COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 9, 2020

Introduction

The Advisory Committee on Civil Rules met on a teleconference platform that included public access on October 16, 2020. Draft minutes from the meeting are attached to this report.

Part I of this report presents three items for action. The first recommends approval for adoption of amendments to Rule 7.1 that were published for comment in August 2019. The others recommend approval for publication of an amendment to clarify the intended meaning of Rule 15(a)(1) and an amendment to broaden the means for providing notice of a magistrate judge's recommended disposition under Rule 72(b)(1).

Part II of this report provides information about ongoing subcommittee projects. The CARES Act Subcommittee draft Rule 87 addressing declaration of a Civil Rules emergency by the Judicial Conference, as reviewed by the Advisory Committee and approved for discussion along with the emergency rules drafts developed by other advisory committees, is discussed in two places. The joint all-committees report describes the common elements of the various drafts and notes some of the differences. The Civil Rules Committee's report on draft Rule 87 is integrated with the joint report. Part IIA refers back to the joint report. The Advisory Committee has not determined whether any emergency rules provision is necessary for the Civil Rules. When it comes time to recommend publication, the Advisory Committee may recommend simultaneous publication of amendments of specific rules that would take the place of any emergency rules provisions, with an invitation to comment on the wisdom of adopting any emergency rules provision.

Part IIB presents brief accounts of the ongoing work of three other subcommittees. The Advisory Committee has suspended consideration of possible interlocutory appeal rules for MDL proceedings, but the MDL Subcommittee is actively exploring a draft rule that would establish provisions similar to the class action provisions that address the court's role in settlement, and appointment and compensation of lead counsel. A joint subcommittee with the Appellate Rules Committee is exploring possible amendments to address the effects of Rule 42 consolidation in determining when a judgment becomes final for purposes of appeal. Another joint subcommittee continues to consider the time when the last day for electronic filing ends.

Part III describes continuing work on projects carried forward on the agenda for further work. Rule 12(a) seems to recognize that a statute may alter the time to respond under Rule 12(a)(1), but not to recognize statutes that would alter the time set by Rule 12(a)(2) or (3); this proposal remains on the agenda after failing of adoption by an even vote. A potential ambiguity in Rule 4(c)(3) may affect the procedure for ordering a United States marshal to serve process in an *in forma pauperis* or seaman case. Other items include the Rule 5(d)(3)(B) limits on electronic filing by unrepresented parties and the information required in applications for *in forma pauperis* status.

Part IV describes new items that have been added to the agenda and are being carried forward for further work, including the Rule 26(b)(5)(A) provisions for privilege logs; an outside proposal to adopt a broad rule governing practices for sealing court records; and a proposal to amend the Rule 9(b) provisions for pleading malice, intent, knowledge, and other conditions of a person's mind.

Part V describes two proposals that are not being pursued further. One was a proposal to amend Rule 17(d) to require that a public officer who sues or is sued in an official capacity be named only by title, not name. The other was to amend Rule 45 to make it clear that the list of places where a subpoena can compel compliance does not supersede federal statutes that provide for nationwide service and compliance.

I. Action Items

A. For Final Approval: Amendment to Rule 7.1

Two distinct proposals to amend Rule 7.1(a) were published in August 2019. Further consideration of the proposal in light of the public comments demonstrated the wisdom of making a conforming amendment of Rule 7.1(b). The amendments were brought to the Standing Committee with a recommendation for adoption in June 2020. The topic was remanded for further consideration of the part of Rule 7.1(a)(2) that addresses the time of the citizenships that establish or defeat complete diversity. A revised version of that provision was developed after lengthy deliberation. The revised version is recommended for adoption, and is transmitted along with an alternative that takes the simpler approach of omitting any reference to the times of the citizenships.

The proposed amendment to Rule 7.1(a)(1) and the conforming amendment to Rule 7.1(b) are discussed first. They have not presented any difficulty, but the report that recommended them for adoption at the June meeting is presented again for convenience. The more complicated questions raised by Rule 7.1(a)(2) are discussed after that.

The proposed full rule text recommended for adoption, marked to show changes since publication by double underlining, is:

Rule 7.1 Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

(~~1~~A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(~~2~~B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* ~~Unless the court orders otherwise, a~~

~~party i~~In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement that names—and identifies the citizenship of —every individual or entity whose citizenship is attributed to that party or intervenor ~~at the time~~ when:

(A) the action is filed in or removed to federal court, and

(B) any subsequent event occurs that could affect the court's jurisdiction.

