the events giving rise to the case had any connection to the district or division where the case was filed.[8] In those cases, the Department provided exhibits illustrating the scope of the problem, noting this practice "appears to be exploiting single-judge Divisions in ways that create the appearance of judge shopping that threatens to undermine the integrity of the judicial process."[9] *See* Appendix (judge-shopping data). To date, those motions have been denied, and the cases have remained in the district where the case was filed.

In light of these concerns, the Department believes that case assignment is a significant issue that should be addressed by a rules amendment.

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[1] Letter to Hon. Robin L. Rosenberg from Sen. Charles E. Schumer, *et al.* (July 10, 2023).

[2] Congressional Research Service, *Where a Suit Can Proceed: Court Selection and Forum Shopping* at 3 (Nov. 8, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10856.

[3] 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"), at 5.

[4] *Id.*

[5] *Id.*

[6] Motion for Leave to File Amicus Curiae Brief and Brief of Stephen I. Vladeck as Amicus Curiae in Support of Applicants at, United States v. Texas, No. 22-40367 (July 13, 2022), https://www.supremecourt.gov/DocketPDF/22/22A17/230032/20220713161446965_22A17%20tsac%20Stephen%20I.%20Vladeck.pdf, at 3-4, 6. (Hereinafter "Vladeck *amicus*").

[7] *Id.*

[8] *See, e.g., State of Texas et al v. Department of Homeland Security, et al.*, No. 6:23-cv-00007 (S.D. Tx.), ECF No. 46 (Government's Reply in Support of Motion to Transfer), at 13.

[9] *Id.*

II. The Rules Enabling Act Permits the Supreme Court To Prescribe Case Assignment Procedures

Under the Rules Enabling Act, the Supreme Court may "prescribe general rules of practice and procedure" for the U.S. district courts and courts of appeal. 28 U.S.C. § 2072(a). The Court's authority under this provision is broad, so long as the rules adopted are procedural and not substantive. *See id.* § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."). The test is "whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[10] The Supreme Court has thus described the Rules Enabling Act as permitting the regulation of "the whole field of court procedure . . . in the interest of speedy, fair and exact determination of the truth."[11]

A rule that would require random district court assignment of cases—or, as proposed, a subset thereof—falls comfortably within the authority provided by the Rules Enabling Act. The division of labor among judges in any district is procedural by any reasonable definition. It "regulates . . . judicial process for enforcing rights and duties recognized by substantive laws,"[12] and it leaves substantive rights unchanged. Indeed, the Federal Rules of Civil Procedure have long addressed related issues of judicial workload management. For example, Rule 63(a) sets forth the procedure to be followed when "a judge conducting a hearing or trial is unable to proceed." The inclusion of this provision in Rule 63 supports a conclusion that a rule concerning the assignment of cases also would be procedural in nature.

III. A Federal Rule of Civil Procedure Addressing Case Assignment Would Not Conflict with 28 U.S.C. § 137

No other provision of federal law withdraws the broad authority that the Rules Enabling Act provides to address court procedures, including case assignments. During the October Advisory Committee meeting, there was a discussion about whether such a rulemaking would conflict with 28 U.S.C. § 137. Section 137 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.

[10] *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

[11] *Sibbach*, 312 U.S. at 14.

[12] *Hanna*, 380 U.S. at 464.

The Department does not believe that section 137 forecloses rulemaking in this area. Congress knows how to withdraw or limit the Supreme Court's broad authority to promulgate Rules on particular issues or procedure. *E.g.*, 28 U.S.C. § 2074(b) ("Any such rule [prescribed under section 2072] creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress"). But section 137 does not do so. Nor would section 137 inherently conflict with a Rule on the same subject. Section 137 requires district courts to set assignment procedures by local rule or order of the court; charges the chief judge with enforcing those rules and filling in the gaps; and provides a backstop—the judicial council—for when district judges are unable to agree. Nothing about those assignment-specific provisions conflicts with the Supreme Court's general authority to set rules of practice and procedure.

Instead, section 137 is best read as doing no more than what its text provides: It sets forth a default case-assignment procedure that can be modified by rules adopted pursuant to section 2072 and that must be guided by any federal rules so adopted. Hence, unless and until the Supreme Court sets rules or procedures for how districts must allocate cases among judges, the districts have broad discretion to determine the procedures to govern assignment pursuant to section 137. But if the Supreme Court wishes to adopt a rule in this area, it has the authority to do so under section 2072(a).

As noted, section 137 provides that case assignment may be governed by "the rules . . . of the court"—*i.e.*, the local rules. When district courts adopt such a local rule, they act pursuant to their general rulemaking authority under 28 U.S.C. § 2071(a), which provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Hence, under section 2071, the federal courts are generally authorized to set their own rules "for the conduct of their business." But these rules "shall be consistent with" the rules that the Supreme Court sets under its section 2072 power. Local rules governing case assignment therefore must be consistent with any Federal Rule adopted to govern case assignment. Nor can it be said that when district courts adopt local rules governing case assignments, they act under a separate grant of authority in section 137 that is not subject to section 2072's limits. Section 2071(f) expressly provides that "[n]o rule may be prescribed by a district court other than under this section."

Of course, some districts treat assignment questions through orders rather than through local rules, as section 137 permits.[13] But that does not diminish the force of the structural point just described: If local rules governing case assignments must comply with Federal Rules on the subject (as section 2071(a) and (f) establish), then Congress cannot have intended to empower district courts to avoid compliance with the Federal Rules simply because Congress permitted courts to act by order as well. The orders of a district court also must, of course, be consistent

[13] For example, the Northern District of Illinois and the District for the District of Columbia have assignment procedures as part of their local rules. By contrast, the Southern and Eastern Districts of New York have assignment procedures separate from their local rules.

with the Federal Rules. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.").

Although section 137 provides that "the business…*shall* be divided…as provided by the rules and orders of the court," this language does not foreclose adoption of a Federal Rule in this area. It merely imposes a mandatory duty on district courts to allocate cases via local rules or orders. It does not mean that rules and orders adopted by district courts to govern case assignment need not comply with relevant Federal Rules of Civil Procedure. Indeed, this language cannot relieve local courts of the obligation to adhere to any relevant Federal Rules of Civil Procedure for the reasons explained above. The local rules or orders that section 137 directs district courts to promulgate must themselves accord with the Federal Rules, and section 137 therefore cannot give district courts exclusive authority over case assignment rules. A contrary reading of section 137, moreover, would call into question rules like Rule 63, which addresses an aspect of how a court's business is divided among judges. The very first edition of the Federal Rules included a version of Rule 63, and this long history militates against reading section 137 to conflict with rulemaking in this area.

Another aspect of section 137 further undermines any suggestion that Congress intended to empower district courts to set case assignments free from the Supreme Court's supervision. The final sentence of the section provides that "[i]f 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." 28 U.S.C. § 137(a). This sentence suggests, first, that Congress's concern in enacting section 137 was to ensure that some entity established case-assignment rules—not to declare that adoption of case assignment rules was somehow a unique prerogative of district courts. Moreover, if section 137 empowered district courts to establish case assignments without regard to the Federal Rules, then presumably it would authorize judicial councils to do the same thing when exercising their backstop authority. But a principal duty of "[e]ach judicial council" is to "periodically review [local] rules . . . for consistency with [Federal] rules prescribed under section 2072" and to "modify or abrogate any such rule found inconsistent." 28 U.S.C. § 332(d)(4). It is implausible that Congress intended to authorize judicial councils charged with *enforcing* the Federal Rules to act *without regard to* those Rules.

The history of section 137 and the Rules Enabling Act confirms that Congress did not intend the former to displace the latter. Section 137 has its origins in the Judicial Code of 1911, which provided that, "[i]n districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial." Pub. L. No. 61-475, § 23, 36 Stat. 1087, 1090. That 1911 provision predated the Rules Enabling Act of 1934. And that 1911 provision's permissive terms ("may agree") cannot plausibly be read to conflict with, or limit, the broad rulemaking authority that Congress conferred in the Rules Enabling Act. Then, Congress enacted section 137 in its current "shall be divided" form in 1948, when it recodified and amended Title 28. Pub. L. 80-773, 62 Stat. 869, 897 (1948). The Committee on the Revision of the Laws reported that the recodified section 137 "was rewritten and the practice simplified." H.R. Rep. No. 80-308 at A31–32 (1947). There is no hint that Congress intended to amend the 1911 provision to foreclose rulemaking under the Rules Enabling Act. Had Congress intended that result, after adoption of the Rules Enabling Act, it would have left some evidence in the statute's text or legislative history. It is therefore far more plausible to understand section 137 as continuing a line of statutes that pre-dated the Rules Enabling Act and that provided default rules

to address a specific problem, rather than as precluding action via rules under section 2072(a). Nothing we have found in the legislative history indicates that Congress intended case assignment to be a unique prerogative of the district court, independent of any direction from the Supreme Court.

In short, section 137 does not mean that *only* the district courts may set case-assignment rules. It instead indicates that Congress intended to ensure that case assignment procedures be adopted. Congress directed district courts to do so in the first instance and gave the judicial council the duty to act if the district court did not. There is no persuasive reason to understand section 137 as taking priority over other provisions of federal law, including those that permit the Supreme Court to rule-make in this area *even if* the district has set case-assignment procedures pursuant to section 137. Nor does this interpretation read § 137(a) out of the federal code or render it superfluous. Section 137(a) sets an important, mandatory default—because, in fact, the Supreme Court has not yet promulgated rules and procedures in this area.

IV. Supersession: Section 2072(b) Permits the Supreme Court to "Clear the Field"

As explained above, a new Federal Rule governing case assignment would not conflict with section 137. Even if such a rule would conflict, however, the Supreme Court could still adopt a new rule in this area. Section 2072(b) provides that rules of practice and procedure adopted by the Supreme Court displace any conflicting provisions of law: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Although it might at first blush seem surprising that rules may supersede a statute, section 2072(b) expressly provides for that result and mandates that "[w]here a Rule of Civil Procedure conflicts with a prior statute, the Rule prevails."[14] Section 2072(b) permitted the Supreme Court to clear the field when the Federal Rules of Civil Procedure were promulgated. Previously, courts were following any number of different local systems for procedure. To unify the federal courts under the Federal Rules, Congress needed to ensure that those Rules, as set forth by the Supreme Court, would supersede conflicting rules of procedure. Courts accommodate arguably overlapping Rules and statutes by reading them to avoid conflict where reasonably possible. But when there is irreconcilable conflict, section 2072(b) specifies that a lawful Rule prevails over a prior statute.[15]

It might be suggested that section 2072(b) was meant for one-time use only, at the initial inception of the Federal Rules. But this argument is unpersuasive for three reasons. First, by its plain terms section 2072(b) contains no expiration date. The text does not provide that the power to supersede conflicting rules is limited only to those rules in effect before the Federal Rules of Civil Procedure were promulgated in 1934. Second, consistent with this interpretation, Congress reenacted the supersession clause even after the House passed a bill that would have eliminated the clause on the grounds that its purpose had been fulfilled.[16] Third, courts' treatment of the

[14] *Penfield Co. v. SEC*, 330 U.S. 585, 589 n.5 (1947).

[15] Congress could of course withdraw the Supreme Court's authority to act via rule on a particular subject or provide that certain statutes prevail over conflicting rules. Nothing in section 137, however, does so.

[16] Pub. L. No. 100-702, sec. 401(a), 102 Stat. 4642, 4648-49; *see* 131 Cong. Rec. 35,192 (Dec. 9, 1985) (House passage of bill that would have eliminated supersession clause); H.R. Rep. No. 99-422 at 16 (1985) (House

supersession clause also rebuts the argument that it has an implicit expiration date. At least twice, courts of appeals have held that the Rules superseded federal statutes whose enactment postdated the Rules Enabling Act.[17]

V. Proposals for Rulemaking

There are multiple options that the Advisory Committee could consider to address concerns about judge-shopping. Organizations such as the Brennan Center for Justice and the American Bar Association (ABA), have put forward reasonable proposals. We summarize some of those proposals here.

The Brennan Center has suggested assigning cases in districts with single-judge divisions by looking to the relief requested by the plaintiff. The motivation here is to address the apparent practice—discussed above—of requesting and receiving nationwide injunctions after filing in a single-judge division seemingly chosen because of the identity of the judge. Under this proposal:

> 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.[18]

Another proposal by the Brennan Center addressing the same concern would require random assignment in 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.[19] This proposal appears focused on addressing instances like those discussed by Professor Vladeck—for example, when a state attorney general sues in a jurisdiction other than where the state capital is located, and instead brings its case in a single-judge division elsewhere in the state.

The ABA recently proposed solutions in a similar vein. Under the ABA proposal, where a case is filed in a single-judge district *and* a party objects within a designated number of days after service, that case would then be "randomly assigned to a judge at the district level without regard to the division in which the case was filed."[20]

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committee report arguing that the original purpose of the supersession clause had been fulfilled). The Senate declined to eliminate the clause, *see* 134 Cong. Rec. 31,052 (Oct. 14, 1988), and the final statute retained it.

[17] *See Halasa v. ITT Educ. Servs., Inc.*, 690 F. 3d 844, 850, 852 (7th Cir. 2012) (provisions in Rule 26(b)(4)(E) for cost-shifting of exert discovery superseded a 1959 revision to 28 U.S.C. § 1821 that limited payable fees for expert discovery witness); *United States v. Wilson*, 306 F.3d 231, 236-37 (5th Cir. 2002) (Rule 4(b) superseded 18 U.S.C. § 3731 as to notice of appeal deadline), *overruled on other grounds by United States v. Gould*, 364 F.3d 578, 586 (5th Cir. 2004).

[18] Brennan Center for Justice, "Submission of a Proposal to Adopt a Rule to Increase the Randomness of Civil Case Assignments," 23-CV-U (Sept. 1, 2023), at 4.

[19] *Id.*

[20] *Id.*

Judge-assignment mechanisms bearing some similarities to these, which tie together the assignment with the relief sought by the plaintiff, are already in place in some districts. The District of Nebraska randomly assigns cases across the district when the United States is the plaintiff and when the State of Nebraska, its agencies, or its employees are the defendants.[21] Similarly, the District of Maine randomly assigns cases across the district where the state is a plaintiff or defendant.[22]

Other districts ensure random cross-district assignment for certain types of cases. The Northern District of California randomly assigns patent, trademark, and copyright cases; securities class actions; and prisoner petitions and capital habeas corpus cases.[23] The District of Montana randomly assigns election cases.[24]

And still other districts randomly assign all cases regardless of the division filed, including the Northern District of New York and the Western District of Missouri, which are both large districts with many subdivisions.[25]

Any of these random-assignment formats could be adopted as national rules under the Rules Enabling Act. At this time, however, it is not necessary to reach a view as to what a future Rule should provide. The threshold question is whether a Rule would be useful and whether one could be adopted.

CONCLUSION

The Rules Enabling Act permits the Supreme Court to set the "general rules of practice and procedure" in the United States district courts. The Department respectfully suggests that the Advisory Committee act pursuant to this authority to adopt case assignment procedures that would address concerns about the appearance of judge-shopping in divisions with only one or two district judges.

Sincerely,

BRIAN BOYNTON Digitally signed by BRIAN BOYNTON
Date: 2023.12.21 14:15:40 -05'00'

Brian M. Boynton
Principal Deputy Assistant Attorney General

[21] *Id.*

[22] Brennan Center, at 5.

[23] *Id.*

[24] *Id.*

[25] *Id.*

APPENDIX

Exhibit A

Suits by Plaintiff Texas vs. the Federal Government in Texas Federal Courts

#	Case Name	Docket	Filed	District (Division)	Judge	Odds of drawing judge	Issue
1	Texas v. United States	6:21-cv-00003	1/22/2021	S.D. Tex. (Victoria)	Tipton	100%	Deportation pause
2	Texas v. Biden	3:21-cv-00065	3/17/2021	S.D. Tex. (Galveston)	Brown	100%	XL Pipeline
3.	Texas v. United States	6:21-cv-00016	4/6/2021	S.D. Tex. (Victoria)	Tipton	100%	Immigration Enforcement Priorities
4.	Texas v. Biden	2:21-cv-00067	4/13/2021	N.D. Tex. (Amarillo)	Kacsmaryk	95%	Suspension of Migrant Protection Protocols
5.	Texas v. Biden	4:21-cv-00579	4/22/2021	N.D. Tex. (Fort Worth)	Pittman	45%	Title 42 / COVID
6.	Texas v. Yellen	2:21-cv-00079	5/3/2021	N.D. Tex. (Amarillo)	Kacsmaryk	95%	ARPA Funding
7.	Texas v. Brooks-Lasure	6:21-cv-00191	5/14/2021	E.D. Tex. (Tyler)	Barker	50	Medicaid Demonstration Project
8.	Texas v. EEOC	2:21-cv-00194	9/20/2021	N.D. Tex. (Amarillo)	Kacsmaryk	95	EEOC Gender Identity Protection
9.	Missouri v. Biden	6:21-cv-00052	10/21/2021	S.D. Tex. (Victoria)	Tipton	100	Border Wall
10.	Texas v. Biden	3:21-cv-00309	10/29/2021	S.D. Tex. (Galveston)	Brown	100	Contractor Vaccine Mandate
11.	Texas v. Becerra	2:21-cv-00229	11/15/2021	N.D. Tex. (Amarillo)	Kacsmaryk	95	CMS Vaccine Mandate
12.	Texas v. Becerra	5:21-cv-00300	12/10/2021	N.D. Tex (Lubbock)	Hendrix	64	Head Start Vaccine Mandate
13.	Abbott v. Biden	6:22-cv-00003	1/4/2022	E.D. Tex. (Tyler)	Barker	50	COVID Mandate for National Guard
14.	Texas v. Biden	2:22-cv-00014	1/28/2022	N.D. Tex. (Amarillo)	Lynn*	5	Central American Minors Program
15.	Texas v. Biden	6:22-cv-00004	2/10/2022	S.D. Tex. (Victoria)	Tipton	100	Minimum Wage for Contractors
16.	Van Duyne v. CDC	4:22-cv-00012	2/16/2022	N.D. Tex. (Fort Worth)	O'Connor	45	Airline Mask Mandate
17.	Paxton v. Richardson	4:22-cv-00143	2/24/2022	N.D. Tex. (Fort Worth)	Pittman	45	Firearms Suppressors
18.	Texas v. Walensky	6:22-cv-00013	4/22/2022	S.D. Tex. (Victoria)	Tipton	100	Title 42 / COVID
19.	Texas v. Mayorkas	2:22-cv-00094	4/28/2022	N.D. Tex. (Amarillo)	Kacsmaryk	95	Credible Fear Screening
20.	Texas v. Becerra	5:22-cv-00185	7/14/2022	N.D. Tex (Lubbock)	Hendrix	64	Post-*Dobbs* Abortion Guidance
21.	Texas v. Becerra	3:22-cv-00419	12/12/2022	S.D. Tex. (Galveston)	Brown	100	Religiously Affiliated Adoptions
22.	Texas v. Mayorkas	6:23-cv-00001	1/5/2023	S.D. Tex. (Victoria)	Tipton	100	Public Charge Rule
23.	Texas v. EPA	3:23-cv-00017	1/18/2023	S.D. Tex. (Galveston)	Brown	100	New Clean Water Act Rules
24.	Texas v. HHS	4:23-cv-00066	1/18/2023	N.D. Tex. (Fort Worth)	Means	10	Medicare Funding/ Abortions
25.	Texas v. DHS	6:23-cv-00007	1/24/2023	S.D. Tex. (Victoria)	Tipton	100	Immigration Parole
26.	Utah v. Walsh	2:23-cv-00016	1/26/2023	N.D. Tex. (Amarillo)	Kacsmaryk	100	Pension Trust Asset Investments
27.	Texas v. Becerra	7:23-cv-00022	2/7/2023	W.D. Tex. (Midland)	Counts	100	Medicare & Medicaid Pharmacies/ Abortion
28.	Texas v. Garland	5:23-cv-00034	2/15/2023	N.D. Tex (Lubbock)	Hendrix	67	Quorum Clause/Proxy Voting in House

Total by Division/Judge

Victoria (Tipton):	7
Amarillo (Kascmaryk):	6
Galveston (Brown):	4
Lubbock (Hendrix):	3
Tyler (Barker):	2
Fort Worth (Pittman)	2
Fort Worth (O'Connor)	1
Fort Worth (Means)	1
Amarillo (Lynn)	1
Midland (Counts)	1

* -- Only after drawing Chief Judge Lynn (a 5% chance at the time, but no longer possible), Texas moved to designate the case as related to another case pending before Judge Kacsmaryk Chief Judge Lynn denied the motion and transferred the case to Dallas.

Gray: Division in which one judge hears 60% or more of all cases

Exhibit B

Texas Federal District Court Divisions By District

District	Division	Judges Hearing New Civil Cases
Eastern District	Beaumont	3 (Truncale: 50%)
	Lufkin	1 (Truncale: 100%)
	Marshall	2 (Gilstrap: 90%)
	Sherman	2 (Mazzant/Jordan: 50%)
	Texarkana	2 (Schroeder: 90%)
	Tyler	2 (Barker/Kernodle: 50%)
Northern District	Abilene	2 (Hendrix: 67%)
	Amarillo	1 (Kacsmaryk: 100%)
	Dallas	11 (6 Judges: 10%)
	Fort Worth	3 (Pittman/O'Connor: 45%)
	Lubbock	2 (Hendrix: 67%)
	San Angelo	2 (Hendrix: 67%)
	Wichita Falls	1 (O'Connor: 100%)
Southern District	Brownsville	2 (Olvera/Rodriguez: 50%)
	Corpus Christi	2 (Morales/Ramos: 50.0%)
	Galveston	1 (Brown: 100%)
	Houston	10 (6 Judges: 12.42%)
	Laredo	2 (Marmolejo/ Saldana: 50%)
	McAllen	3 (Alvarez/Crane/Hinojosa: 33.3%)
	Victoria	2 (Morales/Ramos: 50.0%)
Western District	Austin	2 (Pitman/Yeakel: 50%)
	Del Rio	1 (Moses: 100%)
	El Paso	4 (Cardone/Guaderrama: 37%)
	Midland-Odessa	1 (Counts: 100%)
	Pecos	1 (Counts: 100%)
	San Antonio	4 (Biery/Garcia/Pulliam/Rodriguez: 25%)
	Waco	1 (Albright: 100% of non-patent cases)

Blue—Divisions in which one judge hears 90% or more of new civil cases

Gray—Divisions in which no judge hears more than 50% of new civil cases

*The parenthetical identifies the judge or judges who hear the highest percentage of new civil cases and the total percentage of new civil cases assigned to them as of February 2023, following the most recent amendments to relevant division of work orders

TAB 17

17. Remote Testimony – 24-CV-B

24-CV-B, from a number of prominent plaintiff-side lawyers, proposes that an amendment be adopted to resolve a split in the courts about the interaction of Rule 45(c)'s limitations on where a witness must appear under subpoena and the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence at a distant place of testimony can be obtained only by subpoena.

The submission says that the Rule 45 question was first addressed by a court of appeals in In re Kirkland, 75 F.4th 1030 (9th Cir. 2023), which is included in this agenda book. As the Ninth Circuit said, this particular litigation had "a lengthy and complex history." The decision employed supervisory mandamus to rule that a subpoena issued by a bankruptcy court in the Central District of California could not compel two residents of the U.S. Virgin Islands to appear within 100 miles of their residences to testify in a trial in bankruptcy court even though the district court had determined that, under Rule 43(a), their testimony would be permitted "by contemporaneous transmission from a different location," i.e., the Virgin Islands.

The original litigation in district court had begun in 2010, and involved one trial at which the Kirklands testified, and Mr. Kirkland obtained a favorable verdict. In later proceedings in bankruptcy court in an adversary proceeding brought by the bankruptcy trustee against an entity linked to the Kirklands, the court determined that the Kirklands' testimony was necessary at trial. In part, that ruling was based on the trustee's prior success in having the Kirklands' trial testimony (from the earlier trial) excluded. On that issue, the defendant in the adversary proceeding argued that the Kirklands' earlier testimony was admissible hearsay because they were unavailable within the meaning of Fed. R. Evid. 804, but the court concluded that they were not unavailable because their unavailability had been arranged by the defendant.

The Kirklands were served with a subpoena in the Virgin Islands directing them to testify remotely from there in the C.D. Cal. proceeding. Citing its favorable experience during the Covid pandemic with remote witnesses, the district court denied their motion to quash the subpoena.

The bankruptcy court declined to authorize an immediate interlocutory appeal under 28 U.S.C. § 158(d)(2) to determine whether Rule 45(c) authorizes a subpoena to provide remote trial testimony at a location within 100 miles of the witness's residence but more than 100 miles from the place of trial. Among other things, the bankruptcy court observed that "the litigation landscape has permanently shifted towards the greater use of videoconference technology." Id. at 1040.

The Ninth Circuit issued a supervisory writ of mandamus commanding that the subpoenas be quashed. It acknowledged finding "three different approaches regarding whether a witness may be compelled to testify remotely from a location that is beyond Rule 45(c)'s 100-mile geographic limitation." Id. at 1038 n.1. After a thorough review of a number of Civil Rules, it concluded that the current rules do not permit a subpoena to compel such remote testimony.

This submission urges amendments to Rule 43 and Rule 45 to permit what it says is the majority rule the Ninth Circuit did not adopt.

Rule 43(a) proposal

First, the submission proposes that Rule 43(a) be amended 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,~~ In the event in-person testimony at trial cannot be obtained, the court, with appropriate safeguards, must require witnesses to testify ~~may permit testimony~~ in open court by contemporaneous transmission from a different location unless precluded by good cause in compelling circumstances or otherwise agreed by the parties. The existence of prior deposition testimony alone shall not satisfy the good cause requirement to preclude contemporaneously transmitted trial testimony.

Below, the memorandum provides some background information about the evolution of Rule 43(a), and in particular the 1996 amendment. But at this point it seems useful to provide some thoughts about this rule proposal.

in the event in-person testimony at trial cannot be obtained: This seems a very broad provision. It may correspond to Rule 32(a)(4), regarding the use of deposition testimony as substantive evidence if the witness is more than 100 miles from the place of trial and attendance of the witness cannot be procured by subpoena. Rule 32(a)(4)(C) also mentions infirmity, age, or imprisonment as unavailability factors.

requiring witnesses to testify by remote means: As noted, one of the unavailability factors in Rule 32(a)(4) focuses on whether a subpoena can be used to compel attendance at trial. Unless that is possible (depending perhaps on an amendment to Rule 45(c)), it is not clear how the court is to "require" the witness to testify by remote means unless by means of a subpoena. But Rule 45 addresses subpoenas, not Rule 43(a).

importance of witness relevant? This amendment might be conditioned on at least a finding that the testimony of the witness is important, if not "necessary" or "essential." Fed. R. Evid. 403 surely permits a judge to limit cumulative testimony by multiple witnesses present in the courtroom to testify to the same circumstances. And one would think that if substitute witnesses could also attest to those circumstances (particularly if they do not relate to key disputes) it would be odd for a rule to say the court must require remote testimony from all those witnesses. Perhaps the proviso that "in-person testimony cannot be obtained" takes account of this sort of situation; Rule 403 could be noted in a Committee Note to an amendment to Rule 43(a). To take the Kirklands' case, it seems that their testimony and credibility might be central to the trial in bankruptcy court. That is probably not true as to every potential remote witness.

switching the burden of proof on compelling circumstances: The current rule seems to make the proponent of remote testimony demonstrate compelling circumstances, rather than making the opponent of such testimony show that compelling circumstances cut against remote testimony.

burden with regard to appropriate safeguards: The current rule does not seem to impose on the court the obligation to devise safeguards, but instead to treat that as part of the showing

supporting the remote testimony to be offered by the proponent of remote testimony. This amendment might be read to say that the court "must" devise the safeguards itself.

prior deposition testimony: In the Kirkland case, the prior testimony was in a jury trial, not a deposition. In terms of Rule 45, it is somewhat odd that a subpoena seemingly can compel the distant witness to show up within 100 miles of her residence to testify and be videotaped, but not to testify remotely in a trial, even though that is likely much more helpful to the trier of fact than bits and snatches of videotaped deposition testimony. The last sentence sounds, however, much more like a Committee Note observation than a rule provision.

Rule 45(c) Proposal

The Rule 45(c)(1) proposal is as follows:

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transactions business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer, or

(ii) is commanded to attend a trial and would not incur substantial expense; or

(C) by contemporaneous transmission from anywhere within the United States, provided the location commanded for the transmission complies with Rule 45(c)(1)(A) or (B).

Background on Rule 43(a)

The contemporaneous transmission possibility was introduced by the 1996 amendments to the rule. The 1996 Committee 1996 Note was cautious about the use of such techniques:

> Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The Note also found depositions to be a good substitute:

> Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving

difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying.

CARES Act Consideration

Much has changed since Rule 43(a) was amended in 1996. The pandemic, in particular, has introduced the legal community (and the public at large) to the utility of online alternatives to in-person participation. "Zoom depositions" became a regular occurrence beginning in mid 2020, and may still be used frequently.

The CARES Act Subcommittee, convened in 2020 under the leadership of Judge Jordan, considered whether many rules needed amending to cope with emergency conditions, including Rule 43(a). As with many other rules, the conclusion reached was that Rule 43(a) had been shown to offer sufficient flexibility to cope with the difficulties of the pandemic lockdown. There were even some trials – court trials at least – conducted substantially or entirely by remote means.

For the present, then, one might say that the societal transition to digital communication, leavened by the pandemic litigation experience, shows that the concerns of 1993 about remote testimony no longer call for such a stringent standard.

But lest it seem that worries about remote testimony no longer matter, it's worth noting that striking examples can be found. Nuvasive, Inc. v. Absolute Medical, LLC, 642 F.Supp.3d 1320 (M.D. Fla. 2022), provides a striking illustration, though it's not about a trial. Instead, it involves testimony in a court-ordered arbitration. The arbitrators permitted testimony by video conference. After the arbitration concluded with an award, the court vacated the award based on evidence that one defendant witness was sent messages by another defendant via the witness's phone while the witness was testifying remotely during the arbitration hearing.

This defendant witness had sworn that "no unauthorized person can communicate with you while you are giving your testimony," and later claimed that he did not know his phone was on and that his co-defendant was sending him messages. But meticulously assembled evidence of these communications sent by the co-defendant supported the view that the co-defendant's messages influenced the content of the testimony. See id. at 1331-32. The judge found that clear and convincing evidence proved fraud by these co-defendants. Id. at 1333. So it appears that having this witness swear proved not to be an "adequate safeguard" in this instance.

This one example may be exceptional almost to the point of being unique. The judge noted: "In the many years that the Undersigned has practiced law and sat on the bench as a state and then federal court judge, never has he witnessed conduct so persistently contrary to the principles of our judicial process as the actions by Defendants in this case." Id. at 1336. But it does signal caution about whether protective measures can fully protect against the risks of remote testimony.

Another potential issue could result from the reported proliferation of uses of generative AI to produce what are essentially fakes. The Sedona Conference has held at least one conference on use of AI "deepfakes" in ways that could affect remote testimony. The March 13 program announcement includes a two-minute video prepared by a Louisiana court of appeal judge that

seems to show him talking to the camera but is, according to what the video says, a fake. It is uncertain whether this sort of fakery would work for remote testimony, but worth noting.

2013 Rule 45 Amendments

The 2013 Rule 45 amendments were the fruit of an extended Rule 45 project that produced, among other things, the Rule 45(c) provision that this submission seeks to augment. Before these amendments, Rule 45 presented what Judge Campbell (chair of the Rule 45 Subcommittee) aptly described as a "three-ring circus" challenge for lawyers and witnesses. A major goal of the amendments was to unravel the rule. Thus, the amendment provided that the subpoena could issue from the court entertaining the action, and need not be sought from the court in the location where a deposition was to be held.

Similarly, it provided in Rule 45(c) a uniform limit on the distance a subpoenaed witness must travel to comply with a subpoena no matter where the subpoena was served. Though the prior rule did require that the subpoena be obtained from the court for the location in which the testimony would be taken, it also permitted service in that location on a witness who was a "transient witness," far from home. That person could, due to such local service, be required to return to testify at that location. In place of the many provisions in the prior rule about place of compliance, new Rule 45(c) provided protections for witnesses. But the Committee Note addressed the problem raised by this submission and addressed in the *Kirkland* case: "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)."

As the Ninth Circuit concluded, however, this Committee Note observation might be viewed as conflicting with Rule 45(d)(3)(A)(ii), which requires that a subpoena be quashed if it "requires a person to comply beyond the geographical limits specified in Rule 45(c)." The Ninth Circuit concluded that – unlike a deposition – the command to "attend a trial" would not include going to some other location to provide testimony remotely. One might note, hypothetically, that this interpretation might forbid use of a subpoena to require a witness to testify from another room in the courthouse (perhaps to avoid contagion) even though Rule 43(a) does say the court may "permit testimony in open court by contemporaneous transmission from a different location." So the fact that in the *Kirkland* case the proposed site for the testimony was thousands of miles away does not seem critical. And it does seem that, as currently written Rules 43(a) and 45(c) would accommodate what the district court ordered in that case.

Bankruptcy Rules Treatment

In 2023, the National Bankruptcy Conference (NBC) proposed that the Bankruptcy Rules be revised to accommodate video proceedings. See 23-BK-C, included in this agenda book. It observed: "Remote evidentiary hearings conducted over zoom or other video conferencing services became common place; many bankruptcy courts instituted standing orders and published procedures for video hearings," and that the rules may "require amendment in order to permit remote testimony in the absence of compelling circumstances." In part, bankruptcy proceedings are distinctive because, in place of one trial, they involve numerous evidentiary hearings on expedited consideration. That repeated need for testimony might make in-person testimony a greater burden than in civil trials.

The NBC submission urged that the Rule 43(a) standard is inconsistent with Fed. R. Evid. 611(a), which gives the court "broad discretion" to manage "the mode and order of examining witnesses." See United States v. Bozovich, 782 F.3d 814, 816 (7th Cir. 2015). Accordingly, the NBC urged that Bankruptcy Rule 9017 be amended to strike reference to Civil Rule 43 and that a new Bankruptcy Rule 7043 be added to provide that Civil Rule 43 applies in adversary proceedings.

In addition, the NBC urged that Bankruptcy Rule 9014(d) be amended to address the manner of taking testimony on "contested matters." As presented at the September 2023 meeting of the Bankruptcy Rules Committee, this change would involve the following revision in Rule 9014:

> (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.

This amendment proposal may be presented to the Standing Committee at its June meeting with a recommendation that it be published for public comment in August 2024.

Rule 30(b)(4)

Rule 30(b)(4) permits the parties to stipulate, or the court to order, that a deposition be taken by remote means. That rule says that (at least for purposes of enforcement of discovery obligations under Rule 37) "the deposition takes place where the deponent answers the questions." Of course, this provision does not address whether remote testimony "in open court" takes place in the courtroom rather than where the witness is located.

This rule may be worth considering as remote testimony in trials is considered because of the extensive experience with remote depositions during the pandemic. As with bankruptcy courts, many district courts regularly authorized or ordered remote depositions. The CARES Act Subcommittee considered whether Rule 30(b)(4) might be in need of amendment to deal with the pressures of the pandemic, but concluded that it offered sufficient flexibility. Experience with remote depositions suggests that some of the same safeguards needed for remote testimony in trials might be considered for remote depositions particularly if holding such depositions remains commonplace.

Rule 32(a)(4)

Rule 32(a)(4) provides that a deposition may be used for any purpose if the witness is unavailable. Several of the grounds for finding a witness unavailable might be reconsidered if a subpoena could require remote testimony in open court: (B) the witness is more than 100 miles from the place of hearing or trial; (C) the witness cannot attend because of age, illness, infirmity, or imprisonment, and (D) that the party offering the deposition could not procure the witness's attendance by subpoena. As the submission to this Committee notes, playing snippets of a video deposition or reading from a transcript of a deposition is often markedly less effective than remote

testimony, so those who might currently have to rely on using a deposition might not object if that became less feasible were the remote testimony option more readily available. But the effect (noted by the Ninth Circuit) deserves mention.

Fed. R. Evid. 804(a)(4)

In the same vein, Fed. R. Evid. 804(a)(4) provides that a declarant is "unavailable," and that hearsay statements of the declarant may be admissible due to that unavailability, if the declarant "cannot be present or testify at the trial or hearing" due to then-existing infirmity or physical illness. Changes to Rule 43(a) and/or Rule 45 might affect the application of this rule if the witness testifying by remote means is nonetheless testifying "in open court." But that seems an unduly literalist view.

* * * * *

This introduction should suffice to show both that technological trends may call for a re-examination of the 1993 Rule 43(a) attitude toward remote testimony at trials, and that a rule amendment may be advisable to deal with the divergent attitudes toward use of a subpoena to compel attendance at a remote location for the purpose of remote testimony during trial should be resolved by amendment. In terms of Rule 45, one might say that adopting a restrictive attitudes like the one adopted by the Ninth Circuit would mean that willing witnesses would be able to testify remotely while unwilling witnesses would be exempt from doing so.

TAB 17A

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February 13, 2024

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Re: Proposed Amendments to Rules 43 and 45 of the Federal Rules of Civil Procedure

Dear Secretary Byron:

We respectfully submit the enclosed proposal to amend Rules 43(a) and 45(c) of the Federal Rules of Civil Procedure for the consideration of the Advisory Committee on Civil Rules.

The proposed changes (i) make live trial testimony via contemporaneous transmission under Rule 43(a)—not deposition video—the preferred alternative for witnesses whose in-person attendance at trial cannot be secured, and (ii) clarify the ability of courts to issue subpoenas compelling a witness to testify via live contemporaneous transmission from any location within the geographic limitations of Rule 45(c), i.e., that the 100-mile limit applies to the location where the witness will sit for the contemporaneous transmission, not the courthouse where the trial is held.

The proposed amendments effectuate a long overdue modernization of civil trial practice and promote the just, speedy, and inexpensive determination of civil actions promised by Rule 1. They also resolve a growing split among federal district courts as to the applicability of Rule 45(c)'s 100-mile limit to testimony via live contemporaneous transmission under Rule 43(a)—a question first considered by a court of appeals last July in *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). There, the Ninth Circuit concluded that, "[w]hile technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted, the rules defining the federal subpoena power have not materially changed," which is an issue "for the Rules Committee and not for [a] court." *Id.* at 1046–47.

This proposal does not seek to change the preference for live, in-person trial testimony that is a longstanding value of our legal tradition. But there is little dispute among lawyers and judges

that testimony via contemporaneous live transmission better promotes the truth-seeking goal of trials than videotaped deposition testimony, particularly with recent advances in videoconferencing technology. But, contrary to these uncontroversial principles, courts continue to interpret Rules 43 and 45 and their Advisory Committee notes as requiring them to conduct trials in which juries are subjected to hours (if not days) of testimony presented in the form of spliced, disjointed video clips from depositions taken during the discovery phase. Replacing deposition testimony with testimony via live contemporaneous transmission (from a location remote from the trial court but otherwise within the limitations of Rule 45(c)) for witnesses whose physical presence at trial cannot be obtained will greatly enhance the truth-seeking function of our civil justice system, reduce the costs and increase the efficiency of civil litigation, and promote justice by maximizing access to evidence.

The proponents of these amendments are listed below. For the convenience of the Committee, all communications can be directed to the undersigned at tom@hbsslaw.com, copying racheld@hbsslaw.com.

Respectfully submitted,

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PROPOSED AMENDMENTS TO RULES 43 AND 45 OF THE FEDERAL RULES OF CIVIL PROCEDURE

EXECUTIVE SUMMARY

This proposal seeks to modify Rules 43 and 45 of the Federal Rules of Civil Procedure to: (1) ensure that courts can require witnesses unable or unwilling to testify live in person at trial to testify live via contemporaneous transmission under Rule 43(a), and (2) clarify that the place of compliance for subpoenas for live trial testimony via contemporaneous transmission is the location from which the testimony is transmitted, not the courthouse where the trial is conducted. The specific proposed textual changes are set forth in the next section.

It is axiomatic that live witness testimony is essential to the truth-seeking mission of trial. There is no real debate that jurors' ability to evaluate witness demeanor and credibility is best served by the presentation of live witnesses in open court subject to real-time cross-examination in the physical presence of the jury. But courts and litigants also have long recognized that, when a witness cannot be physically present at trial, the next best option is for that witness to testify live via contemporaneous transmission. Indeed, some courts have questioned whether there is any meaningful difference between in-person and remote testimony, particularly in light of advancements in videoconferencing and courtroom technology necessitated by the COVID-19 pandemic. Testimony by deposition, in contrast, not only undermines juror interest and engagement, but it is often taken during the discovery phase of the case, when the litigants often have not yet narrowed the case to the triable issues. Yet Rule 43 and its accompanying Advisory Committee notes continue to favor the presentation of pre-recorded deposition video over live testimony via contemporaneous transmission.

The Advisory Committee sought to remedy this with the 2013 amendments to Rule 45 permitting nationwide service of subpoenas. Read in tandem with Rule 43(a), the amended version of Rule 45(c) was intended to empower courts to issue subpoenas compelling trial testimony via contemporaneous transmission from any place within 100 miles of the witness's location. However, since the 2013 amendments went into effect, federal courts have reached starkly different conclusions about the place of compliance for subpoenas for trial testimony via contemporaneous transmission, with a significant and growing minority of courts concluding that the 1996 amendments to Rule 43(a) preclude them from ordering remote trial testimony from witnesses outside Rule 45's 100-mile limit. The confusion has created costly uncertainties for litigants, unnecessarily burdened trial courts with time-consuming disputes, and enabled litigants to game the Federal Rules to shield inculpatory witnesses from trial. The proposed amendments, if implemented, would eliminate this confusion, enhance the truth-seeking mission of trials, and promote more efficient, cost-effective, and just civil litigation.

PROPOSED TEXTUAL CHANGES

RULE 43

The proposed amendments to Rule 43(a) below maintain the gold standard of live, in-person trial testimony, but promote the use of live testimony via contemporaneous submission, rather than deposition testimony, as the default alternative.

> (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,~~ In the event in-person testimony at trial cannot be obtained, the court, with appropriate safeguards, ~~may~~must ~~permit testimony~~require witnesses to testify in open court by contemporaneous transmission from a different location unless precluded by good cause in compelling circumstances or otherwise agreed by the parties. The existence of prior deposition testimony alone shall not satisfy the good cause requirement to preclude contemporaneously transmitted trial testimony.

RULE 45

The proposed amendments to Rule 45(c) below clarify that the "place of compliance" for subpoenas for testimony via contemporaneous transmission is the location from which that testimony is transmitted, not the location of the courthouse where the transmitted testimony will be received.

> (1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
>
> > (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
> >
> > (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
> >
> > > (i) is a party or a party's officer; or
> > >
> > > (ii) is commanded to attend a trial and would not incur substantial expense~~.~~; or
> >
> > (C) by contemporaneous transmission from anywhere within the United States, provided the location commanded for the transmission complies with 45(c)(1)(A) or (B).

BACKGROUND & POINTS IN SUPPORT OF PROPOSED AMENDMENTS

A. Rule 43(a) should make live trial testimony by contemporaneous transmission, not prerecorded deposition video, the alternative to live, in-person trial testimony.

1. With modern videoconferencing technology, live testimony via contemporaneous transmission offers the same benefits as in-person testimony.

The "inherent goal of our system of justice established by our forefathers" is to ensure "the 'powerful force of truth-telling.'"[1] It is universally recognized that this goal is best served through the presentation of live, in-person testimony.[2] As the Advisory Committee's notes to the 1996 amendments to Rule 43(a) emphasize, "The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."

But courts and practitioners have long recognized that, when a witness cannot be physically present in the courtroom, testimony by contemporaneous video transmission satisfies many of the goals of in-person testimony, providing an opportunity for live cross-examination and enabling the factfinder to evaluate the witness's demeanor and credibility in real time.[3] And this is more true now than ever: the COVID-19 pandemic spurred dramatic improvements to videoconferencing technology and accelerated federal courts' already

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[1] *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 12-cv-64, 2014 WL 107153, at *6 (W.D. La. Jan. 8, 2014) (quoting Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment); *see also In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006).

[2] *See Actos*, 2014 WL 107153, at *5 ("Ideally, all witnesses would appear in Open Court and testify before the trier of fact . . . ."); *Vioxx*, 439 F. Supp. 2d at 644 ("[L]ive, in-person testimony, is optimal for trial testimony."); Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment ("The importance of presenting live testimony in court cannot be forgotten.").

[3] *See Warner v. Cate,* No. 12-cv-1146, 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015) ("Because a witness testifying by video is observed directly with little, if any, delay in transmission, . . . courts have found that video testimony can sufficiently enable cross-examination and credibility determinations, as well as preserve the overall integrity of the proceedings."); *Actos*, 2014 WL 107153, at *8 ("[U]se of 'live' contemporaneous transmission grants the trier of fact—here, the jury—the added advantage inherent in observing testimony in open court that is *truly contemporaneous* and part of the whole trial experience, [and] thus better reflects the *fluid dynamic* of the trial they are experiencing, and, better serves the goal of 'truth telling.'"); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010) *(*"The use of videoconferencing . . . will not prejudice Defendants. Each of the witnesses will testify in open court, under oath, and will face cross-examination. . . . With videoconferencing, a jury will also be able to observe the witness'[s] demeanor and evaluate his credibility in the same manner as traditional live testimony."); *Sallenger v. City of Springfield*, No. 03-cv-3093, 2008 WL 2705442, at *1 (C.D. Ill. July 9, 2008) ("Video conferencing allows the jury to view the witness as he testifies, and thus, it satisfies many of the goals of in person testimony . . . ."); *Vioxx*, 439 F. Supp. 2d at 644 ("By allowing for contemporaneous transmission, the Court allows the jury to see the live witness along with his 'hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration,' and, thus, satisfies the goals of live, in-person testimony . . . ." (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946)).

"consistent sensitivity to the utility of evolving technologies that may facilitate more efficient, convenient, and comfortable litigation practices,"[4] requiring them to become more adept at and comfortable with remote proceedings and improve the technological capacities of courtrooms. Numerous federal courts seamlessly conducted entire trials remotely during the pandemic.[5] Indeed, technological advancements have led many courts to question whether there is any practical difference between live testimony and contemporaneous video transmission.[6]

2. Trial testimony via contemporaneous transmission unquestionably better serves the fact-finding mission of trial than pre-recorded deposition video.

At minimum, "there is little doubt that live testimony by contemporaneous transmission offers the jury better quality evidence than a videotaped deposition."[7] In 1939, Judge Learned Hand remarked that "[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand," and that to hold otherwise "is not to help the reform of procedure, but to introduce an irrational and unfair exception, until deposition become competent regardless of the accessibility of the deponents at trial."[8] Federal

[4] Charles A. Wright et al., 9A *Federal Practice and Procedure* § 2414 (4th ed. 2008 & 2022 Supp.).

[5] *See* Christopher Robertson, *The Jury Trial Reinvented*, 9 Tex. A&M L. Rev. 109, 120–21 (2021).