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:

(1) file the disclosure statement * * *.

Rule 7.1(a)(1)

The proposal to amend Rule 7.1(a)(1) published in August 2019 reads:

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

~~(1)~~ (A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

~~(2)~~ (B) states that there is no such corporation.

This amendment conforms Rule 7.1 to recent similar amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a). It drew three public comments. Two approved the proposal. The third suggested that the categories of parties that must file disclosure statements should be expanded for both parties and intervenors, a subject that has been considered periodically by the advisory committees without yet leading to any proposals for amending the parallel rules.

The Advisory Committee recommends approval for adoption of the Rule 7.1(a)(1) amendment.

Rule 7.1(b)

Discussion of public comments on the time to make diversity party disclosures under proposed Rule 7.1(a)(2) led the Advisory Committee to recognize that the time provisions in Rule 7.1(b) should be amended to conform to the new provision for intervenor disclosures in Rule 7.1(a)(1):

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:
(1) file the disclosure statement * * *.

* * * * *

This is a technical amendment to conform to adoption of amended rule 7.1(a)(1) and can be approved for adoption without publication.

Rule 7.1(a)(2)

Rule 7.1(a)(2) is a new disclosure provision designed to establish a secure basis for determining whether there is complete diversity to establish jurisdiction under 28 U.S.C. § 1332(a). The Advisory Committee recommends that it be approved for adoption with changes suggested by the public comments, as revised to address the concerns raised in the Standing Committee discussion last June.

The core of the diversity jurisdiction disclosure lies in the requirement that every party or intervenor, including the plaintiff, name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The proposed rule text has been modified to identify more accurately the time that is relevant to determining the citizenships that control diversity jurisdiction.

The citizenship of a natural person for diversity purposes is readily established in most cases, although somewhat quirky concepts of domicile may at times obscure the question. Section 1332(c)(1) codifies familiar rules for determining the citizenship of a corporation without looking to the citizenships of its owners.

Noncorporate entities, on the other hand, commonly take on the citizenships of all their owners. The rules are well settled for many entities. The rule also seems to be well settled for limited liability companies. The citizenship of every owner is attributed to the LLC. If an owner is itself an LLC, that LLC takes on the citizenships of all of its owners. The chain of attribution reaches higher still through every owner whose citizenship is attributed to

an entity closer along the chain of owners that connects to the party LLC. The great shift of many business enterprises to the LLC form means that the diversity question arises in an increasing number of actions filed in, or removed to, federal court.

The challenges presented by the need to trace attributed ownership are a function of factors beyond the mere proliferation of LLCs. Many LLCs are not eager to identify their owners——the negative comments on the published rule included those that insisted that disclosure is an unwarranted invasion of the owners' privacy. Beyond that, the more elaborate LLC ownership structures may make it difficult, and at times impossible, for an LLC to identify all of the individuals and entities whose citizenships are attributed to it, let alone determine what those citizenships are. But if it is difficult for an LLC party to identify all of its attributed citizenships, it is more difficult for the other parties and the court, whose only likely source of information is the LLC party itself.

As difficult as it may be to determine attributed citizenships in some cases, the imperative of ensuring complete diversity requires a determination of all of the citizenships attributed to every party. Some courts require disclosure now, by local rule, standard terms in a scheduling order, or more ad hoc means. And there are cases in which inadvertence, indifference, or perhaps strategic calculation have led to a belated realization that there is no diversity jurisdiction, wasting extensive pretrial proceedings or even a completed trial.

Disclosure by every party when an action first arrives in federal court, or at a later time that may displace the relevance of the time of filing the complaint or notice of removal, is a natural way to safeguard complete diversity. Most of the public comments approve the proposal, often suggesting that it will impose only negligible burdens in most cases. Summaries of the comments were attached to the June report.

The public comments indirectly illuminated the value of developing further the published rule text that identified the time that controls the existence of complete diversity as "the time the action is filed." Many of the comments supporting the proposal suggested that defendants frequently remove actions from state court without giving adequate thought to the actual existence of complete diversity. Some of these comments feared that the published rule text did not speak clearly to the need to distinguish between citizenship at the time a complaint is filed in federal court and citizenship at the time a complaint is filed in state court, to be followed by removal. Removal, for example, may become possible only after a diversity-destroying party is dropped

from the action in state court.