[6] *See Liu v. State Farm Mut. Auto. Ins. Co.*, 507 F. Supp. 3d 1262, 1266 (W.D. Wash. 2020) ("[G]iven the clarity and speed of modern videoconference technology, there will be no discernable difference between witnesses' 'live' versus 'livestreamed' testimony . . . ."); *Lopez*, 748 F. Supp. 2d at 480 ("With videoconferencing, a jury will . . . be able to observe the witness's demeanor and evaluate his credibility in the same manner as traditional live testimony."); *FTC v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) ("[T]o prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness's testimony which is exactly equal to the other."); Suppl. Order Answering Pet. for Writ of Mandamus at 4–5, *In re Kirkland*, No. 22-70092 (9th Cir. June 29, 2022), Dkt. No. 9 ("*Kirkland* Mandamus Pet. Resp.") ("Technology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference."). Interestingly, in one study of remote jury trials, some mock jurors "felt it was easier to judge witness credibility" when the witness testified remotely "because they had a closer view of the witness rather than looking across a courtroom." Online Courtroom Project, *Online Jury Trials: Summary and Recommendations* at 8 (2020).

[7] *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *5 (N.D. Fla. May 28, 2021); *see also In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592, 2017 WL 2311719, at *4 (E.D. La. May 26, 2017) (finding live testimony by video "preferable to a year-old video deposition"); *Actos*, 2014 WL 107153, at *8 (concluding that live witness testimony via contemporaneous transmission "more fully and better satisfy the goals of live, in-person testimony" than deposition video); *Swedish Match*, 197 F.R.D. at 2 ("The court will have a greater opportunity through the use of live video transmission to assess the credibility of the witness than through the use of deposition testimony. . . . I am mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are . . . preferable to reading his deposition into evidence."); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551, 1988 WL 525314, at *2 (W.D. Wash. Aug. 9, 1988) ("Presentation of witnesses under Court-controlled visual electronic methods provides a better basis for jurors to judge credibility and content than does use of written depositions."); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424, 425–26 (D.P.R. 1989) (finding trial testimony via contemporaneous transmission a "viable, and even refreshing, alternative" to the "droning recitation of countless transcript pages of deposition testimony read by stand-in readers in a boring monotone").

[8] *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) (Hand, L.).

courts have echoed this sentiment for decades.[9] Witness testimony presented in the form "spliced, edited, and recompiled clips of deposition that took place over multiple days"[10] results in an "unavoidable esthetic distance"[11] that reduces jurors' comprehension, engagement, and interest and impairs their ability to evaluate witness credibility. As one court aptly commented:

> To best fulfill its fact-finding duties, a jury should be engaged and highly sensitive to each witness. As this Court knows all too well, the deposition, whether read into the record or played by video has the opposite effect. It is a sedative prone to slowly erode the jury's consciousness until truth takes a back seat to apathy and boredom.[12]

Parties forced to present testimony from key witnesses through dated and immutable depositions may also be prejudiced. Depositions are usually taken during the discovery phase and thus may not address what are ultimately the critical factual issues for trial. And trials are "dynamic, ever evolving process[es]" with "inevitable, unexpected developments and shifts"[13] to which static deposition testimony is ill-suited to respond.

B. Rule 45(c) should unambiguously empower trial courts to issue subpoenas for trial testimony via contemporaneous transmission from any place within 100 miles of the witness's location.

1. The 2013 amendments to Rule 45 sought to allow nationwide service of subpoenas, including for Rule 43 live trial testimony via contemporaneous transmission.

The 2013 amendments removed the geographics limits of Rule 45(b)(2) to allow service of subpoenas "at any place within the United States."[14] Accordingly, trial courts may issue a nationwide subpoena commanding "a person to attend a trial, hearing, or deposition" within

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[9] *See, e.g.*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants."); *Mazloum v. D.C. Metro. Police Dept.*, 248 F.R.D. 725, 728 (D.D.C. 2008) (urging the parties to reach an arrangement allowing for a key witness to testify live at trial because "tediously reading deposition excerpts into the record" would be "highly unsatisfactory"); *Paul v. Int'l Precious Metals Corp.*, 613 F. Supp. 174, 179 (S.D. Miss. 1985) (finding videotaped deposition "particularly unappealing" and an inadequate substitute for the live testimony of a key witness); *Kolb v. Suffolk Cnty.*, 109 F.R.D. 125, 129 (E.D.N.Y. 1985) ("Clearly, testimony by deposition is less desirable than oral testimony and should be used as a substitute only under very limited circumstances."); *B.J. McAdams, Inc. v. Boggs*, 426 F. Supp. 1091, 1105 (E.D. Pa. 1977) ("A party should not be forced to rely on 'trial by deposition' rather than live witnesses.").

[10] *Mullins v. Ethicon, Inc.*, No. 12-cv-2952, 2015 WL 8275744, at *2 (S.D.W. Va. Dec. 7, 2015).

[11] *Actos*, 2014 WL 107153, at *8.

[12] *In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664, 668 (E.D. La. 2006).

[13] *Actos*, 2014 WL 107153, at *8.

[14] Fed. R. Civ. P. 45 & advisory committee's note to 2013 amendment.

"100 miles of the person of where the person resides, is employed, or regularly transacts business in person."[15]

The Advisory Committee intended the amended version of Rule 45 to be read with Rule 43(a) to allow courts to issue subpoenas compelling trial testimony via contemporaneous transmission from any location within 100 miles of the witness's location. It squarely addressed this issue in its responses to public comments to the proposed 2013 amendments. One of the comments, from a lawyer in Hawaii, observed the persistent difficulty he faced in persuading courts to enforce subpoenas for witnesses with a "transient presence in paradise" to testify at trials in Hawaii from the mainland by means of contemporaneous transmission under Rule 43(a).[16] The Discovery Subcommittee agreed that a Rule 45 subpoena "is properly issued for this [very] purpose"—to compel a witness outside the trial court's subpoena power to testify at trial via Rule 43 contemporaneous transmission from "a place within the limits imposed by Rule 45," i.e., within 100 miles of the witness's location.[17] The Advisory Committee concurred and determined that its note to the 2013 amendment should "confirm this plain reading of the revised Rule 45 text."[18] The note was therefore revised to state, "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1)."[19] The note also makes clear that Rule 45(c)'s geographic limits were intended to protect witnesses from the burden of *traveling* more than 100 miles[20]—a concern not implicated by testimony remotely transmitted under Rule 43(a).

In recommending adoption of the 2013 amendments in full, the Committee on Rules of Practice and Procedure "concurred" with all the Advisory Committee's Rule 45 recommendations, including its "clarify[ing]" note "confirm[ing] that, when the issuing court has made an order for remote testimony under Rule 43(a), a subpoena may be used to command the *distant* witness to attend and testify within the geographical limits of Rule 45(c)."[21]

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[15] Fed. R. Civ. P. 45(c)(1).

[16] Paul Alston, Comment to Committee on Rules of Practice and Proc. Regarding Revisions to Fed. R. Civ. P. 45 (Jan. 25, 2012), https://www.uscourts.gov/file/16846/download.

[17] Minutes of Civil Rules Advisory Committee Meeting at 13 (Mar. 22–23, 2012), https://www.uscourts.gov/file/15074/download.

[18] *Id.*

[19] Fed. R. Civ. P. 45 advisory committee's note to 2013 amendment.

[20] *Id.* ("Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer *to travel* more than 100 miles . . ." (emphasis added)); *id.* ("Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required *to travel* more than 100 miles within the state where they reside, are employed, or regularly transact business in person only if they would not, as a result, incur 'substantial expense.'" (emphasis added)).

[21] Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure at 21, 23 (Sept. 2012), https://www.uscourts.gov/file/14521/download (emphasis added).

2. Since the 2013 amendments, federal courts have split on whether Rule 45 permits them to issue subpoenas for trial testimony via contemporaneous transmission to witnesses located more than 100 miles from the trial court.

Since the 2013 amendments, a majority of federal courts have—as the Advisory Committee intended—interpreted Rule 45(c)'s 100-mile limit to apply to the place from which remote testimony is transmitted.[22] For example, in *Walsh*, the District of Massachusetts observed that the 100-mile limit of Rule 45(c), as amended, "restricts the place of *compliance* with the subpoena, not the location of the court from which the subpoena issues."[23] The court concluded, based on "the plain language of Rules 43 and 45 and their accompanying Advisory Committee notes," that it could "issue a subpoena under Rule 45, upon a finding of good cause and compelling circumstances, for a witness to provide remote testimony from any place within 100 miles of her residence, place of employment, or place where she regularly conducts business."[24] Similarly, in *3M Combat Arms Earplug Products Liability Litigation*, the Northern District of Florida held that Rules 43(a) and 45 were to be read in "tandem" to permit a party to "use a Rule 45 subpoena to compel remote testimony by a witness from anywhere so long as the place of compliance (where the testimony will be given by the witness and not where the trial will take place) is within the geographic limitations of Rule 45(c)."[25]

However, a growing minority of courts have held that Rule 45(c)'s geographic limits prohibit them from issuing subpoenas for testimony via contemporaneous transmission to anyone located more than 100 miles from the trial court.[26] In so holding, these courts have often relied exclusively on the Advisory Committee's notes to Rule 43 without considering its notes to

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[22] *See, e.g.*, *Walsh v. Tara Constr., Inc.*, No. 19-cv-10369, 2022 WL 1913340, at *2 (D. Mass. June 3, 2022); *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, No. 16-17039, 2021 WL 6202422, at *3 (E.D. La. July 26, 2021); *Off. Comm. of Unsecured Creditors v. Calpers Corporate Partners LLC*, No. 18-cv-68, 2021 WL 3081880, at *3 (D. Me. July 20, 2021); *United States v. $110,000 in U.S. Currency*, No. 21-cv-981, 2021 WL 2376019, at *3 (N.D. Ill. June 10, 2021); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 19-md-2885, 2021 WL 2605957, at *3–4 (N.D. Fla. May 28, 2021); *Int'l Seaway Trading Corp. v. Target Corp.*, No. 20-mc-00086, 2021 WL 672990, at *4–5 (D. Minn. Feb. 22, 2021); *In re Newbrook Shipping Corp.*, 498 F. Supp. 3d 807, 815 (D. Md. 2020), *vacated on other grounds by* 31 F.4th 889 (4th Cir. 2021); *Redding v. Coloplast Corp.*, No. 19-cv-1857, slip op. at 3 (M.D. Fla. Aug. 28, 2020); *Diener v. Malewitz*, No. 18-cv-85, 2019 WL 13223871, at *7 (D. Wyo. Oct. 18, 2019); *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-2541, slip op. at 5–6 (N.D. Cal. Aug. 31, 2018); *Xarelto*, 2017 WL 2311719, at *4–5; *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, MDL No. 11-2244, 2016 WL 9776572, at *2 (N.D. Tex. Sept. 9, 2016); *Actos*, 2014 WL 107153, at *8–10.

[23] 2022 WL 1913340, at *2.

[24] *Id.*

[25] 2021 WL 2605957, at *3–4.

[26] *See, e.g.*, *Moreno v. Specialized Bicycle Components, Inc.*, No. 19-cv-1750, 2022 WL 1211582, at *1–2 (D. Colo. Apr. 25, 2022); *Singh v. Vanderbilt Univ. Med. Ctr.*, No. 17-cv-400, 2021 WL 3710442, at *2 (M.D. Tenn. Aug. 19, 2021); *Ashton Woods Holdings LLC v. USG Corp.*, No. 15-cv-1247, 2021 WL 8084334, at *1 (N.D. Cal. Apr. 5, 2021); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-md-2785, 2021 WL 2822535, at *4–6 (D. Kan. July 7, 2021); *Black Card LLC v. Visa USA Inc.*, No. 15-cv-27, 2020 WL 9812009, at *2 (D. Wyo. Dec. 2, 2020); *Roundtree v. Chase Bank USA, N.A.*, No. 13-cv-239, 2014 WL 2480259, at *1 (W.D. Wash. June 3, 2014); *Lin v. Horan Cap. Mgmt., LLC*, No. 14-cv-5202, 2014 WL 3974585, at *1 (S.D.N.Y. Aug. 13, 2014).

the 2013 amendments to Rule 45. In *Black Card*, for instance, the District of Wyoming concluded that "a full reading of Rule 43 and the committee notes"—including their instructions that the "good cause" standard "is anticipated for witnesses who are already expected to attend the trial" and "[o]rdinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena"—demonstrated that "subpoenas for live video testimony under Rule 43 are subject to the same geographic limits as a trial subpoena under Rule 45."[27] The *Moreno* and *EpiPen* decisions, similarly, were predicated only on the notes to the 1996 amendments to Rule 43.[28]

3. The Ninth Circuit's 2023 *Kirkland* decision underscores the urgent need for clarification of Rules 43 and 45.

The need for clarifying amendments has grown more critical in the wake of the recent *In re Kirkland* decision,[29] the first from a United States Court of Appeals to address the interplay between Rule 45(c)'s 100-mile limit and subpoenas for trial testimony via contemporaneous transmission under Rule 43(a).

In *Kirkland*, the Ninth Circuit considered a petition from John and Poshow Ann Kirkland for a writ of mandamus directing the United States Bankruptcy Court for the Central District of California to quash trial subpoenas directing them to testify via contemporaneous submission from their homes in the U.S. Virgin Islands. The Ninth Circuit found that the petition "present[ed] a novel issue involving the interplay between two Federal Rules of Civil Procedure that has divided district courts across the country and that is likely to have significant continued relevance in the wake of technological advancements and professional norms changing how judicial proceedings are conducted," but one that was "likely to evade direct appellate review."[30]

In its response to the petition, the bankruptcy court agreed that mandamus jurisdiction was necessary to resolve two "conflicting lines of authority" with "equally plausible interpretations" of Rules 43 and 45 and urged the Ninth Circuit to side with the majority of courts concluding that Rule 45(c)'s 100-mile limit does not apply to witnesses ordered to testify by means of contemporaneous transmission under Rule 43.[31] Citing its own experience conducting trials with testimony taken exclusively by remote video transmission, the bankruptcy court argued that "[t]echnology has advanced to the point where the Court can discern no meaningful difference between taking testimony in-person versus taking testimony by videoconference" and that remote video testimony allows juries "to assess the demeanor and credibility of the [remote] witnesses to the same extent as would have possible had [they] been

[27] 2020 WL 9812009, at *2–3.

[28] *See Moreno*, 2022 WL 1211582, at *1–2; *EpiPen*, 2021 WL 2822535, at *4.

[29] 75 F.4th 1030, 1051–52 (9th Cir. 2023).

[30] *Id.* at 1036.

[31] *Kirkland* Mandamus Pet. Resp. at 2–3.

physically present in the courtroom."[32]

The Ninth Circuit disagreed, concluding that "neither the text of the rules nor the advisory committee's notes establish that the 100-mile limitation is inapplicable to remote testimony or that the 'place of compliance' under Rule 45 changes the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely."[33] The Ninth Circuit dismissed the Advisory Committee's notes to the 2013 amendments to Rule 45 because "it is the text of the rules that control, and 'the [n]otes cannot . . . change the meaning that the Rules would otherwise bear'"[34] and reasoned that the term "trial" as used in Rule 45 necessarily meant "a specific event that occurs in a specific place: where the court is located," regardless of where or how the witness may "appear."[35] While the Ninth Circuit acknowledged that "technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted," it concluded that "the rules defining the federal subpoena power have not materially changed" and it was "bound by the text of the rules."[36] The issue, therefore, was "one 'for the Rules Committee and not for [a] court.'"[37]

C. The proposed amendments ensure more efficient, cost-effective, and fair civil trials.

1. The proposed amendments maximize access to evidence in multidistrict litigation, which is rarely confined to the jurisdiction of a single federal district court.

The need for trial testimony via contemporaneous transmission is arguably most acute in multidistrict litigation, which has become the primary vehicle for the resolution of complex civil cases and is designed for the efficient management of large numbers of similar claims that often involve multiple parties and evidence dispersed nationwide. In such cases, witnesses

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[32] *Id.* at 4-5. The bankruptcy court also cited a 2022 survey it conducted on "hearings or trials conducted by videoconference," in which 65% of respondents stated they had not experienced "any problems with remote hearings or trials in the past" and only 1 of 287 reported encountering any issues with remote cross-examination. *Id.* at 5.

[33] *Kirkland*, 75 F.4th at 1044.

[34] *Id.* at 1043 (alterations in original) (quoting *Tome v. United States*, 513 U.S. 150, 168, (1995) (Scalia, J., concurring)).

[35] *Id.* at 1043–44; *see also id.* at 1045 ("[T]here is no indication that Rule 45's reference to attending 'a trial' was intended to refer to anything other than the location of the court conducting the trial."). In reaching this conclusion, the Ninth Circuit did not consider the body of cases concluding that Rule 77(b) expressly permits a fully virtual civil jury trial with no fixed location. *See, e.g.*, *Le v. Reverend Dr. Martin Luther King, Jr. Cnty.*, 524 F. Supp. 3d 1113, 1115 (W.D. Wash. 2021) (construing Rule 77 as allowing a fully virtual civil jury trial with no fixed location because "Rule 77(b) sets forth the caveat 'so far as convenient,' which is in stark contrast to the imperative 'must,' used in connection with 'open court'" and therefore "offers the flexibility to conduct trials in 'non-traditional ways'" (quoting *Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm'n*, 470 F. Supp. 735, 738 (E.D. Mich. 2020))); *see also id.* at 1116 ("Nothing about a virtual jury trial is inconsistent with the principles underlying Rules 43(a) and 77(b).").

[36] *Kirkland*, 75 F. 4th at 1046.

[37] *Id.* at 1047 (quoting *Swedberg v. Marotzke*, 339 F.3d 1139, 1145 (9th Cir. 2003)).

relevant to all parties' claims and defenses are unlikely to be confined to a single federal district. Geographic limitations on MDL courts' ability to subpoena testimony via contemporaneous transmission can therefore unfairly handicap plaintiffs, who must make a no-win forum selection choice at the outset when the identities and locations of key trial witnesses are unknown. Such limits also undermine the purpose of bellwether trials, which are intended to present the best evidence to juries to obtain outcomes representative for all underlying actions. Without access to critical witness testimony, verdicts in bellwether trials are inaccurate predictors of the merits of the remaining claims, undermining their ability to facilitate productive settlement discussions and global resolutions of claims.

2. The proposed amendments minimize, if not eliminate, litigants' ability to exploit the Rules to unfairly immunize adverse witnesses and evidence from jury consideration.

Rule 45's 100-mile limit can be exploited by litigants to unfairly shield adverse evidence from trial in several ways. Defendants may take advantage of plaintiffs' lack of knowledge regarding the identity and location of essential witnesses by urging the JPML to centralize the litigation in a jurisdiction outside the 100-mile range of those witnesses. Litigants can also hand-pick the witnesses within their control whose testimony will be most favorable to their claims or defenses, forcing the opposing party to rely on inferior deposition testimony for witnesses outside the 100-mile limit at trial, thereby hindering that party's ability to effectively present its best evidence to the jury.[38] Litigants can even intentionally relocate critical witnesses outside the subpoena reach of the trial court. The proposed amendments would minimize, if not eliminate, such gaming tactics.[39]

3. The proposed amendments will save time and money for both litigants and courts.

Resolving disputes over deposition designations is time consuming and a wasteful drain of judicial resources. As explained in the *Manual on Complex Litigation*, "[u]nless the parties can reach substantial agreement on the form and content of the videotape to be shown to the jury,

[38] *See, e.g.*, *3m Combat Arms Earplug*, 2021 WL 6327374, at *5 (concluding that defendants sought a tactical advantage by preventing two witnesses essential to the case from testifying live at trial just after one of them made statements contradicting his prior testimony); *Vioxx*, 439 F. Supp. 2d at 643 (finding that the defendant's refusal to produce a witness "possess[ing] information highly relevant to the plaintiff's claims" and "damaging to [the defendant's] position" for trial was "for a purely tactical advantage," namely, "to eliminate any unpredictability and limit [the witness's] trial testimony to his 'canned' deposition testimony"); *Wash. Pub. Power Supply*, 1998 WL 525314, at *2 ("Defendants do not claim they cannot get witnesses to appear voluntarily [at trial] for 'live' testimony. They rely instead on the tactical advantage they have in not being required to do so, while at the same time indicating that they intend to call the same witnesses in person [in] their own case.").

[39] Litigants faced with an order requiring witnesses to testify via contemporaneous transmission have also been known to thereafter produce the at-issue witness in person for trial. *See Wash. Pub. Power Supply*, 1998 WL 525314, at *2; *accord* Cathaleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 Geo. L.J. 81 (1990).

the process of passing on objections can be so burdensome and time-consuming as to be impractical for the court."[40] Live testimony by contemporaneous transmission, on the other hand, "ensure[s] efficient use of judicial resources" because it relieves the court "of the burden of reviewing voluminous transcripts of multi-day depositions, analyzing hours of edited videos submitted for trial, and then ruling on objections to those videos."[41]

Promoting the use of testimony by contemporaneous transmission would also provide courts with greater precision and flexibility in trial scheduling, avoiding the constraints of individual witness availabilities and travel schedules. Litigants would benefit from the reduced costs of witness travel. And assurance that witnesses outside the 100-mile limit could be compelled to testify remotely at trial, if necessary, would likely reduce the number and attendant costs of depositions taken during discovery.

[40] *Manual for Complex Litigation (Fourth)* § 12.333.

[41] *Mullins*, 2015 WL 8275744, at *2; *see also Actos*, 2014 WL 107153, at *6 (criticizing the defendants' inability to secure the in-person attendance of important witnesses at trial, which "result[ed] in the parties still taking discovery depositions" and "a large number of motions" needing resolution on the eve of trial and "the parties' continu[ing] to present disputed video depositions for evidentiary resolution" and declaring that "this Court simply will not be able to rule on the very large number of additional video transcripts and objections that would be required it the Plaintiffs were not permitted to use the procedures established in Rules 43 and 45 to present live testimony at trial via contemporaneous transmission").

TAB 17B

NATIONAL BANKRUPTCY CONFERENCE
A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

Submitted Electronically

December 21, 2022

Judicial Conference of the United States
Committee on Rules of Practice and Procedure
Advisory Committee on Bankruptcy Rules
Washington, DC 20544

Re: Proposed Amendments to Bankruptcy Rules 9014 and 9017, and Proposed Adoption of Rule 7043

Ladies and Gentlemen:

The National Bankruptcy Conference ("NBC") is a voluntary, non-partisan, not-for-profit organization composed of about 60 of the nation's leading bankruptcy judges, professors, and practitioners. The NBC has provided advice to Congress regarding bankruptcy legislation for approximately 80 years. We enclose a Fact Sheet providing further information about the NBC.

The National Bankruptcy Conference makes the following proposal to the Advisory Committee on Bankruptcy Rules with respect to remote testimony in bankruptcy cases and proceedings. This recommendation is limited to the issue of remote testimony, and is not intended to address all issues related to conducting hearings either remotely or in hybrid formats.

I. Background

The wide-spread use of video conferencing for evidentiary and other hearings by bankruptcy courts during the COVID-19 pandemic permitted seamless administration of bankruptcy cases during a time when courts were constrained from use of courthouse facilities for hearings. The procedure not only enabled courts a constructive means to hear and determine matters but enabled greater participation by parties affected by the matters. Remote evidentiary hearings conducted over zoom or other video conferencing services became common place; many bankruptcy courts instituted standing orders and published procedures for video hearings. *See, e.g.*, *Third Amended Order Governing the Conduct of Hearings Due To Coronavirus Disease 2019 (COVID-19)* (Bankr. D. Del. May 11, 2020)[1]; *Second Amended General Order 20-05 Trials and Evidentiary Hearings During COVID-19 Public Emergency* (Bankr. N.D. Ill. Mar. 15, 2022)[2]; *see also* Zoom Video Hearing Guide for Participants (Bankr. S.D.N.Y.).[3]

The successful application of video conferencing during the pandemic has led to serious interest in continuing video conferencing for bankruptcy hearings after the exigent circumstances created by the pandemic subside. If video conference hearings continue for bankruptcy cases, the current Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure may

[1] https://www.deb.uscourts.gov/sites/default/files/news/3rd%20Amended%20Order%20re%20court%20hearings.5.11.2020.pdf

[2] https://www.ilnb.uscourts.gov/sites/default/files/general-ordes/Gen-Ord-20-05-SecondAmended.pdf

[3] https://www.nysb.uscourts.gov/sites/default/files/NYSB_Zoom_Video_Hearing_Guide_for_Participants.pdf

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require amendment in order to permit remote testimony in the absence of compelling circumstances. The National Bankruptcy Conference believes the only amendment required is slight and targeted to the appropriate use of video conferencing for remote testimony in contested matters.