Committee discussion of this question last April emphasized the rules that require complete diversity at some time other than the original filing in federal court or removal to it. One example is changes in the parties after an action is filed. Other and more complex examples may arise in determining removal jurisdiction. Disclosure should aim at the direct and attributed citizenships of each party at the time identified by the complete-diversity rules. The time at which the court makes the determination is not relevant, although the purpose of requiring disclosure is to facilitate determination as early as possible.

These observations led to revising the rule text to the form presented to the Standing Committee last June, calling for disclosures of citizenships:

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

Discussion in the Standing Committee focused on two perceived problems with this formulation.

The first problem arose from concern that the rule would be misread, taking it to address the time for filing the disclosure statement rather than the time of the citizenships that must be considered in determining diversity jurisdiction. That concern could be met by adding redundant but perhaps helpful words to the rule text: " * * * a party or intervenor must, unless the court orders otherwise, file <u>at the time set by Rule 7.1(b)</u> a disclosure statement * * *." But it is better met by substituting a new formula for "at the time" and "at another time" in the rule text. That change is shown in the revised rule text.

The second problem arose from concern that many parties would be confused by the reference to "another time that may be relevant to determining the court's jurisdiction." Diversity will be determined in most cases by the citizenships that exist at the time the action is initially filed in federal court, or at the time it is removed. But many lawyers know that the rules that govern diversity jurisdiction can be complicated, and fear that they must undertake time-consuming and costly research to be sure that their cases do not come within one of the variations on the basic rule. Some might be simply bewildered. The proposal was remanded for further consideration of this concern.

The Advisory Committee's deliberations on remand are summarized in the draft October Minutes. The Advisory Committee

renewed its belief that it is useful to adopt rule text that directs attention to the problem that diversity jurisdiction is not permanently fixed by the citizenships that exist at the time a case first comes to the federal court, whether by initial filing or removal. And it concluded that clear language can reduce, indeed virtually eliminate, the risk that lawyers will be driven to undertake unnecessary research into diversity jurisdiction doctrine. The recommended new language focuses on events subsequent to filing or removal, providing assurance by focusing directly on changes in the shape of the litigation. Substituting "when" for "at the time" also should address the concern about confusion between the time for making disclosure and the times of the citizenships to be disclosed:

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

Although the Advisory Committee recommends this revised version for adoption, it offers an alternative recommendation for adoption in the event that the revised version does not assuage the concerns that led the Standing Committee to remand. The alternative would simply omit everything in subparagraphs (A) and (B) as shown above. The rule text would say nothing about the times of the citizenships that determine whether there is diversity jurisdiction. This version does what is required to establish a disclosure practice that will provide a secure foundation for prompt and accurate determinations of jurisdiction. That is the most important task set for the rule.

This alternative version also responds to the problem presented by any attempt to use rule text to remind the parties of the complexities that occasionally arise from the more esoteric corners of diversity jurisdiction requirements. No court rule can change those requirements. Any attempt to provide a comprehensive digest would inevitably be incomplete, and might well be inaccurate on one or another points. Referring to "another time that may be relevant" showed the risks of a simple reference. Referring to "any subsequent event" may not fully allay this concern. Rule 7.1(b) provides an indirect reminder of the need to supplement an earlier disclosure "if any required information changes." That includes a change in the information that is required as well as a change in the information itself. The committee note can point to the general issue, providing a rough guide of the need to remain alert for developments in the litigation that may call for additional disclosures.

Two additional paragraphs from the June report may be provided to fill out the reminder of other issues that have not been challenged in earlier discussions.

A problem remains when a party's disclosure statement, perhaps illuminated by responses to follow-up discovery, shows that the party cannot identify all of the citizenships that may be attributed to it. The committee note observes that the disclosure rule does not address this problem. Renewed committee discussion rejected a suggestion that the Note should be revised to suggest that a party could ask the court to order that no more than reasonable inquiry is required. The rule cannot reduce the informational burdens required by the doctrines of subject-matter jurisdiction. Nor does it seem wise to attempt to answer the questions that will arise when the party asserting jurisdiction is unable to pry complete information from another party who has far better access to information about its owners, members, or others whose citizenships are attributed to it.

Some public comments opposed adoption of the diversity disclosure proposal. Two of them came from bar groups that have provided helpful advice on many occasions in the past, the American College of Trial Lawyers and the City Bar of New York. Each suggested that a better answer to the dilemma of determining the citizenship of LLCs would be for Congress or the Supreme Court to treat them as corporations. In addition, they suggested that some LLCs may experience great difficulty in determining all attributed citizenships, making it better to rely on targeted discovery in the few cases that present genuine puzzles about citizenship. They also observed that the LLC form is often adopted to protect the privacy of the owners, a point supplemented by other comments suggesting that privacy is particularly important for "non-citizen" owners. An added concern was that expansive diversity disclosures may include so much information that they distract attention from the information that is important in considering judicial recusal, the original purpose of Rule 7.1.