Unlike civil litigation, a bankruptcy case does not typically involve one trial at the culmination of discovery that concludes the case. Instead, bankruptcy cases involve many matters requiring evidentiary hearings on expedited consideration and affecting numerous parties. Frequently bankruptcy court evidentiary hearings pertain to financial and administrative details in which credibility of the witness is not in question. Indeed, most contested matters are very short hearings and in these the credibility of witnesses – a key reason advanced in favor of live, in-court testimony – is simply not the central issue.

Remote participation has significant access to justice implications. Bankruptcy cases are constrained by financial insolvency. Access to bankruptcy court hearings is intrinsically intertwined with cost. Remote transmissions of court hearings allow creditors who are often spread out across the country to participate in hearings when live attendance would be cost prohibitive. Remote 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. Interestingly, the Federal Judicial Center (FJC) issued a report in 2017 (with a second edition in 2019) on Remote Participation in Bankruptcy Proceedings[4] concluding,

> Because of the potential to save money and other resources, bankruptcy courts should consider using DP [distance participation] technology for conducting proceedings. In some circumstances, using the technology would benefit the court and litigants without sacrificing essential elements of the judicial process.

Elizabeth C. Wiggins, *Remote Participation in Bankruptcy Proceedings*, FED. JUD. CTR., at 41, *available at* https://www.fjc.gov/content/326261/remote-participation-bankruptcy-guide.

I. Current Federal Rules

Two rules currently govern remote testimony in bankruptcy cases. Bankruptcy Rule 9017 incorporates Civil Rule 43, which provides:

> **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 a different location.

Fed. R. Bankr. P. 9017; Fed. R. Civ. P. 43(a). Rule 9017 also incorporates Federal Rule of Evidence 611, which grants a court broad discretion over the mode of evidentiary presentations. Rule 611 provides:

> **Control by the Court; Purposes**. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

[4] The report provides a comprehensive examination of the use of technology for distance participation in bankruptcy proceedings. The report describes considerations and challenges to widespread use of video technology for bankruptcy proceedings. In addition to Federal Rule of Civil Procedure 43, the report describes the Judicial Conference policy prohibiting private recording or broadcasting of court proceedings for purposes of public dissemination. Pages 8 -9 of the report explain the policy, its application, and procedures courts adopt to comply with the policy.

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

Fed. R. Evid. 611(a). A third rule, Bankruptcy Rule 5001(b), does not directly address the presentation of remote testimony, but it does require that "[a]ll trials and hearings shall be conducted in open court and so far as convenient in a regular court room." Fed. R. Bankr. P. 5001(b).[5]

Rule 611 and Rule 43 set forth inconsistent standards. Rule 611 gives a court "broad discretion" to manage the "mode and order of examining witnesses," *see United States v. Bozovich*, 782 F.3d 814, 816 (7th Cir. 2015), while Rule 43(a) requires "good cause in compelling circumstances" to deviate from in-person testimony. The Advisory Committee Notes to Rule 43(a) stress the "importance of presenting live testimony in court" noting that the "very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling." *See* Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment. The Advisory Committee Notes state that remote "[t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial" and stress that remote testimony should be the exception rather than the rule. *Id*. Courts vary in the interpretation of what constitutes "good cause in compelling circumstances." *Compare Matovski v. Matovski*, No. 06 Civ. 4259(PKC), 2007 WL 1575253, at *3 (S.D.N.Y May 31, 2007) (refusing to allow remote testimony due to the inconvenience of travel), *and Gulino v. Bd. of Educ.*, No. 96 Civ. 8414(CBM), 2002 WL 32068971, at *1 (S.D.N.Y. Mar. 31, 2003) (same), *with Aoki v. Gilbert*, No. 2:11-cv-02797-TLN-CKD, 2019 WL 1243719, at *2 (E.D. Cal. Mar. 18, 2019) (allowing remote testimony due to inconvenience of travel), *and Dagen v. CFC Grp. Holdings Ltd.*, No. 00 Civ. 5682(CBM), 2003 WL 22533425, at *1 (S.D.N.Y. Nov. 7, 2003) (same).

While courts have relied on the broad discretion granted under Rule 611 to authorize deviations from the requirement that a witness's direct testimony be taken live in open court, those same decisions still require the witness to appear in person in open court for cross-examination. *See Ball v. Interoceanica Corp.*, 71 F.3d 73, 77 (2d Cir. 1995) (authorizing direct examination by declaration but requiring witness to be present in court from cross-examination); *Adair v. Sunwest Bank (In re Adair)*, 965 F.2d 777, 779-80 (9th Cir. 1992) (same). *But see In re Juarez*, 16-40560, 2017 WL 1169529, at *10 (Bankr. D. Idaho Mar. 28, 2017) (refusing to admit declaration as direct testimony where witness did not appear live for cross-examination).

Given the inconsistencies in the case law and the high standard set forth in Rule 43, once the pandemic subsides, bankruptcy courts may be reluctant to authorize remote testimony even in routine contested matters.

II. Proposal

The following proposal does not amend any Federal Rule of Civil Procedure, but it does amend Federal Rules of Bankruptcy Procedure to provide bankruptcy courts with greater flexibility to authorize remote testimony.

Rule 9017 would be amended to strike the reference to Rule 43:

> The Federal Rules of Evidence and Rules ~~43,~~ 44 and 44.1 F.R.Civ.P. apply in cases under the Code.

A new Rule 7043 incorporating Rule 43 would be added to the Part VII rules governing adversary proceedings:

[5] The rule amendments herein do not affect the requirement that proceedings be conducted in open court in a regular courtroom.

Rule 7043—Taking Testimony
Rule 43 F.R.Civ.P. applies in adversary proceedings.

These two amendments would continue to make Rule 43(a)'s "good cause in compelling circumstances" standard applicable to adversary proceedings while eliminating that heightened standard for contested matters governed by Rule 9014. Because adversary proceedings are analogous to civil litigation, the National Bankruptcy Conference recommends that the current Rule 43 standard for remote testimony continue to apply to adversary proceedings.

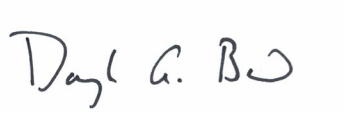
To address the taking of testimony in contested matters, the National Bankruptcy Conference recommends that Rule 9014(d) be amended as follows:

> (d) *Testimony of witnesses; evidence, interpreters*. Rule 43(d)[6] F.R.Civ.P. applies in contested matters. Testimony of witnesses with respect to disputed material factual issues ~~shall be taken in the same manner as testimony in an adversary proceeding~~ 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 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.

By removing the "compelling circumstances" requirement, this proposal would give bankruptcy courts more discretion in contested matters to authorize remote testimony. Because the proposed rule retains the presumption of live testimony, a litigant is free to object to a request for remote testimony in any circumstances.

For these reasons, the National Bankruptcy Conference recommends the proposed rule amendments. Please contact us if the National Bankruptcy Conference can be of further assistance.

Sincerely,



Douglas G. Baird, Chair
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773 459 2719

[6] Fed. R. Civ. P. 43(b) is redundant in bankruptcy cases in light of Rule 9012(b). To avoid this redundancy, the Advisory Committee may consider whether proposed Rule 7043 adopt only Fed. R. Civ. P. 43(a), (c), and (d). Nevertheless, that redundancy exists under the current Rule 9017 and is outside the purpose of this recommendation.

National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005. Most recently, the Conference played a leading role in developing the Small Business Reorganization Act of 2019, Pub. L. 116-54.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort, and tax-related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges, and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

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TAB 17C

75 F.4th 1030
United States Court of Appeals, Ninth Circuit.

IN RE: John C. KIRKLAND; Poshow Ann Kirkland, as Trustee of the Bright Conscience Trust dated September 9, 2009. John C. Kirkland; Poshow Ann Kirkland, as Trustee of the Bright Conscience Trust dated September 9, 2009, Petitioners,
v.
United States Bankruptcy Court for the Central District of California (Los Angeles), Respondent,
Jason M. Rund, Chapter 7 Trustee, Real Party in Interest.

No. 22-70092
|
Argued and Submitted October 4, 2022 Pasadena, California
|
Filed July 27, 2023

Synopsis

Background: Chapter 7 trustee filed adversary complaint against outside counsel for Chapter 7 debtor investment company and trust established by counsel and his wife that was funded by loans to investment company, seeking to avoid fraudulent transfers that occurred as part of debtor's alleged Ponzi scheme and to disallow or equitably subordinate trust's proofs of claim. Counsel asserted his right to jury trial on fraudulent-transfer claims. The District Court, Dale S. Fischer, J., 594 B.R. 423, granted defendants' motion to withdraw reference to bankruptcy court, bifurcated fraudulent-transfer claims against defendant counsel for trial from other claims asserted against trust, dismissed trustee's equitable-subordination claim against counsel after jury returned verdict in his favor, and returned claims against trust to bankruptcy court. Counsel and his wife who was trustee for trust were served with trial subpoenas, and they moved to quash them on basis court did not have power to compel them to testify. The United States Bankruptcy Court for the Central District of California, Ernest M. Robles, J., denied defendants' motions to quash and motion to certify immediate interlocutory appeal, or, alternatively, for leave to file interlocutory appeal in district court. Defendants petitioned Court of Appeals for writ of mandamus directing bankruptcy court to quash their trial subpoenas.

Holdings: The Court of Appeals, Forrest, Circuit Judge, held that:

[1] on issue of first impression, bankruptcy court's order compelling witnesses in United States Virgin Islands to testify remotely by contemporaneous video transmission despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding clearly violated 100-mile limitation under governing Federal Rule of Civil Procedure;

[2] witnesses who currently lived in United States Virgin Islands could not be compelled to testify in person at trial in California;

[3] issue of whether witnesses in United States Virgin Islands could be compelled to testify remotely despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding was important issue;

[4] granting mandamus relief was warranted on basis that bankruptcy court's order was clearly erroneous as matter of law and court's order raised new and important problems, or issues of law of first impression;

[5] failure of witnesses to seek interlocutory review did not mandate denial of petition for mandamus relief;

[6] bankruptcy court's error could not be fully remedied through normal post-judgment appeal; and

[7] whether case involved oft-repeated error did not have to be analyzed in depth to determine whether mandamus relief was warranted.

Petition granted.

Procedural Posture(s): Petition for Writ of Mandamus; Motion to Quash or Vacate a Subpoena.

West Headnotes (39)

[1] Federal Courts Writs in general

Under All Writs Act, Court of Appeals has authority to issue writs of mandamus to lower courts. 28 U.S.C.A. § 1651(a).

[2] **Federal Courts** Writs in general

Authority of Court of Appeals to issue writs of mandamus to lower courts under the All Writs Act extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. 28 U.S.C.A. § 1651(a).

[3] **Mandamus** Jurisdiction and authority

Court of Appeals' mandamus jurisdiction over bankruptcy courts mirrors its mandamus authority over district courts, and it can issue writs of mandamus directly to bankruptcy courts because they are courts within its appellate jurisdiction. 28 U.S.C.A. §§ 151, 158(d), 1651(a).

[4] **Mandamus** Nature and scope of remedy in general

Mandamus Exercise of judicial powers and functions in general

Mandamus Matters of discretion

Mandamus is an extraordinary remedy appropriate only in exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion. 28 U.S.C.A. § 1651(a).

[5] **Mandamus** Nature and scope of remedy in general

In determining whether issuance of a writ of mandamus is appropriate, the court weighs the five *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, factors: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the district court's order raises new and important problems, or issues of law of first impression. 28 U.S.C.A. § 1651(a).

1 Case that cites this headnote

[6] **Mandamus** Nature and scope of remedy in general

Weighing the five Bauman v. U.S. Dist. Ct., 557 F.2d 650, factors, in determining whether issuance of a writ of mandamus is appropriate, is not a mechanical analysis; the factors are weighed holistically to determine whether, on balance, they justify the invocation of that extraordinary remedy. 28 U.S.C.A. § 1651(a).

[7] **Mandamus** Discretion as to grant of writ

Issuance of mandamus relief is discretionary; Court of Appeals is neither compelled to grant writ when all five factors are present, nor prohibited from doing so when fewer than five, or only one, are present. 28 U.S.C.A. § 1651(a).

1 Case that cites this headnote

[8] **Mandamus** Nature of questions involved

Absence of clear error as matter of law is dispositive of a petition for a writ of mandamus relief and will always defeat the petition. 28 U.S.C.A. § 1651(a).

[9] **Mandamus** Nature of questions involved

Mandamus relief can be appropriate to resolve novel and important procedural issues. 28 U.S.C.A. § 1651(a).

[10] **Mandamus** Exercise of judicial powers and functions in general

Mandamus is particularly appropriate when the Court of Appeals is called upon to determine the construction of a federal procedural rule in a new context. 28 U.S.C.A. § 1651(a).

[11] **Mandamus** Proceedings in civil actions in general

Although the Court of Appeals cannot afford to become involved with daily details of discovery or trial, it may rely on mandamus to resolve new questions that otherwise might elude appellate review. 28 U.S.C.A. § 1651(a).

[12] **Mandamus** Exercise of judicial powers and functions in general

The clear-error standard for granting a writ of mandamus is highly deferential and typically requires prior authority from the Court of Appeals that prohibits the lower court's action. 28 U.S.C.A. § 1651(a).

[13] **Mandamus** Exercise of judicial powers and functions in general

The clear-error standard for granting a writ of mandamus is met even without controlling precedent if the plain text of the statute prohibits the course taken by the district court. 28 U.S.C.A. § 1651(a).

[14] **Mandamus** Exercise of judicial powers and functions in general

Mandamus Matters of discretion

On a petition for a writ of mandamus, the Court of Appeals must be left with a firm conviction that the lower court misinterpreted the law or committed a clear abuse of discretion.

[15] **Witnesses** Particular cases

Bankruptcy court's order to compel witnesses in United States Virgin Islands to testify remotely by contemporaneous video transmission despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding clearly violated 100-mile limitation under governing Federal Rule of Civil Procedure, in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim; geographical limitation could not be recalibrated to location of remote witness rather than location of trial and courts could not avoid consequences of witness unavailability by ordering remote testimony. 28 U.S.C.A. § 1651(a); Fed. R. Civ. P. 43(a), 45(c).

[16] **Federal Civil Procedure** Construction and operation in general

As with a statute, Court of Appeals interpreting a Federal Rule of Civil Procedure begins with the text and gives the Rule its plain meaning.

[17] **Federal Civil Procedure** Construction and operation in general

If the language at issue in a Federal Rule of Civil Procedure has a plain and unambiguous meaning with regard to the particular dispute in the case, Court of Appeals' inquiry ceases.

[18] **Witnesses** Distance limitations in general

Persons cannot be required to attend a trial or hearing that is located more than 100 miles from their residence, place of employment, or where they regularly conduct in-person business. Fed. R. Civ. P. 45(c)(1)(A).

1 Case that cites this headnote

[19] **Witnesses** Particular cases

Witnesses who currently lived in United States Virgin Islands could not be compelled to testify in person at trial in California, in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim, since witnesses did not live, work, or regularly conduct in-person business in California any longer. Fed. R. Civ. P. 45(c)(1)(A).

[20] **Federal Civil Procedure** Construction and operation in general

The Court of Appeals may look to the advisory committee's notes to the Federal Rules of Civil Procedure to apply the Rules because they provide a reliable source of insight into their meaning.

[21] **Federal Civil Procedure** Construction and operation in general

The text of the Federal Rules of Civil Procedure control their application; the advisory committee notes cannot change the meaning that the Rules otherwise would bear.

[22] **Witnesses** Persons Who May Be Required to Testify; Persons Subject to Subpoena

A federal court can compel only those witnesses who are within the scope of its subpoena power. Fed. R. Civ. P. 45.

1 Case that cites this headnote

[23] **Witnesses** Distance limitations in general

The 100-mile limitation under Federal Rule of Civil Procedure defining the "place of compliance" for subpoenas and the geographical scope of a federal court's power to compel a witness to testify at a trial or other proceeding is applicable to remote testimony, and the "place of compliance" does not change the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely. Fed. R. Civ. P. 43, 45.

2 Cases that cite this headnote

[24] **Witnesses** Distance limitations in general

The geographical limits under the Federal Rule of Civil Procedure defining the "place of compliance" for subpoenas and the geographical scope of a federal court's power to compel a witness to testify at a trial or other proceeding define the scope of a court's power to compel a witness to participate in a proceeding. Fed. R. Civ. P. 45(c).

1 Case that cites this headnote

[25] **Courts** Construction and application of rules in general

Statutes Plain Language; Plain, Ordinary, or Common Meaning

A court generally seeks to discern and apply the ordinary meaning of a text of a statute or rule at the time of its adoption.

[26] **Witnesses** Distance limitations in general

Reference to attending "a trial," in the Federal Rule of Civil Procedure defining the "place of compliance" for subpoenas and the geographical scope of a federal court's power to compel a witness to testify at a trial or other proceeding, refers to the location of the court conducting the trial. Fed. R. Civ. P. 45.

[27] **Federal Civil Procedure** Construction and operation in general

Court of Appeals is bound by text of the Federal Rules of Civil Procedure.

[28] **Mandamus** Evidence, witnesses, and depositions

Issue of whether witnesses in United States Virgin Islands could be compelled to testify remotely despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or

other proceeding was important issue, weighing in favor of granting writ of mandamus from bankruptcy court's order in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim, since issue raised by petition was ripe for consideration and was new and far reaching question of major importance, resolution of which would add importantly to efficient and orderly administration of district courts, given recent proliferation of video-conference technology in all types of judicial proceedings. 28 U.S.C.A. § 1651(a); Fed. R. Civ. P. 45.

[29] **Mandamus** Evidence, witnesses, and depositions

Granting mandamus relief was warranted on issue of whether witnesses in United States Virgin Islands could be compelled to testify remotely despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding, in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim, merely on basis that bankruptcy court's order was clearly erroneous as matter of law and court's order raised new and important problems, or issues of law of first impression. 28 U.S.C.A. § 1651(a); Fed. R. Civ. P. 43, 45.

[30] **Mandamus** Existence and Adequacy of Other Remedy in General

Availability of relief through ordinary review process weighs against granting mandamus relief. 28 U.S.C.A. § 1651(a).

[31] **Federal Courts** Preliminary proceedings; depositions and discovery

Order denying motion to quash subpoena generally cannot be immediately appealed. Fed. R. Civ. P. 45.

[32] **Contempt** Decisions reviewable

Mandamus Evidence, witnesses, and depositions

Absent discretionary interlocutory review, to obtain effective review of an order denying motion to quash subpoena, a litigant generally must either seek mandamus, or disobey the order and then appeal the resulting contempt citation. Fed. R. Civ. P. 45.

[33] **Federal Courts** Certification and Leave to Appeal

In the ordinary civil case, interlocutory appellate review is available by certification from the district court. 28 U.S.C.A. § 1292.

[34] **Bankruptcy** Petition for leave; appeal as of right; certification

In a bankruptcy case, a party may seek leave to appeal an interlocutory bankruptcy court order from the district court or from the Bankruptcy Appellate Panel (BAP) with the consent of all the parties. 28 U.S.C.A. §§ 158(a)(3), 158(b)(1).

[35] **Bankruptcy** Petition for leave; appeal as of right; certification

Court of Appeals has discretion to hear interlocutory appeals from bankruptcy court orders if a lower court grants certification. 28 U.S.C.A. § 158(d)(2).

[36] **Mandamus** Modification or vacation of judgment or order

Failure of witnesses to seek interlocutory appeal in district court of bankruptcy court's order to compel them to testify remotely despite falling

outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding did not mandate denial of petition for mandamus relief, in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim, since district court heard and rejected witnesses argument challenging validity of their trial subpoenas, and therefore interlocutory review likely would have been futile. 28 U.S.C.A. § 158(a)(3).

[37] **Mandamus** Existence and Adequacy of Other Remedy in General

The possibility of certification, standing alone, is not a bar to mandamus relief. 28 U.S.C.A. § 1651(a).

[38] **Mandamus** Modification or vacation of judgment or order

Clear violation of Federal Rule of Civil Procedure defining "place of compliance" for subpoenas and geographical scope of federal court's power to compel witness to testify remotely at trial or other proceeding, by bankruptcy court in Central District of California requiring witnesses in United States Virgin Islands to give testimony when it did not have any authority to compel them to do so, could not be fully remedied through normal post-judgment appeal, weighing in favor of granting writ of mandamus from bankruptcy court's order in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim. 28 U.S.C.A. § 1651(a); Fed. R. Civ. P. 43(a), 45(c).

[39] **Mandamus** Evidence, witnesses, and depositions

Whether case involved oft-repeated error did not have to be analyzed in depth to determine whether mandamus relief was warranted on collateral issue of whether witnesses in United States Virgin Islands could be compelled to testify remotely despite falling outside geographic limitations of power of Central District of California to compel witness to testify at trial or other proceeding, in trustee's adversary proceeding against trust that had been funded by loans to Chapter 7 debtor investment company seeking to disallow or equitably subordinate trust's proofs of claim, since issue presented was important and novel, confusion over issue in district courts was ongoing, and issue likely would continue to evade review. 28 U.S.C.A. § 1651(a); Fed. R. Civ. P. 43(a), 45(c).

***1036** Petition for a Writ of Mandamus, B.C. No. 2:12-ap-02424-ER

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Before: Danielle J. Forrest and Gabriel P. Sanchez, Circuit Judges, and Nancy D. Freudenthal, * District Judge.

OPINION

FORREST, Circuit Judge:

Petitioners John and Poshow Ann Kirkland moved to quash trial subpoenas issued by the United States Bankruptcy Court for the Central District of California, requiring them to testify via contemporaneous video transmission from their home in the U.S. Virgin Islands. The bankruptcy court denied their motions, and the Kirklands seek mandamus

relief from this court. The Kirklands argue that Federal Rule of Civil Procedure 45(c)(1) prohibits the bankruptcy court from compelling them to testify, even remotely, where they reside out of state over 100 miles from the location of the trial. Mindful of the "extraordinary nature" of mandamus relief, *In re Williams-Sonoma, Inc.*, 947 F.3d 535, 538 (9th Cir. 2020), we conclude that it is warranted here as the Kirklands present a novel issue involving the interplay of two Federal Rules of Civil Procedure that has divided district courts across the country and that is likely to have significant continued relevance in the wake of technological advancements and professional norms changing how judicial proceedings are conducted. Moreover, because the scope of the court's subpoena power is a collateral matter, this issue is likely to evade direct appellate review. *See* *Perry v. Schwarzenegger*, 591 F.3d 1147, 1158–59 (9th Cir. 2010). Therefore, we grant the Kirklands' mandamus petition and order the bankruptcy court to quash their trial subpoenas.

I. BACKGROUND

The underlying litigation has a lengthy and complex history. We summarize only those facts relevant to the Kirklands' mandamus petition.