The proposed disclosure rule is recommended for adoption in one of the two forms advanced for discussion. The version that alerts the parties to the need to consider subsequent events that may change the calculus of diversity is the first recommendation. But if it still seems too risky, little is likely to be gained by considering still further variations on subparagraphs (A) and (B). The alternative recommendation is to forgo any attempt to allude to "subsequent events" in rule text by simply omitting subparagraphs (A) and (B) revised. It is not a perfect answer to the puzzles created by the requirement of complete diversity. But it will go a long way toward eliminating inadvertent exercise of federal jurisdiction in cases that should be decided by state courts, and——at least as important——toward protecting against tardy

revelations of diversity-destroying citizenships that lay waste to substantial investments in federal litigation.

Clean Rule Text

Rule 7.1 Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file a statement that:

(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement that names——and identifies the citizenship of——every individual or entity whose citizenship is attributed to that party or intervenor when:

(A) the action is filed in or removed to federal court, and

(B) any subsequent event occurs that could affect the court's jurisdiction.

COMMITTEE NOTE

Rule 7.1(a)(1). Rule 7.1 is amended to require a disclosure by a nongovernmental corporation that seeks to intervene. This amendment conforms Rule 7.1 to similar recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Rule 7.1(a)(2). Rule 7.1 is further amended to require a party or intervenor in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The disclosure does not relieve a party that asserts diversity jurisdiction from the Rule 8(a)(1) obligation to plead the grounds for jurisdiction, but is designed to facilitate an early and accurate determination of jurisdiction.

Two examples of attributed citizenship are provided by § 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as parties a legal representative of the estate of a decedent, an infant, or an incompetent.

Identifying citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or are sued as an entity. A familiar example is a limited liability company, which takes on the citizenship of each of its owners. A party suing an LLC may not have all the information it needs to plead the LLC's citizenship. The same difficulty may arise with respect to other forms of noncorporate entities, some of them familiar——such as partnerships and limited partnerships——and some of them more exotic, such as "joint ventures." Pleading on information and belief is acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction exists and to protect against the waste that may occur upon belated discovery of a diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties and intervenors.

What counts as an "entity" for purposes of Rule 7.1 is shaped by the need to determine whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued in a common name, or is treated as no more than a collection of individuals for all other purposes. Every citizenship that is attributable to a party or intervenor must be disclosed.

Discovery should not often be necessary after disclosures are made. But discovery may be appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a disclosure's list of persons or the accuracy of their described citizenships. This rule does not address the questions that may arise when a disclosure statement or discovery responses indicate that the party or intervenor cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.

The rule recognizes that the court may limit the disclosure in appropriate circumstances. Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties to go behind the disclosure.

Disclosure is limited to individuals and entities whose citizenship is attributed to a party or intervenor. The rules that govern attribution, and the time that controls the determination of complete diversity, are matters of subject-matter jurisdiction that this rule does not address. A supplemental statement is required if events subsequent to the initial filing in federal court or removal

to it require a determination of citizenships as they exist at a time after the initial filing or removal.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provision in Rule 7.1(a)(1) that extends the disclosure obligation to intervenors.

B. For Publication: Cure Literal Gap in Rule 15(a)(1) *Suggestion 19-CV-Z*

A drafting mishap leaves the way open to read a dead zone into the middle of the Rule 15(a)(1) provision for amending a pleading once as a matter of course. The problem arises from the word "within," and is readily remedied by substituting "no later than." Describing the problem shows that correction is easy.

Using italics and overlining to emphasize the problem word, and underlining to identify the cure, Rule 15(a)(1) provides:

> (a) AMENDMENTS BEFORE TRIAL.
> (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course ~~*within*~~ no later than:
> (A) 21 days after serving it, or
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

The problem is that a period introduced by "within" is measured by the required interval counted from the described event. An amendment "within" 21 days from service of a responsive pleading or one of the described Rule 12 motions begins at service, not before. If a responsive pleading is required, subparagraph (A) allows one amendment as a matter of course within 21 days after serving the pleading; that period then closes. The responsive pleading or motion, however, may not have been served by that time. The situations that appear on the face of the rules arise when the time to plead or move is longer than 21 days, most commonly 60 days. Or the time may be extended by agreement of the parties, or perhaps a scheduling order. In those situations, there is a gap in the right to amend. It expires after 21 days from serving the pleading, and is revived only on service of the responsive pleading or motion.

The death and revival of the right to amend once as a matter of course make no sense. It might be hoped that the folly of this unintended result is so apparent that no one would adopt the

literal reading of "within." But lawyers have struggled with the issue, and a number of reported opinions show that courts have had to work to reach the right result. The question is more than theoretical. And it can be fixed so readily that amendment is appropriate.

Substituting "no later than" for "within" makes the intended meaning clear. When a responsive pleading is required, the right to amend once as a matter of course arises on serving the pleading and continues until 21 days after service of a responsive pleading or a designated Rule 12 motion, whichever is earlier.

The Advisory Committee recommends publication for comment of an amendment that substitutes "no later than" for "within" in Rule 15(a)(1).

Clean Rule Text

(a) AMENDMENTS BEFORE TRIAL.
(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course no later than:
(A) 21 days after serving it, or
(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

COMMITTEE NOTE

Rule 15(a)(1) is amended to substitute "no later than" for "within" to measure the time allowed to amend once as a matter of course. A literal reading of "within" would lead to an untoward practice if a pleading is one to which a responsive pleading is required and neither a responsive pleading nor one of the Rule 12 motions has been served within 21 days after service of the pleading. Under this reading, the time to amend once as a matter of course lapses 21 days after the pleading is served and is revived only on the later service of a responsive pleading or one of the Rule 12 motions. [The amendment could not come "within" 21 days after the event until the event had happened.] There is no reason to suspend the right to amend in this way. "No later than" makes it clear that the right to amend continues without interruption until 21 days after the earlier of the events described in Rule 15(a)(1)(B).

C. For Publication: Rule 5 Service Under Rule 72(b)(1)

Rule 72(b)(1) directs a magistrate judge to enter a recommended disposition "when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement." It concludes with this sentence: "The clerk must promptly mail a copy to each party."

Mailing a copy is out of step with current electronic docket practices. Rule 77(d)(1) was amended in 2001 to direct that the clerk serve notice of entry of an order or judgment "as provided in Rule 5(b)."

Criminal Rule 59(b)(1) includes a provision analogous to Civil Rule 72(b)(1), directing the magistrate judge to enter a recommendation for disposition of described motions or matters, and concluding: "The clerk must immediately serve copies on all parties."

The Advisory Committee recommends that Rule 72(b)(2) be amended to incorporate all Rule 5(b) methods for serving notice:

(b) DISPOSITIVE MOTIONS AND PRISONER PETITIONS.

(2) *Findings and Recommendations.* * * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must ~~promptly~~ ~~mail~~ immediately serve a copy ~~to~~on each party as provided in Rule 5(b).

COMMITTEE NOTE

Rule 72(b)(1) is amended to permit the clerk to serve a copy of a magistrate judge's recommended disposition by any of the means provided in Rule 5(b). [Service of notice of entry of an order or judgment under Rule 5(b) is permitted by Rule 77(d)(1) and works well.]

II. Information Items

A. Draft New Rule 87 (Procedure in Emergency)

The report on draft new Rule 87 is included in the joint report on emergency rules for all the advisory committees. As noted earlier, the Civil Rules Committee may recommend simultaneous publication of Rule 87 and, as an alternative to adopting Rule 87, amendments to several regular rules.

B. Subcommittee Activities

1. Multidistrict Litigation Subcommittee

The MDL subcommittee has recently had three issues pending before it. One of them——screening claims——is still under study, and awaiting further information. The second issue was whether to provide by rule for expanded interlocutory appellate review in MDL proceedings. On this issue, after much study, the subcommittee has come to a consensus that rulemaking should not be pursued at this time. The Advisory Committee accepted this recommendation at its October meeting. The third issue——judicial supervision of the selection of leadership counsel and of settlement in MDL proceedings——remains under study.

Screening and the "Census" Idea

The subcommittee's consideration of the "screening" issue began in response to assertions that often a considerable portion of the claims asserted in MDL mass tort situations were unsupportable. Problems with these claims included that the claimant in question did not use the drug or the medical device involved in the litigation, or that the claimant did not have the health condition allegedly caused by the product, or that the claimant used the product too briefly for it to cause the problem, or that the claimant developed symptoms too long after discontinuing use of the product for the product to be a cause of the symptoms. It seemed generally agreed that such unsupportable claims were sometimes presented, though there was debate about whether they often constituted a large proportion of the cases. In addition, there was debate about why such claims would appear in MDL proceedings.