A. EPD Investments' Bankruptcy

The Kirklands are a married couple. Between 2007 and 2009, Mr. Kirkland invested in EPD Investments (EPD) by making a series of loans to this entity (EPD Loans). The negotiations for the EPD Loans occurred in California where the Kirklands lived at the time. In September 2009, the Kirklands created the Bright Conscience Trust (BC Trust) for their minor children, and Mr. Kirkland assigned the EPD Loans to BC Trust. Mrs. Kirkland is the sole trustee for BC Trust. Also ***1037** in 2009, Mr. Kirkland began serving as EPD's lawyer.

In December 2010, EPD's creditors forced it into involuntary Chapter 7 bankruptcy. Mr. Kirkland initially represented EPD in the bankruptcy proceedings. BC Trust filed proofs of claim in EPD's bankruptcy case based on the EPD Loans; Mr. Kirkland did not file an individual proof of claim.

The bankruptcy court appointed a Chapter 7 trustee. In October 2012, the trustee initiated the adversary proceeding underlying this petition against Mr. Kirkland and BC Trust in the United States Bankruptcy Court for the Central District of California. Four years later, the trustee filed the operative fourth amended complaint, seeking to disallow or equitably subordinate BC Trust's proofs of claim and to avoid allegedly fraudulent transfers that EPD made to Mr. Kirkland and BC Trust in the form of mortgage payments on the Kirklands' home. Specifically, the trustee alleged that EPD was a Ponzi scheme and that Mr. Kirkland, while acting as its outside counsel, was aware of and engaged in inequitable conduct to hide the company's insolvency. The trustee further alleged that Mr. Kirkland's misconduct should be imputed to BC Trust and the trust's proofs of claim disallowed or subordinated because BC Trust did not separately invest in EPD and was merely the assignee of Mr. Kirkland's interests in EPD. By 2014, the Kirklands had moved to the U.S. Virgin Islands. Nonetheless, they agreed to be deposed in Los Angeles in June 2017.

After Mr. Kirkland asserted his right to a jury trial on the fraudulent-transfer claims asserted against him, the district court withdrew the reference of the entire adversary proceeding from the bankruptcy court because of the commonality and overlap between the claims asserted against Mr. Kirkland and BC Trust. *In re EPD Inv. Co.*, 594 B.R. 423, 426 (C.D. Cal. 2018). The district court then bifurcated for trial the fraudulent-transfer claims against Mr. Kirkland from the other claims asserted against BC Trust. The Kirklands both testified in person at Mr. Kirkland's fraudulent-transfer trial held in California, and the jury returned a verdict in his favor.

Afterwards, the district court dismissed the trustee's equitable-subordination claim against Mr. Kirkland and returned the claims against BC Trust to the bankruptcy court. The district court explained that the bankruptcy court could rely on the testimony provided during the jury trial in adjudicating the claims against BC Trust but "[i]f the [b]ankruptcy [c]ourt determines that it needs substantial testimony from non-parties that would not be necessary if this [c]ourt were to try the matter ..., the parties may seek reconsideration of [the return] on that ground." In the proceedings against BC Trust, Mrs. Kirkland is a party in her capacity as sole trustee and Mr. Kirkland is a non-party witness.

B. The Kirklands' Trial Subpoenas

The bankruptcy court determined that it was necessary for the Kirklands to testify at BC Trust's trial, and it authorized the trustee to serve the Kirklands with trial subpoenas by certified mail and publication commanding them to testify remotely via video transmission from the U.S. Virgin Islands. The Kirklands each moved to quash their trial subpoenas, primarily arguing that they violated Federal Rule of Civil Procedure 45(c)'s geographic limitations.

The bankruptcy court denied the Kirklands' motions to quash, concluding that "good cause and compelling circumstances" warranted requiring their testimony "by way of contemporaneous video ***1038** transmission" under Federal Rule of Civil Procedure 43(a). The bankruptcy court analyzed the split among district courts regarding "whether Civil Rule 45's geographical restriction applies if a witness is permitted to testify by videoconference from a location chosen by the witness." [1] The bankruptcy court recognized that it could not compel the Kirklands to attend the trial in person because they now live in the Virgin Islands. And it reasoned that "[w]here a witness has been ordered to provide remote video testimony transmitted from the witness's home (or another location chosen by the witness)" under Rule 45(c), "that witness has not been compelled to attend a trial located more than 100 miles from the witness's residence." Thus, the bankruptcy court found that the challenged subpoenas satisfied Rule 45(c) because "the purpose of [Rule 45] is to protect witnesses from the burden of extensive travel."

The bankruptcy court heavily relied on its prior ruling granting the trustee's motion in limine to exclude transcripts of the Kirklands' depositions and testimony given in Mr. Kirkland's trial. BC Trust had informed the bankruptcy court that it intended to introduce these transcripts because the Kirklands were unwilling to travel to California to testify at BC Trust's trial and they could not be compelled to testify because they live more than 100 miles from the bankruptcy court. BC Trust argued that the Kirklands were "unavailable" under Federal Rule of Evidence 804, and the transcripts of their prior testimony were therefore admissible hearsay. The bankruptcy court disagreed that a hearsay exception applied because it concluded that the Kirklands' "unavailability ... has been engineered by the BC Trust for purely strategic purposes."

The bankruptcy court also reasoned that "the prior transcripts would be insufficient because certain testimony relevant to the equitable subordination claim was not introduced" at Mr. Kirkland's trial, and additional testimony was necessary. Additionally, in determining whether BC Trust engaged in any inequitable conduct, the bankruptcy court concluded that it needs to "assess the credibility of [the Kirklands], which [it] cannot do based solely on transcripts."

After the bankruptcy court made its in limine ruling, the Kirklands moved the district court to reconsider its return order and withdraw reference to the bankruptcy court. The district court denied the Kirklands' motion, explaining that in returning the proceedings to the bankruptcy court, it did not mandate that the bankruptcy court rely only on prior testimony and explicitly acknowledged that additional testimony may be needed in adjudicating the claims against BC Trust. The district court further directed that if the Kirklands failed to attend trial, the bankruptcy court would be "entitled to make whatever adverse findings it sees fit."

***1039** Lastly, the bankruptcy court detailed its positive experience with witnesses appearing remotely at proceedings conducted during the COVID-19 pandemic. The bankruptcy court explained that, in its view, remote testimony is an adequate substitute for in-person testimony because with technological advancements "there is little practical difference between in-person testimony and testimony via videoconference." For all these reasons, the bankruptcy court concluded that "good cause and compelling circumstances" warranted ordering the Kirklands to testify remotely.

C. The Kirklands' Attempted Appeal

After the bankruptcy court refused to quash the trial subpoenas, the Kirklands moved the bankruptcy court to certify an immediate interlocutory appeal to this court under 28 U.S.C. § 158(d)(2), or to the district court under § 158(a)(3). The bankruptcy court also denied this motion. The bankruptcy court concluded that the circumstances did not "justify an interlocutory appeal that would result in yet more delay." The bankruptcy court acknowledged that there was no controlling authority establishing that Rule 45 applies to remote testimony, but it nonetheless determined that the utility of certifying an interlocutory appeal was outweighed by the "need to finally bring this litigation to an end." The bankruptcy court also reasoned that certification was inappropriate because its denial of the Kirklands' motions to quash was based on factual findings related to its "compelling circumstances" and "good cause" analysis, not just legal conclusions.

The bankruptcy court denied the Kirklands' alternative request for leave to file an interlocutory appeal in the district court as "highly unusual" where the district court's decision would not be binding beyond the subject case and one of the main purposes of certification is to produce binding authority on unresolved questions of law. The Kirklands did not seek leave from the district court or the Ninth Circuit Bankruptcy Appellate Panel (BAP) to pursue an interlocutory appeal in either of those forums, as allowed under 28 U.S.C. § 158(a)(3), (b)(1).

D. Petition for a Writ of Mandamus

In May 2022, the Kirklands petitioned this court for a writ of mandamus directing the bankruptcy court to quash their trial subpoenas.[2] They argue that Rule 45(c) limits the subpoena power over both parties and non-parties who reside within 100 miles of the trial location unless they are employed or regularly transact business in the state where the trial occurs. The Kirklands contend that the bankruptcy court erred by relying on Rule 43(a) in ordering them to testify remotely because "Rule 43(a) governs the mechanical question of taking testimony, not the substantive question of which witnesses may be compelled to testify." They argue that whether remote testimony is permissible under Rule 43(a) "is entirely irrelevant to whether a party can be compelled to comply with a subpoena under Rule 45(c)."

The trustee, as the real party in interest, opposes the Kirklands' petition. The trustee argues that the bankruptcy court's order does not raise a purely legal issue regarding the scope of the subpoena power under Rule 45(c), as the Kirklands contend, but instead is based on a factual finding of "good cause in compelling circumstances" under Rule 43(a). The trustee also argues that although no court of appeals ***1040** "has considered the interplay between Rule 43(a) and Rule 45(c)," any such interplay is immaterial and mandamus relief is unwarranted because the advisory committee's notes to Rule 45 make clear that when remote testimony is authorized under Rule 43(a), "the witness can be commanded to testify from any place described in Rule 45(c)(1)."

We invited the bankruptcy court to respond to the Kirklands' mandamus petition, and it explained that it denied leave for the Kirklands to file a direct appeal because of the already long extended proceedings. But the bankruptcy court acknowledged that it would be appropriate for us "to exercise supervisory mandamus jurisdiction to resolve the undecided question of whether Civil Rule 45's geographical restriction applies where a witness is ordered to testify by means of remote video transmission from a location selected by the witness." For the same reasons that it articulated in denying the Kirklands' motions to quash, the bankruptcy court urged us to find that Rule 45's geographical limitations do not apply here. Pointing to a survey of bankruptcy attorneys and a working group convened by the Judicial Council of California, the bankruptcy court highlights that "the litigation landscape has permanently shifted towards the greater use of videoconference technology" and that witnesses, court staff, attorneys, and judges have had positive experiences with remote testimony in court proceedings.

II. DISCUSSION

[1] **[2]** **[3]** Under the All Writs Act, we have authority to issue writs of mandamus to lower courts. 28 U.S.C. § 1651(a); *see* *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004). This authority "extends to those cases which are within [our] appellate jurisdiction although no appeal has been perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25, 63 S.Ct. 938, 87 L.Ed. 1185 (1943)). While writs of mandamus are most often issued to district courts, bankruptcy courts "constitute a unit of the district court," 28 U.S.C. § 151, and we hear appeals from bankruptcy courts through several avenues. *See* 28 U.S.C. § 158(d). Therefore, structurally, our mandamus jurisdiction over bankruptcy courts mirrors our mandamus authority over district courts, and we can issue writs of mandamus directly to bankruptcy courts because they are courts within our appellate jurisdiction.

[4] **[5]** **[6]** **[7]** **[8]** Mandamus is an "extraordinary remedy" appropriate only in "exceptional circumstances amounting to a judicial usurpation of power" or a "clear abuse of discretion." *Cheney*, 542 U.S. at 380, 124 S.Ct. 2576 (internal quotation marks and citations omitted). In determining whether issuance of a writ of mandamus is appropriate, we weigh the five *Bauman* factors:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

In re Mersho, 6 F.4th 891, 897–98 (9th Cir. 2021) (quoting *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977)). This is not a mechanical analysis; we weigh the factors holistically "to determine whether, ***1041** on balance, they justify the invocation of 'this extraordinary remedy.' " *In re Sussex*, 781 F.3d 1065, 1071 (9th Cir. 2015) (citation omitted). Moreover, issuance of mandamus relief is discretionary; we are "neither compelled to grant the writ when all five factors are present, nor prohibited from doing so when fewer than five, or only one, are present." *Id.*; *see also* *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1146 (9th Cir. 2005) ("[I]ndeed, the fourth and fifth will rarely be present at the same time."). But absence of clear error as a matter of law is dispositive and "will always defeat a petition for mandamus." *See* *In re Williams-Sonoma*, 947 F.3d at 538 (citation omitted).

[9] **[10]** **[11]** Mandamus relief can be appropriate to resolve novel and important procedural issues. For example, in *Schlagenhauf v. Holder*, the Supreme Court granted mandamus relief where the petitioner asserted that a district court order requiring a party to undergo a mental and physical examination exceeded the district court's authority and "the challenged order ... appear[ed] to be the first of its kind in any reported decision in the federal courts under [the governing Federal Rule of Civil Procedure]." 379 U.S. 104, 110, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). We likewise have exercised mandamus authority to address "particularly important questions of first impression" regarding discovery, evidentiary, and other procedural issues. *Perry*, 591 F.3d at 1157 (listing cases); *see also* *In re U.S. Dep't of Educ.*, 25 F.4th 692, 705–06 (9th Cir. 2022) (issuing writ of mandamus to quash deposition subpoena); *Mondor v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 910 F.2d 585, 586–87 (9th Cir. 1990) (issuing writ of mandamus where district court's denial of petitioner's demand for a jury trial upon removal was inconsistent with the governing Federal Rule of Civil Procedure). Indeed, "[m]andamus is particularly appropriate when we are called upon to determine the construction of a federal procedural rule in a new context." *Valenzuela-Gonzalez v. U.S. Dist. Ct. for Dist. of Ariz.*, 915 F.2d. 1276, 1279 (9th Cir. 1990). Therefore, "[a]lthough 'the courts of appeals cannot afford to become involved with the daily details of discovery [or trial],' we may rely on mandamus to resolve 'new questions that otherwise might elude appellate review ....' " *Perry*, 591 F.3d at 1157 (citation omitted).

A. Error

[12] **[13]** **[14]** We start with the third *Bauman* factor because satisfaction of this factor "is almost always a necessary predicate for the granting of the writ." *In re U.S. Dep't of Educ.*, 25 F.4th at 698. The clear-error standard is highly deferential and typically requires prior authority from this court that prohibits the lower court's action. *In re Williams-Sonoma*, 947 F.3d at 538. However, this standard is met even without controlling precedent "if the 'plain text of the statute prohibits the course taken by the district court.' " *In re Mersho*, 6 F.4th at 898 (quoting *Cohen v. U.S. Dist. Ct. for N. Dist. of Cal.*, 586 F.3d 703, 710 (9th Cir. 2009)); *see also* *In re U.S. Dep't of Educ.*, 25 F.4th at 698. We must be left with "a firm conviction that the [lower] court misinterpreted the law ... or committed a clear abuse of discretion." *In re Walsh*, 15 F.4th 1005, 1009 (9th Cir. 2021) (second alteration in original) (internal quotation marks and citation omitted); *Valenzuela-Gonzalez*, 915 F.2d at 1279. We have also stated that "[w]here a petition for mandamus raises an important issue of first impression, ... a petitioner need show only 'ordinary (as opposed to clear) error.' " *Barnes v. Sea Haw. Rafting, LLC*, 889 F.3d 517, 537

(9th Cir. 2018) ***1042** (citation omitted); *see also* *Perry*, 591 F.3d at 1158–59; *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1305–07 (9th Cir. 1982). We do not take the opportunity to address the difference between clear error and ordinary error here because we conclude that mandamus relief is warranted under either standard.

[15] **[16]** **[17]** The issue raised by the Kirklands is narrow: whether Federal Rule of Civil Procedure 45(c)'s 100-mile limitation applies when a witness is permitted to testify by contemporaneous video transmission. As with a statute, we begin with the text and "give the Federal Rules of Civil Procedure their plain meaning." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 540, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) (citation omitted). If "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case" our inquiry ceases. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (citation omitted). And while the Supreme Court has instructed that "[t]he Federal Rules of Civil Procedure should be liberally construed," it has also cautioned that "they should not be expanded by disregarding plainly expressed limitations." *Schlagenhauf*, 379 U.S. at 121, 85 S.Ct. 234.

Federal Rule of Civil Procedure 45(c) defines the "place of compliance" for subpoenas and the geographical scope of a federal court's power to compel a witness to testify at a trial or other proceeding. [3] There are two metrics. First, a person can be commanded to attend trial "within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(1)(A). Second, a person can be commanded to attend a trial "within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) ... would not incur substantial expense." Fed. R. Civ. P. 45(c)(1)(B). If a trial subpoena exceeds these geographical limitations, the district court "*must* quash or modify" the subpoena. Fed. R. Civ. P. 45(d)(3)(A)(ii) (emphasis added).

[18] **[19]** Here, the trustee subpoenaed the Kirklands to testify at a trial in California where it is undisputed the Kirklands no longer live, work, or regularly conduct in-person business. Therefore, we focus on the first metric—Rule 45(c)(1)(A)'s 100-mile limitation. For in-person attendance, the plain meaning of this rule is clear: a person cannot be required to attend a trial or hearing that is located more than 100 miles from their residence, place of employment, or where they regularly conduct in-person business. The Federal Rules of Bankruptcy Procedure incorporate this same limitation: "Although [Bankruptcy] Rule 7004(d) authorizes nationwide service of process, [Federal Rule of Civil Procedure 45] *limits the subpoena power to the judicial district and places outside the district which are within 100 miles of the place of trial or hearing.*" Fed. R. Bankr. P. 9016 advisory committee's note to 1983 amendment (emphasis added). Thus, we have no difficulty concluding that the Kirklands could not be compelled to testify *in person* at a trial in California. The question here is how Rule 45(c) applies when a person is commanded to testify at trial *remotely.*

The trustee argues that Federal Rule of Civil Procedure 43(a) avoids Rule 45(c)'s 100-mile limitation as applied to remote testimony. Specifically, the trustee (and the bankruptcy court) assert that remote testimony moves the "place of compliance" ***1043** under Rule 45(c) from the courthouse to wherever the witness is located, so long as that location is within 100 miles of the witness's home or place of business. Federal Rule of Civil Procedure 43, titled "Taking Testimony," provides that "testimony must be taken in open court" unless a federal statute or rule provides otherwise. Fed. R. Civ. P. 43(a). But it permits courts to allow remote testimony "[f]or good cause in compelling circumstances and with appropriate safeguards." *Id.*

On its face, Rule 43(a) does not address the scope of a court's power to compel a witness to testify or reveal any overlap with Rule 45. Rather, Rule 43(a) establishes *how* a witness must provide testimony at trial: "in open court" unless the law allows otherwise or there is sufficient basis for allowing remote testimony. *Id.* Stated another way, Rule 45(c) governs the court's power to require a witness to testify at trial, and Rule 43(a) governs the mechanics of how trial testimony is presented. And logically, determining the limits of the court's power to compel testimony precedes any determination about the mechanics of how such testimony is presented.

[20] **[21]** The trustee argues that the advisory committee's notes indicate that there is interplay between Rules 43 and 45 and that courts have the power to compel remote testimony beyond Rule 45(c)'s 100-mile limitation. We may look to the advisory committee's notes because they "provide a reliable source of insight into the meaning of a rule." *United States v. Vonn*, 535 U.S. 55, 64 n.6, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002); *see also* *Tome v. United States*, 513 U.S. 150, 167,

115 S.Ct. 696, 130 L.Ed.2d 574 (1995) (Scalia, J., concurring) (recognizing the advisory committee's notes are "*the* most persuasive" authority on the meaning of the Federal Rules of Civil Procedure as "they display the 'purpose,' or 'intent,' of the draftsmen" (cleaned up)). Indeed, we considered the advisory committee's notes in interpreting the "undue burden or expense" clause in Rule 45(c)(1). *See* *Mount Hope Church v. Bash Back*, 705 F.3d 418, 425, 427–28 (9th Cir. 2012). However, it is the text of the rules that control, and "the [n]otes cannot ... change the meaning that the Rules would otherwise bear." *Tome*, 513 U.S. at 168, 115 S.Ct. 696 (Scalia, J., concurring); *see also United States v. Bainbridge*, 746 F.3d 943, 947 (9th Cir. 2014).

The only express reference to interplay between Rules 43(a) and 45(c) is in the notes to Rule 45, which state: "When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from *any place described in Rule 45(c)(1)*." Fed. R. Civ. P. 45 advisory committee's note to 2013 amendment. This note does not do the work that the trustee contends it does. The *places* described in Rule 45(c)(1) are "a trial, hearing, or deposition" that are located within prescribed geographical proximity to where the witness lives, works, or conducts in-person business. Fed. R. Civ. P. 45(c)(1). The note does not state that Rule 43(a) changes the "place described in Rule 45(c)(1)" from the location of the proceedings to the location of the witness. And even if it did, it would not control because it would be contrary to the text of Rule 45(c)(1). *Tome*, 513 U.S. at 168, 115 S.Ct. 696 (Scalia, J., concurring); *Bainbridge*, 746 F.3d at 947. The note clarifies that Rule 45(c)'s geographical limitations apply even when remote testimony is allowed, and a witness is not required "to attend" a trial or other proceedings in the traditional manner.

The advisory committee's notes to Rule 43 reinforce this conclusion by explaining that remote testimony is the exception, and live, in-person testimony is strongly ***1044** preferred. *See* Fed. R Civ. P. 43(a) advisory committee's note to 1996 amendment. These notes state: "The importance of presenting live testimony *in court* cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling." *Id.* (emphasis added); *see also* *Draper v. Rosario*, 836 F.3d 1072, 1081–82 (9th Cir. 2016) (holding the district court properly disallowed remote video testimony under Rule 43 given the importance of "live testimony in court" (citing Fed. R Civ. P. 43(a) advisory committee's note to 1996 amendment)). These notes further instruct that "[t]he most persuasive showings of good cause and compelling circumstances [justifying remote testimony] are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place." Fed. R Civ. P. 43(a) advisory committee's note to 1996 amendment. "A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances." *Id.* The strong preference for in-person testimony would be greatly undermined if the rules were interpreted to impose fewer limits on a court's power to compel remote testimony than on its power to compel in-person testimony.

[22] **[23]** Federal Rule of Civil Procedure 32(a)(4) also supports the conclusion that the Kirklands fall outside the bankruptcy court's subpoena power because it defines witnesses who are "more than 100 miles from the place of ... trial" as "unavailable." Again, there is no indication in this rule that the geographical limitation can be recalibrated under Rule 43(a) to the location of a remote witness rather than the location of trial, nor is there any indication that courts can avoid the consequences of a witness's unavailability by ordering remote testimony. The fact remains that *all* witnesses —even those appearing remotely—must be compelled to appear, and a court can only compel witnesses who are within the scope of its subpoena power. Rule 43 does not give courts broader *power* to compel remote testimony; it gives courts *discretion* to allow a witness otherwise within the scope of its authority to appear remotely if the requirements of Rule 43(a) are satisfied. That is, neither the text of the rules nor the advisory committee's notes establish that the 100-mile limitation is inapplicable to remote testimony or that the "place of compliance" under Rule 45 changes the location of the trial or other proceeding to where the witness is located when a witness is allowed to testify remotely.

[24] No doubt there is intuitive appeal to the trustee's argument and bankruptcy court's view that the "place of compliance" under Rule 45(c) should be based on where the witness is located given that a primary concern underlying the Rule's geographical limitations is unfairly burdening witnesses with travel, *see generally* Fed. R. Civ. P. 45(c) advisory committee's notes to 1991 and 2013 amendments, but grafting this interpretation onto Rule 45(c) is unfounded for several reasons. First, it would essentially render Rule 45(d)(3)(A)(ii)—the requirement that courts quash subpoenas that reach "beyond the geographical limits specified in

Rule 45(c)"—a nullity as related to remote testimony. *See* *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' " (citations omitted)). Rule 45(d)(3)(A)(ii) plainly instructs that courts *must* "quash or modify" subpoenas ***1045** that exceed Rule 45(c)'s "geographical limits," reinforcing the conclusion that these limits define the scope of a court's *power* to compel a witness to participate in a proceeding, *see* *Hill v. Homeward Residential*, 799 F.3d 544, 553 (6th Cir. 2015) (concluding Rule 45 and its "geographic limitations" should be interpreted and enforced "as written").

Second, interpreting "place of compliance" as the witness's location when the witness testifies remotely is contrary to Rule 45(c)'s plain language that trial subpoenas command a witness to "attend *a trial*." Fed. R. Civ. P. 45(c)(1) (emphasis added). A trial is a specific event that occurs in a specific place: where the court is located. *See* Fed. R. Civ. P. 77(b) ("Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom."). No matter where the witness is located, how the witness "appears," or even the location of the other participants, *trials* occur in a court. [4] This concept is expressed in Rule 43(a)'s requirement that witnesses—even remote witnesses—must provide their testimony "in open court." *Id.* For this reason, application of Rule 45(c)'s 100-mile limitation to both trial and deposition subpoenas is not internally inconsistent because unlike trials, there is no ordinary or mandated location for depositions. The "place of compliance" for a deposition subpoena can be any appropriate location "within 100 miles of where the [witness] resides ...." Fed. R. Civ. P. 45(c)(1)(A). [5]

[25] **[26]** Perhaps one could argue that the "place" of trial, like other proceedings, is changing with modern technology. But we "generally seek[ ] to discern and apply the ordinary meaning of [a text] at the time of [its] adoption," *BP P.L.C. v. Mayor and City Council of Balt.*, —— U.S. ——, 141 S. Ct. 1532, 1537, 209 L.Ed.2d 631 (2021), and there is no indication that Rule 45's reference to attending "a trial" was intended to refer to anything other than the location of the court conducting the trial. *Cf.* *Valenzuela-Gonzalez*, 915 F.2d at 1281 ("Absent a determination by Congress that closed circuit television may satisfy the presence requirement of the [criminal] rules, we are not free to ignore the clear instructions of [the] Rules."). Indeed, the advisory committee reinforced the importance of focusing on the location of the proceeding in discussing the 2013 amendment to Rule 45 that resolved a split in authority about whether a party (as opposed to a non-party) who resided more than 100 miles from where the trial was held could be compelled to testify: "These changes resolve a conflict that arose after the 1991 amendment about a court's authority to compel a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c)."

Third, if the "place of compliance" for a trial subpoena could change from the courthouse to the witness's location, there would be no reason to consider a long-distance witness "unavailable" or for the rules to provide an alternative means for presenting evidence from long-distance witnesses that are not subject to the court's subpoena power. Courts could simply find, as the bankruptcy court did here, that live testimony from a witness located ***1046** outside the geographical limitations of Rule 45 was nonetheless necessary, which constitutes "good cause in compelling circumstances" to justify compelling their remote testimony. Fed. R. Civ. P. 43(a).

Here, the trustee moved in limine to prevent BC Trust from introducing transcripts of the Kirklands' prior sworn testimony at trial as inadmissible hearsay. BC Trust argued that the transcripts were admissible because the Kirklands are not subject to the bankruptcy court's subpoena power and are therefore "unavailable" under Federal Rule of Evidence 804(a)(5). The bankruptcy court concluded that the transcripts were inadmissible because the Kirklands' unavailability was "engineered by the BC Trust for purely strategic purposes." *See* Fed. R. Civ. P. 32(a)(4)(B) (a witness's deposition transcript may not be used at trial if "the witness's absence was procured by the party offering the deposition"); Fed. R. Evid. 804(a) (a prior sworn statement of an unavailable witness is not admissible "if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying"). We need not address the validity of this evidentiary ruling because it is immaterial to the question before us regarding the bankruptcy court's subpoena power. Whether or not the Kirklands are properly considered "unavailable" for evidentiary purposes, it is undisputed that they reside and work more than 100 miles from the bankruptcy court conducting the subject trial.

In sum, accepting the trustee's and bankruptcy court's reasoning in this case would stretch the federal subpoena power well beyond the bounds of Rule 45, which focuses on the *location of the proceeding* in which a witness is compelled to testify.

[27] Before the proliferation of videoconference technology, Rule 45's strict geographical limitation was simple: if a witness was located further from the courthouse than Rule 45 proscribes, the witness could not be compelled to testify at trial. *See, e.g.*, *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1019 (9th Cir. 2004) (recognizing that a witness who lived more than 100 miles from the court was "outside of the court's subpoena power" and therefore "unavailable" under Federal Rule of Civil Procedure 32 and Federal Rule of Evidence 804); *McGill v. Duckworth*, 944 F.2d 344, 353–54 (7th Cir. 1991) (noting that the court's subpoena power to compel trial witnesses is "limited to its district and a 100-mile radius around the courthouse," and that a court does not have any " 'inherent powers' to compel the attendance of a witness who is outside the court's subpoena power"), *overruled on other grounds by* *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *In re Guthrie*, 733 F.2d 634, 637 (4th Cir. 1984) ("[A] nonparty witness outside the state in which the district court sits, and not within the 100-mile bulge, may not be compelled to attend a hearing or trial, and the only remedy available to litigants, if the witness will not attend voluntarily, is to take his deposition ...."); *Jaynes v. Jaynes*, 496 F.2d 9, 10 (2nd Cir. 1974) (noting that district courts have the power only to subpoena witnesses in civil cases who "reside within the district or without the district but within 100 miles of the place of hearing or trial"). While technology and the COVID-19 pandemic have changed expectations about how legal proceedings can (and perhaps should) be conducted, the rules defining the federal subpoena power have not materially changed. We are bound by the text of the rules. *See* *Amchem Prods. v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("The text of a rule ... limits judicial inventiveness."). Notwithstanding the ***1047** bankruptcy court's positive experiences with videoconferencing technology, any changes to Rule 45, is one "for the Rules Committee and not for [a] court." *Swedberg v. Marotzke*, 339 F.3d 1139, 1145 (9th Cir. 2003); *see also* *In re Cavanaugh*, 306 F.3d 726, 731–32 (9th Cir. 2002) ("Congress enacts statutes, not purposes, and courts may not depart from the statutory text because they believe some other arrangement would better serve the legislative goals.").

Therefore, we conclude that the bankruptcy court "misinterpreted the law" in its construction of Rule 45(c) as applied to witnesses allowed to testify remotely under Rule 43(a) and the third *Bauman* factor weighs in favor of granting mandamus relief. *In re Walsh*, 15 F.4th at 1009 (internal quotation marks and citation omitted); *see also* *In re Cavanaugh*, 306 F.3d at 731–32 (issuing the writ where the district court "went off the statutory track").

B. Important Issue of First Impression

[28] The fifth *Bauman* factor also weighs in favor of granting mandamus relief. This factor "considers whether the petition raises new and important problems or issues of first impression." *In re Mersho*, 6 F.4th at 903; *see also* *In re Cement Antitrust Litig.*, 688 F.2d at 1304. As previously stated, "[m]andamus is particularly appropriate when we are called upon to determine the construction of a federal procedural rule in a new context." *Valenzuela-Gonzalez*, 915 F.2d at 1279. Whether a witness can be compelled to testify remotely despite falling outside Rule 45's geographic limitations is an important issue given the recent proliferation of videoconference technology in all types of judicial proceedings. Indeed, the bankruptcy court acknowledges that this issue is likely to arise with greater frequency following the COVID-19 pandemic.

Our system's previously noted strong preference for live, in-person testimony has a long pedigree. *See* *Crawford v. Washington*, 541 U.S. 36, 43, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ("The common-law tradition is one of live testimony in court subject to adversarial testing[.]"); *Coy v. Iowa*, 487 U.S. 1012, 1017–20, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (explaining—in terms of the Confrontation Clause—that the right to "face-to-face confrontation" and cross-examination "ensure the integrity of the factfinding process" (cleaned up) (citation omitted)); *Donnelly v. United States*, 228 U.S. 243, 273–76, 33 S.Ct. 449, 57 L.Ed. 820 (1913) (discussing the important safeguards associated with "in person" testimony); *United States v. Thoms*, 684 F.3d 893, 905 (9th Cir. 2012) (noting "the Supreme Court and our

court have repeatedly cited the value of live testimony with respect"). The rules were written with both an understanding of and agreement with this historical view. *See* Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment ("The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."). As evidenced by the diverging views in the district courts, application of the rules to testimony provided via contemporaneous video transmission has been perplexing and likely will continue to be so. Therefore, we conclude that the issue raised by the Kirklands' petition is ripe for our consideration and is "a new and far reaching question of major importance ... [the] resolution [of which] would add importantly to the efficient and orderly administration of the district courts." *In re Cement Antitrust Litig.*, 688 F.2d at 1305; *see also* *Perry*, 591 F.3d at 1158–59; ***1048** *Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. Richey*, 510 F.2d 1239, 1243 (D.C. Cir. 1975) (recognizing that mandamus review is appropriate "where the decision will serve to clarify a question that is likely to confront a number of lower court judges in a number of suits before appellate review is possible, as, for example, where the district judges are in error, doubt, or conflict on the meaning of a rule of procedure").

C. Remaining *Bauman* Factors

[29] The third and fifth *Bauman* factors are sufficient on their own to warrant granting mandamus relief in this case. *See* *In re Sussex*, 781 F.3d at 1076 (issuing the writ based on a strong showing of *Bauman* factors three and five); *Portillo v. U.S. Dist. Ct.*, 15 F.3d 819, 822 (9th Cir. 1994) (similar). Nonetheless, we consider the remaining factors.

1. Alternative Means of Relief

[30] The first *Bauman* factor considers whether a petitioner seeking mandamus relief has other means of attaining the desired relief. *In re United States*, 884 F.3d 830, 834 (9th Cir. 2018). The availability of relief through the ordinary review process weighs against granting mandamus relief. *See* *In re Orange, S.A.*, 818 F.3d 956, 963–64 (9th Cir. 2016); *Cole v. U.S. Dist. Ct. for the Dist. of Idaho*, 366 F.3d 813, 820 (9th Cir. 2004).

[31] **[32]** Here, the Kirklands' challenge to their subpoenas is a collateral matter, and an "order[ ] denying a motion to quash a Rule 45 subpoena generally cannot be immediately appealed." *United States v. Acad. Mortg. Corp.*, 968 F.3d 996, 1006 (9th Cir. 2020). Instead, absent discretionary interlocutory review, discussed further below, to obtain effective review a litigant generally must "either seek mandamus, or disobey the order and then appeal the resulting contempt citation." *In re Grand Jury Investigation*, 966 F.3d 991, 994 (9th Cir. 2020). Because we have not required a litigant to "incur a sanction, such as contempt, before it may seek mandamus relief," there is support for the first *Bauman* factor. *United States v. Fei Ye*, 436 F.3d 1117, 1122 (9th Cir. 2006); *see also* *SG Cowen Sec. Corp. v. U.S. Dist. Ct. for N. Dist. of Cal.*, 189 F.3d 909, 913–14 (9th Cir. 1999) (noting third parties "could not be expected" to seek review through contempt proceedings).

[33] However, the availability of interlocutory review warrants specific consideration here given that this petition arises from a bankruptcy case. In the ordinary civil case, interlocutory appellate review is available by certification from the district court under 28 U.S.C. § 1292. *ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1130 (9th Cir. 2022). Under this statute, if the district court certifies that an interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," we have discretion to exercise interlocutory review. 28 U.S.C. § 1292(b); *Bank of N.Y. Mellon v. Watt*, 867 F.3d 1155, 1159 (9th Cir. 2017). We have held that failing to seek certification under § 1292(b) does not bar granting mandamus relief. *Cole*, 366 F.3d at 817 n.4; *see also* *In re Orange, S.A.*, 818 F.3d at 963.

[34] **[35]** In bankruptcy cases, there are three additional means for seeking interlocutory review. 28 U.S.C. § 158(a)(3), (b)(1), (d)(2); *see also* *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 252–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). Primarily, a party may seek leave to appeal an

interlocutory bankruptcy court order from (1) the district court, or (2) "with the consent of ***1049** all the parties," from the BAP. 28 U.S.C. § 158(a)(3), (b)(1). [6] We also have discretion to hear interlocutory appeals from bankruptcy court orders if a lower court grants certification under 28 U.S.C. § 158(d)(2). *Bullard v. Blue Hills Bank*, 575 U.S. 496, 508, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015); *Bank of N.Y. Mellon*, 867 F.3d at 1159. Under § 158(d)(2), the bankruptcy court, the district court, or the BAP may, "acting on its own motion or on the request of a party," certify that:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; *or* (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

28 U.S.C. § 158(d)(2)(A)(i)–(iii) (emphasis added).

[36] **[37]** Here, the Kirklands moved the bankruptcy court to certify an interlocutory appeal to this court under § 158(d)(2) and alternatively to the district court under § 158(a)(3). The bankruptcy court denied both requests. But the Kirklands did not seek leave from the district court to file an interlocutory appeal. [7] The Kirklands justify this failure by asserting that "[t]here is no exhaustion requirement" for seeking mandamus relief and that decisions from the district court and the BAP bind only the parties and provide no procedural guidance to lower courts. The Kirklands' argument fails to appreciate that the availability of alternate means for obtaining relief weighs against mandamus relief where the Supreme Court has clearly instructed that the writ of mandamus is not to be used "as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380–81, 124 S.Ct. 2576. And the district court and the BAP, not this court, are chiefly charged with reviewing interlocutory bankruptcy orders. *See* 28 U.S.C. § 158(a)(3); *Bullard,* 575 U.S. at 508, 135 S.Ct. 1686. Thus, we do not treat lightly the Kirklands' failure to seek interlocutory review in the district court. But we nonetheless conclude that their failure does not mandate denial of mandamus relief under the unique circumstances of this case. [8]

***1050** The Kirklands did seek relief from the district court related to the specific issue raised in this petition by filing a motion in the district court. We previously recognized a narrow futility exception to the no-alternate-means-of-relief limitation. *See* *Cole*, 366 F.3d at 820. In *Cole*, the petitioner failed to seek reconsideration of a magistrate judge's non-dispositive order with the district court under 28 U.S.C. § 636(b)(1)(A). *Id.* at 816. We explained that the "general rule" that mandamus relief is warranted only where the petitioner has no other means for seeking relief "may give way to an exception if the petitioner can convincingly demonstrate that reconsideration by the district court would have been futile." *Id.* at 820; *see also* *id.* at 819 n.9 (discussing a Third Circuit case that recognized "a narrow exception to the general rule requiring review of the magistrate judge's non-dispositive orders by the district court before mandamus relief can be issued"). But we ultimately concluded that the petitioner failed to establish futility in that case. *Id.* at 820.

Unlike in *Cole*, where the petitioner had an "absolute right to seek district court reconsideration of the magistrate judge's decision" and did not pursue *any* review before seeking mandamus relief in this court, *id.* at 816, 818, the Kirklands did attempt to obtain review of the bankruptcy court's decision before seeking relief in this court. Mrs. Kirkland, as trustee of BC Trust, unsuccessfully sought review in the district court of the scope of the bankruptcy court's subpoena power by seeking reconsideration of the district court's reference of BC Trust's case to the bankruptcy court. Because the district court denied the motion for reconsideration, the Kirklands argue that requiring them to seek further interlocutory review in the district court would be futile. We agree.

When the district court referred the claims against BC Trust to the bankruptcy court, it stated that the bankruptcy

court could "rely on the testimony provided during the jury trial" in Mr. Kirkland's prior trial conducted in district court but that "[i]f the [b]ankruptcy [c]ourt determines that it needs substantial testimony from non-parties that would not be necessary if th[e district] [c]ourt were to try the matter (presumably because the [district c]ourt observed the testimony given at the jury trial) ..., the parties may seek reconsideration of [the reference] on that ground." Mrs. Kirkland sought reconsideration from the district court after the bankruptcy court ruled that BC Trust could not introduce transcripts of the Kirklands' prior testimony and required the Kirklands to present live testimony. Specifically, the motion for reconsideration argued, in part, that the Kirklands "cannot be compelled to appear at trial because they reside in the U.S. Virgin Islands, which is more than 100 miles from the Court." The district court denied reconsideration, stating that if the Kirklands "fail[ ] to attend trial, the [b]ankruptcy [c]ourt is entitled to make whatever adverse findings it sees fit." Because the district court heard and rejected the Kirklands' argument challenging the validity of their trial subpoenas, we are persuaded that requiring the Kirklands to seek interlocutory review in the district court likely would be futile.

For these reasons, we conclude that the first *Bauman* factor does not weigh against granting mandamus relief in this case. [9]

*1051 2. Likelihood of Irreparable Harm

[38] Our inquiry under the second *Bauman* factor is closely related to the first—the Kirklands must demonstrate that they will suffer harm that cannot be remedied through normal post-judgment appeal. *See* *In re Orange, S.A.*, 818 F.3d at 963–64. The Kirklands contend that they will be harmed by having to testify at BC Trust's trial after they have already given testimony in the underlying proceeding twice. They also contend that testifying remotely would be "inadequate[ ]," and that if they are forced to wait to challenge the bankruptcy court's denial of their motions to quash until after BC Trust's trial, the error of being wrongly forced to testify will be irremediable.

Recently, we concluded that the harm suffered from having to comply with an invalid deposition subpoena was "the intrusion of the deposition itself," which was "not correctable on appeal, even if [the deponent's] testimony is excluded at trial." *In re U.S. Dep't of Educ.*, 25 F.4th at 705. The same reasoning applies here. If the Kirklands comply with their subpoenas and testify at trial, the violation of having to give testimony when the bankruptcy court has no authority to compel them to do so cannot be fully remedied post-judgment. Therefore, the second *Bauman* factor also supports granting mandamus relief.

3. Oft-Repeated Error

[39] Finally, the fourth *Bauman* factor "looks to whether the case involves an 'oft-repeated error.' " *In re Mersho*, 6 F.4th at 903 (citation omitted). The fourth and fifth factors are rarely present at the same time. *Id.*; *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1491 (9th Cir. 1989). However, we have recognized that the fourth and fifth factors can both be present when a procedural rule is being applied in a new context because this situation presents "a novel question of law that is simultaneously likely to be 'oft-repeated.' " *Valenzuela-Gonzalez*, 915 F.2d at 1279; *see also* *Cohen v. U.S. Dist. Ct. for N. Dist. of Cal.*, 586 F.3d 703, 711 (9th Cir. 2009). Because we conclude that the fifth factor strongly weighs in favor of exercising our mandamus authority, we do not analyze the fourth factor in depth and simply reiterate that, given the importance and novelty of the issue presented and the ongoing confusion in the district courts, providing guidance regarding Rule 45's application to remote testimony is warranted, especially where this collateral issue is likely to continue to evade review. *See* *Perry*, 591 F.3d at 1159.

III. CONCLUSION

We conclude that mandamus relief is warranted. We have not previously addressed the application of Rule 45(c)'s geographical limitations to testimony provided via remote video transmission, which is a question of increasing import given the recent proliferation of such technology in judicial proceedings. Moreover, we conclude that despite changes in technology and professional norms, the rule governing the court's subpoena power has not changed and does not except remote appearances from the geographical limitations on the power to compel a witness to ***1052** appear and testify at

trial. Because the bankruptcy court concluded otherwise, we grant the Kirklands' petition and issue a writ of mandamus ordering the bankruptcy court to quash their trial subpoenas. *See* *Cheney*, 542 U.S. at 380, 124 S.Ct. 2576.

PETITION GRANTED. [10]

All Citations

75 F.4th 1030, 23 Cal. Daily Op. Serv. 7582, 2023 Daily Journal D.A.R. 7683

Footnotes

* The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

1 There appear to be three different approaches regarding whether a witness may be compelled to testify remotely from a location that is beyond Rule 45(c)'s 100-mile geographic limitation. *See, e.g.,* *Off. Comm. of Unsecured Creditors v. CalPERS Corp. Partners LLC*, 2021 WL 3081880, at *2 (D. Me. July 20, 2021) (listing cases). First, some courts have held that Rule 45(c)'s geographic limitation is firm, and Rule 43(a) cannot be an end-run around it. *Id.* Second, some courts have held that an order requiring remote appearance under Rule 43(a) automatically satisfies Rule 45(c)'s geographical limitation because it does not compel the witness to travel more than 100 miles. *Id.* And third, some courts have held that Rule 43(a) may be used to compel remote testimony from a location within 100 miles of the witness's residence, but only upon a showing of good cause in compelling circumstances. *Id.*

2 The bankruptcy proceeding is stayed pending our determination of the Kirklands' petition.

3 Rule 45 applies to subpoenas in bankruptcy proceedings. Fed. R. Bankr. P. 9016.

4 It is nonsensical to say that a trial is occurring in a witness's living room when a witness is allowed to appear "by contemporaneous transmission" but that a trial is occurring in a courtroom the rest of the time. *See* Fed. R. Civ. P. 43(a).

5 *See also* Fed. R. Civ. P. 45(c)(2) (providing that "[a] subpoena may command ... production of documents ... or tangible things *at a place within 100 miles of*" the person's residence or place of business (emphasis added)).

6 Because obtaining interlocutory review from the BAP under § 158(b)(1) depends on agreement of the parties, we focus our analysis on the Kirklands' ability to seek interlocutory review from the district court under § 158(a)(3).

7 Although the bankruptcy court stated that it "can certify an appeal of an interlocutory order to the [d]istrict [c]ourt rather than [this court]" under § 158(d)(2)(A), there is no support for that assertion. Certification under § 158(d)(2) is directed only to a court of appeals. *Bullard*, 575 U.S. at 508, 135 S.Ct. 1686. Interlocutory review in the district court arises under § 158(a)(3), which is a separate procedure. Leave under § 158(a)(3) must be sought *from the district court*, not the bankruptcy court. *See* 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8004 (outlining procedure for seeking leave from the district court or the BAP to

appeal an interlocutory bankruptcy order). Thus, the Kirklands erroneously sought leave to seek interlocutory review in the district court from the bankruptcy court.

8 We do not address whether review by the district court under 28 U.S.C. § 158(a)(3) is sufficiently analogous to certification to the court of appeals under § 1292(b) such that our rule that "the possibility of certification, standing alone, is not a bar to mandamus relief" should also apply in this context. *In re Orange, S.A.*, 818 F.3d at 963; *see In re Belli*, 268 B.R. 851, 858 (B.A.P. 9th Cir. 2001) ("We look for guidance to standards developed under 28 U.S.C. § 1292(b) to determine if leave to appeal should be granted [under § 158(a)(3)], even though the procedure is somewhat different."); *Ad Hoc Comm. of Holders of Trade v. PG&E Corp.*, 614 B.R. 344, 351 (N.D. Cal. 2020) (same); *see also* 1 *Collier on Bankruptcy* ¶ 5.08[4] (16th ed. 2023) (noting that § 1292(b) is the closest analogy to seeking leave to appeal under § 158(a)(3)).

9 Even if the first *Bauman* factor did weigh against mandamus relief, we have granted mandamus relief where this factor is lacking, especially where "the fifth *Bauman* factor (novel issue of circuit law) is satisfied," as it is here. *Cole*, 366 F.3d at 820 n.10; *see, e.g., San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1099–100 (9th Cir. 1999) (issuing the writ where the second, third, and fifth *Bauman* factors were satisfied, despite finding that the "first *Bauman* factor tip[ped] against mandamus relief" because a direct appeal was available).

10 The trustee's Request for Judicial Notice, Dkt. No. 10, is DENIED.

End of Document

TAB 18

18. Use of "Master" in the Rules – 24-CV-A

The American Bar Association has submitted 24-CV-A, proposing that the word "master" be removed from Rule 53 and from any other rule that refers to the possibility of appointing a "master." The ABA suggests substituting "court-appointed neutral."

Four reasons are advanced in support of this proposal:

(1) Master is a very poor term and a very poor description. It can be a positive when used to describe accomplishments, such as "chess master" and "master of the art." But "master" also can have a negative connotation when used in "situations involving power relationships." There, "[i]t refers to one (male) person who has control or authority over another; and the most obvious example of that is slavery."

These negative connotations have prompted some universities to stop using "master" for the title of the head of a residential college. Some real estate professionals have begun debating whether to use the term "master bedroom." It is reported that at least three states – Maryland, Delaware, and Pennsylvania – to substitute a different term. Various professional organizations have stopped using "master," and many others are actively considering removing the word from their lexicon.

Of possible relevance is a Civil Rules project in the 1980s that adopted "gender-neutral" amendments, with the rule amendments that went into effect in 1987. That might be likened to this proposed change in rule language.

(2) "Court-Appointed Neutral" is a Much More Accurate Term. The term "master" has ancient roots. As Magistrate Judge Brazil wrote in 1983: "The office of master in chancery . . . is one of the oldest institutions in Anglo-American law." Brazil, Referring Discovery Tasks to Special Masters, Is Rule 53 a Source of Authority and Restrictions, 8 ABA Res. J. 143 (1983).

Rule 53 uses the term "master," but Supreme Court Rule 33(1)(g) uses "special master." State legislatures have used a variety of terms, including adjunct, special magistrate, hearing examiner, special facilitator, discovery facilitator, appointed mediator, monitor, court advisor, investigator, claims administrator, claims evaluator, court mediator, case evaluator, referee, receiver, commissioner, and others.

Court-appointed neutral, it is submitted, is superior to "master" because it "better describes a professional appointed as a special officer to help, rather than to take over specific functions in a litigation."

(3) "Court-Appointed Neutral" is becoming the Standard Term. The ABA has in its Resolution 517, adopted in August 2023, adopted a Model Rule it is urging courts to adopt, defining "court-appointed neutral" as:

> a disinterested professional appointed as an adjunct special officer appointment to assist a court in its case-management, adjudicative or post-resolution responsibilities in accordance with the provisions of this Rule and any standards established by this Court for qualification to hold such an appointment.

(4) Adopting "Court-Appointed Neutral" Will Clarify an Ambiguity in the Existing Rules. The ambiguity results from the use of different terms for persons appointed to perform tasks like the ones described in Resolution 517. If the court calls the neutral a "master," "it is clear that Rule 53 applies to the appointment." But the application of Rule 53 to appointment of a "monitor," a "referee," or a "discovery facilitator" presents the question whether Rule 53 applies.

According to the ABA submission, this ambiguity can be cured by changing the term used in Rule 53 and the other rules that presently use "master." If some appointments of neutrals should not follow the strictures of Rule 53, the ABA urges that they be carved out.

This report attempts to provide an introduction to some of the issues raised by this submission.

Background on Current Rule 53

As originally adopted in 1938, Rule 53 was a modification of the Equity Rule on references to masters. As Magistrate Brazil's 1983 article (quoted above) said, it had been used for centuries in Anglo-American law. In 1983, Rule 53 was amended, and some attention was given to terminology. Thus, the Committee Note to that amendment explained:

> The term "special master" is retained in Rule 53 in order to maintain conformity with 28 U.S.C. § 636(b)(2), authorizing a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts."

Rule 53 was extensively revised and reorganized in 2003 based on work done by a subcommittee chaired by Judge Shira Scheindlin. The FJC did an extensive study, Special Masters' Incidence and Activity (FJC 2000), which also addressed terminology on p. 1:

> Throughout this report, the term "special master" is used in an expansive sense to refer to adjuncts appointed to address a court's need for special expertise in a particular case. The titles most often given to such adjuncts are "special Master" and "court-appointed expert." Other names given to judicial adjuncts include auditors, assessors, appraisers, commissioners, examiners, monitors, referees, and trustees. On occasion because of interest in their specific use, court-appointed experts appointed pursuant to Federal Rule of Evidence 706 will be discussed as a separate subgroup of the special master group.

The 2003 Committee Note explained that the revision of the rule done on the basis of the study recognized "changing practices in using masters." The word "special" no longer appears in the rule. The different types of masters described in Rule 53(a) (based on the study of current use of masters) included consent masters (Rule 53(a)(1)(A)), trial masters (Rule 53(a)(1)(B)), and pretrial and posttrial masters (Rule 53(a)(1)(C)).

The 2003 Committee Note also included the following acknowledgement of problems of terminology:

> **Expert Witness Overlap.** This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master, and as court-appointed expert witness under Evidence Rule 706. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

In addition, the Note observed that "Special masters are appointed in many circumstances outside the Civil Rules." On that subject, consider 9C Fed. Prac. & Pro. § 2602 at 538-40, discussing use of masters to assist in the administration of complex settlements or enforcement of a judgment or consent decree:

> Some federal courts explicitly make such appointments in these cases under the aegis of Rule 53; however, as the activities of these masters often do not meet the procedural standards set out by Rule 53, these appointments may more appropriately be authorized by the inherent traditional equity powers of a federal court to seek assistance in discharging their duties rather than the rule. Courts may also use special masters to help assess the fair market value of stock.

ABA Bankruptcy Rules Submission

At the same time the ABA submitted 24-CV-A, it also submitted 24-BK-C. Presently, Bankruptcy Rule 9031, entitled "Masters Not Authorized," says: "Rule 53, FRCiv.P, does not apply in cases under the Code." An earlier submission (24-BK-A), from Bankruptcy Judge Michael Kaplan proposed that Rule 9021 be revised as follows: "Rule 53, FRCiv.P, ~~does not apply~~ applies in cases or proceedings under the Code." The ABA proposes that the word "master" not be used in the Bankruptcy Rules for reasons very similar to the reasons for its proposal to amend Rule 53.

Connection to Slavery

There seems little doubt that the word "master" had a prominent role in relation to slavery. But it does not immediately appear that the use of the word in Anglo-American law has any connection to the disreputable use of the same word in regard to slavery. Instead, as pointed out by Wayne Brazil, it seems to antedate the African slave trade.

It may be that the legal term "master" was introduced into England around the time of William the Conqueror. That does not mean the office of "master" in England was always a shining beacon to the world. Indeed, as one of my colleagues wrote, "[t]he early history of special masters' fees can be fairly described as sordid." Levine, Calculating Fees for Special Masters, 37 Hast. L.J. 141, 144 (1985). The position was so lucrative that it was sold for large sums. "The practice became so abusive that one Lord Chancellor, Lord Macclesfield (Thomas Parker) was impeached in 1725 for, among other things, taking money for granting permission for the sale of the office of master." Id. at 145-46. See also Id. at 146-47 (referring to the depiction of the masters in Dickens' *Bleak House*).

But brief research does not reveal any connection between this judicial position and slavery. Perhaps more careful research would cast more light on the subject.

Power Relationships

The ABA submission says the term has particularly negative connotations when used in situations that involve power relationships. Rule 53(c) shows that Rule 53 masters do sometimes wield power over the parties. Rule 53(c)(1)(C) permits masters to compel, take, and record evidence. Rule 53(c)(2) permits a master by order to impose on a party any noncontempt sanction provided by Rule 37 and to recommend a contempt sanction against a party and also recommend sanctions against a nonparty. Rule 53(f)(5) says "the court may set aside a master's ruling on a procedural matter only for an abuse of discretion."

Urgency

On this topic, it is notable that in 2019 the ABA adopted ABA Resolution 100, capping 18 months of effort by a Working Group including many prominent judges, including Judge Shira Scheindlin, who chaired the Advisory Committee's Rule 53 Subcommittee that produced the 2003 amendments and Judge Michelle Childs (D.C. Circuit). Resolution 100 approved the resulting "Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation." Guideline 1 said: "It should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation."

Resolution 516 (adopted in August 2023) retitled these guidelines and also supports the present proposal to amend the Civil Rules. According to the submission, there is widespread change in nomenclature for these quasi-judicial positions. To the extent this movement gains momentum, that may provide this Committee with useful insights.

Statutory Use of Term "Master"

As noted above, there is at least one provision in title 28 of the United States Code that uses the term "master." If the Committee decides to move forward on this proposal, it will be important to determine whether there are other places, either in Title 28 or elsewhere, in which the term is used. Whether the use in § 636(b)(2) would be adversely affected by a terminology change in Rule 53. For one thing, the statute also contemplates appointments without regard to the rule. The statute continues beyond the quotation above from the 1983 Committee Note to the Rule 53 amendments that year to say:

> A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

And Rule 53(h) seems consistent:

> A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

If the Committee decides to proceed with this amendment project, a careful review of the United States Code would likely be important to find out whether the term "master" is used in other places that would be affected by changes to the rules.

Reference to a Master Outside Rule 53

As noted above, courts often refer matters to a "master" without using Rule 53 authority. Presumably no change to Rule 53 would limit that activity. If the goal is to prevent use of the word "master," amending Rule 53 may be only a partial solution. It is not likely that an amendment to Rule 53 could limit the inherent authority of judges to make such appointments using that title.

References to "Master" in the Civil Rules Outside Rule 53

Removing the word "master" from Rule 53 would not remove it from the other places where it appears in the Civil Rules. It seems that those other rules are:

Rule 16(c)(2)(H): "referring matters to a magistrate judge or a master;"

Rule 23(h)(4): "The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D)."

Rule 52(a)(4): "**Effect of a Master's Findings.** A master's findings, to the extent adopted by the court, must be considered the court's findings."

Rule 54(a): "A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings."

Rule 54(d)(2)(D):

> *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

Rule 71.1(h)(2)(D):

> *Commission's Powers and Report.* A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

Further work may identify additional rules outside Rule 53 that use the term "master."

Selecting a New Term

The ABA urges that "court-appointed neutral" is a good substitute term, and says that this term is "becoming the standard term." Whether this term has meanings that should be scrutinized before it is put into the Civil Rules calls for careful evaluation of other uses of "neutral." One example from the N.D. Cal. is a program called "Early Neutral Evaluation," adopted in that district in the 1980s. For discussion, see Brazil, Kahn, Newman & Gold, Early Neutral Evaluation, 69 Judicature 279 (1986); Levine, Early Neutral Evaluation: The Second Phase, 1989 J. Disp. Resol.

This N.D. Cal program involved a process for lawyers to qualify to serve as Early Neutral Evaluators and receive appointment to that position by the court. Then they could be referred cases through the program. It is not presently clear whether other districts have used the term "neutral" in the same way, but since those who qualified in the N.D. Cal. were (at least in a sense) "court-appointed," they might seem to fall within the term "court-appointed neutral" if it were added to Rule 53.

And a similar term seems to be used in the ADR community. For example, it appears that JAMS calls its providers (many of them retired judges) "neutrals." JAMS appointment of such neutrals is different from court appointment, so saying "court-appointed neutrals" would not seem to include these persons.

As noted above, a great many other terms have also been used. Whether they have also gained currency is presently uncertain, as is whether they those terms would work as well as the ancient term "master" in the Civil Rules where "master" now appears would need to be evaluated.

Initial Conclusion

Determining how to balance the ancient heritage of the term "master" in Anglo-American law against the use of the same word in relation to slavery is not really a civil procedure question. But substituting something else may indeed raise Civil Rules issues both because (a) any new term would need to work in all the places where "master" is now used in the rules, and (b) replacing the term used in the Civil Rules would not automatically affect the inherent power of judges to make appoints using the term "master" but not in reliance on Rule 53, though it might prompt a change in judicial habits. It may be the evolving experience will be informative in addressing both the importance of removing the term from the rules and the best way to select a substitute term.

TAB 18A

AMERICAN BAR ASSOCIATION

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February 12, 2024

H. Thomas Byron III,
Secretary Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Room 7-300
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Amendment of the Federal Rules of Civil Procedure to Substitute the Use of the Phrase "Court-Appointed Neutral" for "Court-Appointed Master"

Dear Mr. Byron:

The American Bar Association (ABA) respectfully requests that the Judicial Conference of the United States recommend that the Federal Rules of Civil Procedure be amended to substitute the term "court-appointed neutral" for "court-appointed master" both in Federal Rule of Civil Procedure 53 and in other rules that reference potentially appointing a "master."

Background

At its Midyear Meeting in January 2019, the ABA House of Delegates approved ABA Resolution 100.[1] This Resolution approved "Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation" (the "Guidelines") and urged that Bankruptcy Rule 9031 be amended "to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases."

This 2019 Resolution resulted from 18 months of effort by a Working Group that included representatives of the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, the Lawyers Conference, the ABA Standing Committee on the American Judicial System, and the ABA's Litigation, Business Law, Dispute Resolution, Intellectual Property Law, Tort Trial and Insurance Practice, and Antitrust Sections on best practices concerning the use, selection, administration, and evaluation of "special masters."

[1] www.americanbar.org/content/dam/aba/administrative/board_of_governors/greenbook/greenbook.pdf at 227. Under ABA Policy, ABA Resolutions themselves are official policies of the Association. Reports that accompany resolutions are not adopted as official policy, and are treated as guidance provided by resolutions' drafters.

The Working Group that drafted the 2019 Resolution included retired Southern District of New York Judge Shira Scheindlin, who chaired the Subcommittee of the Advisory Committee on the Federal Rules of Civil Procedure that drafted the 2003 version of Federal Rule of Civil Procedure 53; then District of South Carolina Federal District Court Judge (now District of Columbia Circuit Judge) J. Michelle Childs; a former chair of the ABA Business Law Section, the then chairs of the ABA Litigation and Intellectual Property Law Sections; two former chairs of the ABA Section on Dispute Resolution; two former chairs of the ABA Antitrust Section; one former, and one now, state supreme court justice and numerous other judges and practitioners.

The central principle of the Guidelines enunciated in Guideline 1 is that "[i]t should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation."[2] Over the decades courts have become increasingly involved in case management. Expanding the understanding of how neutrals might assist with case management benefits both the courts and the parties. While court-appointed neutrals may be appointed to serve quasi-adjudicative functions (e.g., discovery referees), they can also serve in non-adjudicative roles such as performance management (e.g., monitoring a decree), facilitation (e.g., working with the parties to resolve discovery disputes without motion), advisory (e.g., providing expertise to assist the court in assessing the adequacy of expert reports); information gathering (e.g., a forensic accountant, who reports to the court on where money went from a trust); or a liaison (e.g., providing a distillation of information to the court without exposing the court to settlement discussions or privileged material).[3]

In the three and one-half years following the adoption of Resolution 100, the ABA examined approaches to implementing these precepts. This process required thousands of hours of discussion, involving at least 14 of the ABA's sections, divisions and forums, and over 20 organizations outside of the ABA. It has resulted in the drafting of two other resolutions co-sponsored by both the Judicial Division and the Section of Dispute Resolution and their approval by the ABA House of Delegates in August 2023:

> Resolution 516, which is the focus of this request, provides:
>
> RESOLVED, That the American Bar Association amends the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation* ("Guidelines"), adopted January 2019 (Resolution 100, 19M100), by retitling the Guidelines, "*ABA Guidelines for the Appointment and Use of Court-Appointed Neutrals in Federal and State Civil Litigation*" and replacing the terms "Special Master" and "Master" with "Court-Appointed Neutral;"
>
> FURTHER RESOLVED, That the American Bar Association further amends ABA Resolution 100, 19M100, to urge that Bankruptcy Rule 9031 and other provisions of rules or law related to Bankruptcy be amended to permit courts

[2] *See* ABA Resolution 100 Guideline 1.

[3] *See, id.* Guideline 4.

> responsible for cases under the Bankruptcy Code to use court-appointed neutrals (whether identified as "masters" or otherwise) in the same way as they are used in other federal cases; and
>
> FURTHER RESOLVED, That the American Bar Association supports rule and legislative changes designed to replace the term "master" or "special master" with "court-appointed neutral."[4]

In addition, Resolution 517 adopts and urges state, local, territorial, and trial courts to adopt a Model Rule on the use of Court-Appointed Neutrals. (Although this resolution is not directed to amending federal rules, it may be helpful to have as background and also because it includes a definition of "court-appointed neutral.")[5]

This Request

This request seeks to make the changes necessary to use "court-appointed neutral" rather than "master" in the Federal Rules of Civil Procedure. The ABA is submitting a separate letter today requesting that the Federal Rules of Bankruptcy Procedure be amended to permit the use of "court-appointed neutrals" in proceedings under the Bankruptcy Code. For convenience, that letter is attached.

Rationale for Having the Term "Court-Appointed Neutral" Replace "Master" in the Federal Rules.

(1) "Master" is a very poor term and a very poor description.

The term "master" has both positive and negative connotations. It can refer to admirable qualities, like expertise, proficiency, accomplishment, scholarship, or leadership to which others can aspire and usually obtained through years of effort. In the context of calling someone a "chess master" or a "master of the art" it does convey one of those meanings.

The situation, however, is very different when "master" is used to identify people invested by a court with some measure of authority over parties. Although no one suggests that the use of "master" in court settings was intended to have a negative meaning, "master" carries an extremely negative connotation in situations involving power relationships. It refers to one (male) person who has control or authority over another; and the most obvious example of that is slavery.

In recent years, many organizations, in many contexts, have been considering whether they should use a different term – especially in situations that describe arguable control over others or invoke images of dominance and subservience. For example, electrical and software engineers are discussing whether they should continue (as they have for decades) to use master and slave to

[4] www.americanbar.org/content/dam/aba/directories/policy/annual-2023/516-annual-2023.pdf

[5] https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/517-annual-2023.pdf

refer to situations in which one device exercises asymmetric control over others. Colleges, including Harvard, Yale, and Rice have stopped using "master" as an academic title or the name for the head of a residential college. Many real estate professionals have decided that "master" bedroom is not the best name. The wine industry is debating whether to delete the term "master" from "master sommelier."

By supporting "rule and legislative changes designed to replace the term "master" or "special master" with "court-appointed neutral," in ABA Resolution 516, and using the term "court-appointed neutrals" in Resolution 517 for a model state, local, tribal, and territorial rule, the ABA joined in an active effort already underway to change the term used by many courts. At least three states – Maryland,[6] Delaware[7] and Pennsylvania[8] – have changed court rules in recent years to substitute a different term for "masters." In Pennsylvania's case, the move followed a resolution of the Philadelphia Bar Association that raised a number of concerns about appointing someone called a "master."[9] The resolution noted that the term "creates a sense of separation, anxiety, and confusion" because it suggests that some people are subject to others."[10]

As the Philadelphia Bar Resolution reflects, even the positive connotation of "master" is a poor description of the role. In this setting, it suggests someone who is put on a pedestal to take charge, not someone who is brought in to help, and certainly not someone to assist the parties in a self-determined process to resolve differences.

Even before these latest movements, some settings have highlighted the difficulty in using the term "master." For example, after years of litigation, one court approved a consent decree in *Pigford v. Glickman*,[11] – a case that resulted ultimately in payment of billions of dollars to settle allegations of discrimination against black farmers in United States Department of Agriculture programs. The consent decree called for neutrals in various capacities. But none of them was called a "master" – a name that would be particularly inappropriate.[12]

Numerous organizations have now recognized that what was inappropriate in *Pigford* may be equally inappropriate, if less obvious, in other settings. In 2022, the ABA's Judicial Division's Lawyers Conference committee that had been leading the effort to implement the Guidelines changed its name from the "Special Masters Committee" to the "Court-Appointed Neutrals

[6] *See* https://www.courts.state.md.us/news/new-rule-changes-masters-magistrates.

[7] *See* https://legis.delaware.gov/BillDetail?LegislationId=140635.

[8] *See* https://law.justia.com/cases/pennsylvania/supreme-court/2023/744-civil-procedural-rules-docket.html.

[9] *See* https://philadelphiabar.org/?pg=ResNov20_1

[10] *Id.*

[11] 185 F.R.D. 82 (D.D.C. 1999).

[12] https://media.dcd.uscourts.gov/pigfordmonitor/orders/19990414consent.pdf

Committee."[13] The Academy of Court-Appointed Masters changed its name to the Academy of Court-Appointed Neutrals.[14] The National Association of Women Judges adopted a Resolution in Support of Ceasing to Use the Term "Master" or "Special Master" in favor of using the term "Court-Appointed Neutrals."[15]

Since the ABA adopted these resolutions, many organizations either have already or are currently considering similar changes or have urged their members to use "court-appointed neutral" rather than "master" on resumes, websites and business cards. The American Arbitration Association has stopped using the term "master" for neutrals appointed to assist in arbitration. The Institute of Inclusion in the Legal Profession has announced its support for the change from "master" to "court-appointed neutral." We have also learned that organizations that are actively considering similar name changes include the American Judges Association, the National Council of Juvenile and Family Court Judges, the National Association for Court Management, the National Bar Association, the National Asian Pacific American Bar Association, the International Institute for Conflict Prevention and Resolution, and Judicial Arbitration and Mediation Services.

(2) "Court-Appointed Neutral" Is a Much More Accurate Term

The use of a court-appointed neutral to assist adjudicators has a very long history. "The office of master in chancery, of French origin and imported [to England] with the Norman Conquest, is one of the oldest institutions in Anglo-American law."[16] Some historians trace the practice to "civilian judex of the Roman Republic and Early Empire – a private citizen appointed by the praetor or other magistrate to hear the evidence, decide the issues and report to the [appointing] court."[17] The United States Supreme Court appointed a committee of neutrals to assist in deciding the very first case filed on its docket.[18] And over 100 years ago, the Court wrote that the inherent power of the judiciary "includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government, federal courts have exercised authority,

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13 https://www.americanbar.org/groups/judicial/conferences/lawyers_conference/committees/court-appointed-neutrals/committee-name-change/

14 *See* *www.courtappointedneutrals.org/acam/assets/file/public/namechange/on%20becoming%20the%20academy%20of%20court-appointed%20neutrals.pdf*

15 Available at www.nawj.org/uploads/files/resolutions/resolutionsupportingcourtappointedneutrals10-22-2022.pdf

16 Wayne D. Brazil, "Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?," 8 American Bar Foundation Research Journal, 143 at n.31 and accompanying text (Winter 1983).

17 *Id.*

18 *Vanstophorst v. Md.*, 2 U.S. 401 (1791).

when sitting in equity, by appointing either with or without the consent of the parties, special masters, auditors, examiners, and commissioners."[19]

Despite the long history of courts appointing neutrals, courts and rule-makers have never completely settled on a single term to refer to a neutral appointed by a court to perform one or more of these functions or to serve in one or more of these roles. Since 2003, Federal Rule of Civil Procedure 53, and state rules that adopt the federal language, have used the term "master." However, the Supreme Court rules use the term "special master."[20] And states legislatures and courts have used dozens of other terms that often have their own meanings in other contexts. These terms include "adjunct," "special magistrate," "hearing examiner," "special facilitator," "discovery facilitator," "appointed mediator," "monitor," "court advisor," "investigator," "claims administrator," "claims evaluator," "court mediator," "case evaluator," "referee," "receiver," "commissioner," and others.[21]

Court-appointed neutrals have these different titles because they can fill very different roles depending on case needs. Where the term "master" suggests someone brought in to adjudicate, court-appointed neutrals are a multipurpose tool that could be used for quasi-adjudicative work, but could also be used for facilitative, investigative, intermediary, informatory, administrative, monitoring, implementing or various other purposes.

Calling someone "Master" suggests that their role is to make decisions or recommendations to the court. That mischaracterizes someone who is used to facilitate or otherwise assist the parties in reaching their own resolution of differences; or to offer expertise about science, or industries like construction, forensic accounting or computer forensics. Indeed, even when the role is ostensibly quasi-adjudicative, a significant benefit from appointing a neutral can come from helping the parties resolve differences without the need for motions in the first place.

"Court-Appointed Neutral" better describes a professional appointed as a special officer to help, rather than to take over specific functions in a litigation. It makes it easier for parties to appreciate that this is a multi-faceted tool and to focus the consideration on whether and which facet might be useful in a particular case and whether the benefit from using the tool in a particular case outweighs the costs.

(3) "Court-Appointed Neutral" Is Becoming the Standard Term.

As noted above, the inaccurate term "master" has never gained universal acceptance and, with three states already specifically rejecting the term, it never can be expected to serve as a unifying term. By contrast, "court-appointed neutral," is an accurate description. It captures the wide variety of names that jurisdictions use for this tool. And it is also becoming a term of art.

Both the main professional organization of those who serve courts as appointed neutrals (the Academy of Court-Appointed Neutrals) and the main Committee of the ABA Judicial Division

[19] *In re Peterson,* 253 U.S. 300, 312 (1920).

[20] *See* Sup. Ct. R. 33(1)(g); 37(1).

[21] *See* ABA Resolution 100, Report at 1 n.1.

(the "Court-Appointed Neutrals" Committee) have adopted this term. The ABA has standardized the use of the term "Court-Appointed Neutrals" in a Model Rule that it is urging state, local, territorial and tribal courts to adopt.[22] That Model Rule defines "court-appointed neutral" as:

> a disinterested professional appointed as an adjunct special officer appointment to assist a court in its case-management, adjudicative or post-resolution responsibilities in accordance with the provisions of this Rule and any standards established by this Court for qualification to hold such an appointment.[23]

(4) Adopting "Court-Appointed Neutral" Will Clarify an Ambiguity in the Existing Rules.

In discussions concerning Proposed Federal Rule of Civil Procedure 16.1, the Advisory Committee on the Federal Rules noted an important ambiguity in Rule 53. Neither Rule 53, nor any of the other rules that use the term "master" define the term. Under the current rule, if a court in a civil case appoints a neutral that the court calls a "master," it is clear that Rule 53 applies to the appointment. But if the court appoints someone as a "monitor," or "referee" or "discovery facilitator" the application of the rule is unclear.[24]

Standardizing and defining the term "court-appointed neutral" to encompass the broad roles of a neutral clarifies these rules. If there are appointments of neutrals (for example, referrals to court-based mediation programs or the appointment of a mediator outside of a court-based referral program) that should *not* follow the strictures of Rule 53, then they should be carved out of Rule 53, instead of leaving courts and parties to guess what rules apply. The ABA Proposed Model Rule for state, local, territorial, and tribal courts, contains such a carve out. It permits courts to

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[22] Resolution 517.

[23] *Id.* Subpart (a).

[24] (Draft) Minutes of the Civil Rules Advisory Committee (reporting on Subcommittee Discussions), March 28, 2023 at 7. Available at https://www.uscourts.gov/sites/default/files/2023-03_advisory_committee_on_civil_rules_meeting_minutes_final_0.pdf ("[t]here 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."). Indeed, a significant reason for considering and adopting the 2003 rules was that before the 2003 version of Rule 53 was adopted, the rule discussed only the use of "masters" or "special masters" to conduct trials and "[b]y the end of the twentieth century, the use and practice of appointing special masters had grown beyond the then-current version of Rule 53," Shira A. Scheindlin and Jonathan A. Redgrave, "Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation," 76 N.Y. ST. BAR ASS'N J. 18, 19 (January 2004), to include appointments based on inherent authority to conduct pre- and post-trial functions that the preexisting Rule 53 did not discuss. *See* Advisory Committee Notes on 2003 Amendments to Federal Rule of Civil Procedure 53. Courts making those types of appointments before the 2003 Amendments were doing so as a matter of inherent authority, which existed regardless of what Rule 53 provided. *See* Brazil, *supra* n.16.

make appointments in appropriate cases "[u]nless law or the court provides otherwise, and subject to any court rules, procedures (including the provisions of any court-based alternative dispute resolution program) and principles of ethics applicable to the services being performed."[25]

(5) The Changes Are Non-Substantive and Relatively Simple to Implement.

The ABA is not proposing at this time to make substantive changes to Federal Rule of Civil Procedure 53. The Model Rule is directed to state, local, territorial and tribal courts. The changes proposed to the Federal Rules of Civil Procedure relate only to changing the name.

Including the index and headings, the term "master" currently appears 42 times in the Federal Rules of Civil Procedure, each time used in the context of a person appointed by the court. (Some comments on Proposed Rule 16.1 use the term "master complaint" to reference what the proposed rule identifies as a "consolidated" complaint). The change could be made by adding a definition of court-appointed neutral to Rule 53, with an appropriate carve-out and changing the term "master" to "court-appointed neutral" where it appears throughout the rules.

We appreciate the Judicial Conference's consideration of these changes and are of course available to address any concerns. Attached for reference is a copy of the request the ABA has submitted today to enable the use of court-appointed neutrals in bankruptcy proceedings.

Sincerely,

Mary Smith

Mary Smith
President, American Bar Association

[25] https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/517-annual-2023.pdf, subpart (c).

TAB 19

Date: March 6, 2024

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan
Federal Judicial Center Research Division

Re: Federal Judicial Center Research Projects

This memorandum summarizes current and recently completed Federal Judicial Center research relevant to the Federal Rules of Practice and Procedure. Center researchers attend committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides.

Current Research for Rules Committees

Complex Criminal Litigation Website

As suggested by the Criminal Rules Committee, the Center is developing as one of its special-topics websites (curated content) a collection of resources on complex criminal litigation.

Attorney Admissions

The Center is conducting research for the Standing Rules Committee's subcommittee on admissions to the district courts' bars.

Completed Research for Rules Committees

Default and Default Judgment Practices in the District Courts

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55. In most districts, the clerk of court enters defaults, perhaps in consultation with chambers. District practices with respect to entry of default judgments for a sum certain were more varied; in many districts, the clerk of court never enters default judgments pursuant to the national rule.

Mandatory Initial Discovery Pilot (MIDP)—Final Report

At the request of the Civil Rules Committee, the Center studied a pilot program in two districts, in which initial disclosures required by the Federal Rules of Civil Procedure were supplemented with broader disclosure requirements (www.fjc.gov/content/376773/mandatory-initial-discovery-

pilot-final-report). Among other findings, pilot cases had shorter disposition times than nonpilot cases, controlling for case type, district, and the effects of the Covid-19 pandemic.

Jury-Trial Demands in Terminated Civil Cases, Fiscal Years 2010–2019

Prepared for the Civil Rules Committee, this study observed that jury-trial demands were recorded in half of the federal courts' civil cases, but only 0.7% of civil cases were resolved by jury trials (www.fjc.gov/content/373277/jury-trial-demands-terminated-civil-cases-fiscal-years-2010-2019).

Federal Rule of Civil Procedure 42(a) Consolidation, Appellate Finality, and Hall v. Hall

Prepared for the Appellate Rules and Civil Rules Advisory Committees, this study examined potential issues arising from the Supreme Court's 2018 decision in *Hall v. Hall* that a case that has been consolidated with other cases may become appealable before other cases in the consolidation (www.fjc.gov/content/373279/federal-rule-civil-procedure-42a-consolidation-appellate-finality-and-hall-v-hall). The research did not observe widespread losses of appeal rights following the decision in *Hall*.

Federal Courts' Electronic Filing by Pro Se Litigants

In light of interest in whether self-represented litigants should be provided expanded electronic filing opportunities, the Center interviewed a modified random sample of seventy-eight clerks of court or members of their staffs in late 2021 and early 2022, including courts of appeals, district courts, and bankruptcy courts (www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants).

Electronic filing avoids the burden of visiting a courthouse or the delay inherent in regular mail. One option for electronic filing is use of the court's CM/ECF (case management, electronic case filing) system, which is how attorneys typically file now. Another option is email or its equivalent, such as an electronic drop box. Courts vary according to whether they generally permit or forbid these methods and whether they allow for exceptions to their general rules. Some courts have arrangements with some prisons (typically state prisons) for electronic submissions by prisoners.

Some courts do not require paper service by paper filers on parties already receiving electronic service.

Electronic Filing Times in Federal Courts

In light of a proposal to require electronic filing to be completed by the close of business on the day that the filing is due, the Center catalogued the times all docket entries were made in 2018 for all federal courts of appeals, district courts, and bankruptcy courts (www.fjc.gov/content/365889/electronic-filing-times-federal-courts). About nine in ten attorney filings were made before 6:00 p.m.

A survey of attorneys' practices and preferences was piloted but discontinued because of the Covid-19 pandemic. Preliminary pilot data suggested that most attorneys working for large firms preferred a filing deadline earlier than midnight, and most other attorneys preferred a midnight deadline.

Electronic Filing in State Courts

The Center surveyed electronic filing rules for thirty states selected to equally represent each of the federal circuits (www.fjc.gov/content/373599/electronic-filing-state-courts).

Current Research for Other Judicial Conference Committees

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings, an update to research prepared for the Committee on Rules of Practice and Procedure in 2010 and 2015 (Unredacted Social Security Numbers in Federal Court PACER Documents, www.fjc.gov/content/313365/unredacted-social-security-numbers-federal-court-pacer-documents).

Remote Public Access to Court Proceedings

At the request of the Committee on Court Administration and Case Management, the Center has conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences during the pandemic providing remote public access to proceedings with witness testimony.

Case Weights for Bankruptcy Courts

Data collection has begun for the Center's updated research on case weights for bankruptcy courts. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships in bankruptcy courts. The research was requested by the Committee on Administration of the Bankruptcy System.

Completed Research for Other Judicial Conference Committees

Evaluation of the Interim Recommendations from the Cardone Report

In 2023, the Center completed for the Defender Services Committee and the Executive Committee an assessment of the implementation of thirty-five recommendations for how the courts manage their responsibilities under the Criminal Justice Act, which specifies how the courts provide financially needy criminal defendants with legal representation (www.fjc.gov/content/380873/evaluation-interim-recommendations-cardone-report). The

recommendations were provided in 2017 by the Cardone Committee, named after its chair, Western District of Texas Judge Kathleen Cardone.

Court Orders Issued During the COVID-19 Pandemic on Criminal Justice Act Interim Voucher Payments

This report—prepared as part of the Center's research on recommendations in the 2017 Cardone report—summarizes federal court orders issued during the coronavirus pandemic regarding interim payments to Criminal Justice Act panel attorneys (www.fjc.gov/content/376241/court-orders-issued-during-covid-19-pandemic-criminal-justice-act-interim-voucher).

Federal-State Court Cooperation: Surveys of U.S. District and U.S. Court of Appeals Chief Judges and State and Territorial Chief Justices and Court Administrators

Prepared for the Committee on Federal-State Jurisdiction, this report updates the findings of a 2016 survey of U.S. chief district judges regarding their past, current, and future plans for cooperation with the state courts, as well as their use of state-federal judicial councils as a forum for communication between the courts (www.fjc.gov/content/378684/federal-state-court-cooperation-surveys-us-district-and-us-court-appeals-chief-judges).

Other Current Research

Manual for Complex Litigation

The Center is preparing a fifth edition of its Manual for Complex Litigation (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Court Judges

The Center is preparing a seventh edition of its *Benchbook for U.S. District Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

Other Completed Research

Special-Topic Website: Science Resources

The Center maintains a website for federal judges with resources related to scientific information and methods (www.fjc.gov/content/326577/overview-science-resources). Topics include fingerprint identification, neuroscience, the opioid crisis, DNA technologies, and water and the law.

Emergency Election Litigation: From Bush v. Gore to Covid-19

The Center prepared 513 case studies of how the federal courts have managed emergency election litigation from 2000 through 2020; the case studies include 717 individual emergency cases (www.fjc.gov/content/382726/emergency-election-litigation-federal-courts-bush-v-gore-covid-19). Individual case studies are also posted separately on the Center's website (www.fjc.gov/content/case-studies).

Jurisdictions with a High Number of Civil Jury Trials

Congress directed the Center to study factors related to high numbers of civil jury trials in some jurisdictions (www.fjc.gov/content/376750/jurisdictions-high-number-civil-jury-trials). The ten districts with the highest rates of civil jury trials were all small to medium in size. Civil trial rates ranged from 0.29% to 2.75%; the rates for a large majority of districts (82%) were between 0.5% and 1.5%.

COVID-19 and the U.S. District Courts: An Empirical Investigation

This examination of district-court case processing during the coronavirus pandemic showed an overall slowing of case processing but an overall reduction in backlogs (www.fjc.gov/content/374523/covid-19-district-courts-empirical-investigation). For some courts, however, their backlogs increased.

Resolving Unsettled Questions of State Law: A Pocket Guide for Federal Judges

The Center prepared a short guide to what federal judges might consider when applying unsettled questions of state law (www.fjc.gov/content/373468/resolving-unsettled-questions-state-law-pocket-guide-federal-judges).

National Security Case Studies: Special Case-Management Challenges

The Center published its seventh edition of *National Security Case Studies: Special Case-Management Challenges* in 2022 (www.fjc.gov/content/372882/national-security-case-studies-special-case-management-challenges-seventh-edition). The cases studied include terrorism prosecutions, espionage prosecutions, and other criminal and civil cases. Challenges include handling classified information and other security concerns.

Results of a Survey of U.S. District and Magistrate Judges: Use of Virtual Technology to Hold Court Proceedings

The Center surveyed federal district and magistrate judges about the use of virtual technology before and after the onset of the coronavirus pandemic (www.fjc.gov/content/370037/results-survey-district-magistrate-judges-virtual-technology-court-proceeding).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
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MEMORANDUM

TO: Advisory Committee on Civil Rules

FROM: Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Revised Proposed Rule 16.1 and Revised Committee Note

DATE: April 3, 2024

Attached you will find a revised proposed Rule 16.1 and revised Committee Note to Rule 16.1. The revisions were made after the submission of the Rule and Note for inclusion in the agenda book. Since that submission, the Subcommittee received helpful input from the Committee's stylists and from Judge Bates. We are grateful for their comments and their comments have been substantially incorporated into this revised proposal. This proposal represents the Rule and Note that the Committee will be asked to vote on at the upcoming meeting.

Revised Proposed New Rule 16.1

Rule 16.1. Multidistrict Litigation

(a) Initial Management Conference. After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial plan for orderly pretrial activity in the MDL proceedings.

(b) Report for the Conference.

(1) ***Submitting a Report.*** The transferee court should order the parties to meet and to submit a report to the court before the conference.

(2) ***Required Content: Leadership Appointment and Other Matters.*** The report must address any matter designated by the court — which may include any matter in Rule 16 — and, unless the court orders otherwise, the parties' views on:

(A) whether leadership counsel should be appointed and, if so:

(i) the timing of the appointments;

(ii) the structure of leadership counsel;

(iii) the procedure for selecting leadership and whether the appointments should be reviewed periodically;

(iv) responsibilities and authority in conducting pretrial activities and any role in resolution of the MDL proceedings;

(v) the proposed methods for regularly communicating with and reporting to the court and nonleadership counsel;

(vi) any limits on activity by nonleadership counsel; and

(vii) whether and when to establish a means for compensating leadership counsel.

(B) any previously entered scheduling or other orders that should be vacated or modified;

(C) a schedule for additional management conferences with the court;

(D) how to manage the direct filing of new actions in the MDL proceedings; and

(E) whether related actions have been — or are expected to be — filed in other courts, and whether to adopt methods for coordinating with them.

(3) ***Additional Reporting Matters: Parties Initial Views.*** Unless the court orders otherwise, the report also must address the parties' initial views on:

(A) whether consolidated pleadings should be prepared;

(B) how and when the parties will exchange information about the factual bases for their claims and defenses;

(C) discovery, including any difficult issues anticipated;

(D) any likely pretrial motions;

(E) whether the court should consider any measures to facilitate resolving some or all actions before the court;

(F) whether any matters should be referred to a magistrate judge or a master; and

(G) the principal factual and legal issues likely to be presented.

(4) ***Permitted Content***: The report may include any other matter that the parties wish to bring to the court's attention.

(c) Initial Management Order. After the conference, the court should enter an initial management order addressing the matters in Rule 16.1(b) and, in the court's discretion, any other matters. This order controls the course of the proceedings unless the court modifies it.

Committee Note
[April 1 revision]

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased since the statute was enacted but has leveled off in recent years. These actions have accounted for a substantial portion of the federal civil docket. There has been no reference to multidistrict litigation (MDL proceedings) in the Civil Rules. The addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. Of course, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies in handling those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop an initial management plan for the MDL proceedings and, thus, this initial conference may only address some of the matters referenced in Rule 16.1(b)(2)-(3). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(b)(2)-(3) should be of great value to the transferee judge and the parties.

Rule 16.1(b)(1). The court ordinarily should order the parties to meet to submit a report to the court about the matters designated in Rule 16.1(b)(2)-(3) prior to the initial management conference. This should be a single report, but it may reflect the parties' divergent views on these matters.

Rule 16.1(b)(2). Unless the court orders otherwise, the report must address all of the matters identified in Rule 16.1(b)(2) (as well as all those in 16.1(b)(3)). The court also may direct the parties to address any other matter, whether or not listed in Rule 16.1(b) or in Rule 16. Rules 16.1(b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

The rule distinguishes between the matters identified in Rule 16.1(b)(2)(B)-(E) and in Rule 16.1(b)(3) because court action on some of the matters identified in Rule 16.1(b)(3) may be premature before leadership counsel is appointed, if that is to occur. For this reason, 16.1(b)(2)

calls for the parties' views on the matters designated in (b)(2) whereas 16.1(b)(3) requires only the parties' initial views on those matters listed in (b)(3).

Rule 16.1(b)(2)(C) directs the parties to suggest a schedule for additional management conferences during which the same or other matters may be addressed, and the Rule 16.1(c) initial management order controls only until it is modified. The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceeding. Experience has shown, however, that the matters identified in Rule 16.1(b)(2)(B)-(E) and Rule 16.1(b)(3) are often important to the management of MDL proceedings.

Rule 16.1(b)(2)(A). Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointments may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel and many times this will be one of the early orders the transferee judge enters. Rule 16.1(b)(2)(A) calls attention to several topics the court should consider if appointment of leadership counsel seems warranted.

The first topic is the timing of appointment of leadership. Ordinarily, transferee judges enter orders appointing leadership counsel separately from orders addressing the matters in Rule 16.1(b)(2)(B)-(E) and 16.1(b)(3).

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Rule 16.1(b)(2)(A)(ii) therefore prompts counsel to provide the court with specific suggestions on the leadership structure that should be employed.

The procedure for selecting leadership counsel is addressed in item (iii). There is no single method that is best for all MDL proceedings. The transferee judge is responsible to ensure that the lawyers appointed to leadership positions are able to do the work and will responsibly and fairly discharge their leadership obligations. In undertaking this process, a transferee judge should consider the benefits of geographical distribution as well as differing experiences, skills, knowledge, and backgrounds. Courts have considered the nature of the actions and parties, the needs of the litigation, and each lawyer's qualifications, expertise, and access to resources. They have also taken into account how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries and also claims by third-party payors who paid for medical treatment. The court may need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.

The rule also calls for advising the court whether appointment to leadership should be reviewed periodically. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

Item (iv) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such means as early exchange of information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

An additional task of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Item (v) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accordance with the court's initial management order under Rule 16.1(c). In some MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As item (vi) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, item (vii) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for the management of case staffing, timekeeping, cost reimbursement, and related common benefit issues. But it may be best to defer entering a specific order relating to a common benefit fee and expenses until well into the proceedings, when the court is more familiar with the effects of such an order and the activities of leadership counsel.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify one or more classes, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23(g).

Rule 16.1(b)(2)(B)-(E) and (3). Rule 16.1(b)(2) and (3) identify a number of matters that often are important in the management of MDL proceedings. The matters identified in Rule 16.1(b)(2)(B)-(E) frequently call for early action by the court. The matters identified by Rule 16.1(b)(3) are in a separate paragraph of the rule because, in the absence of appointment of leadership counsel should appointment be warranted, the parties may be able to provide only their initial views on these matters at the conference.

Rule 16.1(b)(2)(B). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which they were transferred. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

Rule 16.1(b)(2)(C). The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceeding to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(b)(2)(D). When large numbers of tagalong actions (actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceeding) are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for remand at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related litigation (e.g., state courts and bankruptcy courts) at the case management conferences.

Rule 16.1(b)(2)(E). On occasion there are actions in other courts that are related to the MDL proceeding. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may happen that a party to an MDL proceeding is a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceeding. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such actions in other courts have been filed or are anticipated.

Rule 16.1(b)(3). As compared to the matters listed in Rule 16.1(b)(2)(B)-(E), Rule 16.1(b)(3) identifies matters that may be more fully addressed once leadership is appointed, should leadership be recommended, and thus, in their report the parties may only be able to provide their initial views on these matters.

Rule 16.1(b)(3)(A). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers, in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and

may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in all MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceeding. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

Rule 16.1(b)(3)(B). In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that in many cases an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. 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. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Early exchanges may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as motions to dismiss or other early matters and their impact on the early exchange of information. Other factors might include whether there are issues that should be addressed early in the proceeding (e.g., jurisdiction, general causation, or preemption) and the number of plaintiffs in the MDL proceeding.

This court-ordered exchange of information may be ordered independently from the discovery rules, which are addressed in Rule 16.1(b)(3)(C). Alternatively, in some cases, transferee judges have ordered that such exchanges of information be made under Rule 33 or 34. Under some circumstances – after taking account of whether the party whose claim or defense is involved has reasonable access to needed information – the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

Rule 16.1(b)(3)(C). A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceeding may help guide the discovery plan and avoid inefficiencies and unnecessary duplication.

Rule 16.1(b)(3)(D). Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

Rule 16.1(b)(3)(E). Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the resolution of some or all actions before the transferee court. Ultimately, the question of whether parties reach a settlement is just that – a decision to be made by the parties. But the court may assist the parties in efforts at resolution. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, focused discovery

orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate resolution.

Rule 16.1(b)(3)(F). MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(b)(3)(G). Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(b)(4). In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial management conference.

Rule 16.1(c). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. An initial management order need not address all matters designated under Rule 16.1(b) if the court determines the matters are not significant to the MDL proceeding or would better be addressed in a subsequent order. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is appointed after the initial management conference under Rule 16.1(a).

Revised Proposed New Rule 16.1

Rule 16.1. Multidistrict Litigation

(a) Initial Management Conference. After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial plan for orderly pretrial activity in the MDL proceedings.

(b) Report for the Conference.

(1) ***Submitting a Report.*** The transferee court should order the parties to meet and to submit a report to the court before the conference.

(2) ***Required Content: the Parties' Views on Leadership Counsel and Other Matters.*** The report must address any matter the court designates — which may include any matter in Rule 16 — and, unless the court orders otherwise, the parties' views on:

(A) whether leadership counsel should be appointed and, if so:

(i) the timing of the appointments;

(ii) the structure of leadership counsel;

(iii) the procedure for selecting leadership and whether the

appointments should be reviewed periodically;

(iv) their responsibilities and authority in conducting pretrial activities and any role in resolution of the MDL proceedings;

(v) the proposed methods for regularly communicating with and reporting to the court and nonleadership counsel;

(vi) any limits on activity by nonleadership counsel; and

(vii) whether and when to establish a means for compensating leadership counsel;

(B) any previously entered scheduling or other orders that should be vacated or modified;

(C) a schedule for additional management conferences with the court;

(D) how to manage the direct filing of new actions in the MDL proceedings; and

(E) whether related actions have been — or are expected to be — filed in other courts, and

whether to adopt methods for coordinating with them.

(3) ***Additional Required Content: the Parties' Initial Views on Various Matters.*** Unless the court orders otherwise, the report also must address the parties' initial views on:

(A) whether consolidated pleadings should be prepared;

(B) how and when the parties will exchange information about the factual bases for their claims and defenses;

(C) discovery, including any difficult issues that may arise;

(D) any likely pretrial motions;

(E) whether the court should consider any measures to facilitate resolving some or all actions before the court;

(F) whether any matters should be referred to a magistrate judge or a master; and

(G) the principal factual and legal issues likely to be presented.

(4) ***Permitted Content***: The report may include any other matter that the parties wish to bring to the court's attention.

(c) Initial Management Order. After the conference, the court should enter an initial management order addressing the matters in Rule 16.1(b) and, in the court's discretion, any other matters. This order controls the course of the proceedings unless the court modifies it.