The initial proposal was that the court impose a rigorous automatic requirement that every claimant submit proof of use of the product and development of pertinent symptoms promptly at the commencement of litigation. But early conferences showed that often Plaintiff Fact Sheets (PFSs) were instead obtained in the early stages of MDL proceedings. The subcommittee obtained research assistance from the FJC that indicated that in almost all very large MDLs the court did in fact employ a PFS, and that courts also often required Defendant Fact Sheets (DFSs) as well.

Unlike the proposal that such early submissions all adhere to a form prescribed in a rule, however, actually these fact sheets were ordinarily keyed to the case before the court and took a good deal of time to draft. So it was not clear that any rule could meaningfully prescribe what should be in each one. And some of these documents became fairly elaborate, meaning that providing responses was often burdensome. Some experienced transferee judges

questioned the utility of these detailed documents, commenting that the first page or few pages of a PFS or a DFS often will suffice. Moreover, courts did not undertake to review the submissions on their own motion, but defendants could call to the court's attention deficiencies in some submissions, and dismissal could result with little investment of court time if the deficiencies were not cured. Given the divergences among PFS regimes for differing MDLs, it seemed difficult to devise a rule formula that would improve practice generally.

As these discussions moved forward, parties in various cases began to develop a simplified alternative to a PFS that came to be called a "census" of claims pending in the MDL court. Variations of that method are in use in as many as three major MDL matters, including one pending before Judge Rosenberg, a member of the subcommittee.[1]

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[1] The four proceedings are:

In re Juul (Judge Orrick, N.D. CA.): In October 2019, Judge Orrick directed counsel involved in the MDL proceeding In re Juul Labs, Inc., Marketing, Sales Practices, and Product Liability Litigation (MDL 2913) to develop a plan to "generat[e] an initial census in this litigation," with the assistance of Prof. Jaime Dodge of Emory Law School, who has organized several events attended by members of the MDL Subcommittee. The census requirements applied to all counsel who sought appointment to leadership positions. It appears that relatively complete responses were submitted in December 2019, after which the judge appointed leadership counsel. Disclosures from defendants were due during January. The census method can provide plaintiff-side counsel with a uniform set of questions to ask prospective clients. The census requirements under Judge Orrick's order apply not only to cases on file but also any other clients with whom aspiring leadership counsel had entered into retention agreements. Discussions are under way on the next steps in the litigation, which may involve plaintiff profile sheets or a PFS. The census in this case was not primarily designed as a vetting device, but it is possible that having in hand a list of the sorts of information the court expects from claimants may prompt some counsel to be more focused in evaluating potential claims than would otherwise occur.

In re 3M (Judge Rodgers, N.D. FL): The claims relate to alleged hearing damages related to earplugs that were largely distributed by the military. After appointment of leadership counsel, the judge had counsel design an initial census. But that undertaking involved obtaining military records, an effort that added a layer of complexity to the census. In addition, the due date for census responses was different depending on whether the case had been formally filed or was entered into an "administrative docket" the judge had created. As a general matter, the census was completed in December 2019.

The "census" technique may serve several purposes in mass tort MDLs, including organizing the proceedings, providing a "jump start" to discovery, and possibly contributing to the designation of leadership counsel.

It remains unclear how effective the "census" technique has been in serving any of those purposes. When more is known, it may appear that it is not something appropriately included in a rule, but instead a management technique that could be included in the Manual for Complex Litigation, or disseminated by the Judicial Panel. So this first topic remains under study.

Interlocutory Appellate Review——Recommendation Not to Pursue at this Time Approved by Advisory Committee

The original proposal for a rule providing an additional route to interlocutory review in MDL proceedings, perhaps limited to mass

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In re Zantac (Judge Rosenberg, S.D. FL): This litigation involves a product designed for treatment of heartburn. The MDL includes class claims and individual personal injury claims, and some may go back decades. The Panel order for transfer was entered in February 2020. The litigation is still in the early stages of organization, but much has been done, particularly with regard to the use of census methods. There are 645 filed cases, of which 27 are putative class actions, and a substantial number (in the thousands) of unfiled cases on a registry. The court ordered an initial census including all filed claims and any unfiled claims represented by an applicant for a leadership position. There were 63 applicants for leadership positions. The court received initial census forms for all of the filed cases, including personal injury, consumer, medical monitoring claims among other claims. The court indicated that this was helpful to its consideration of leadership applicants, which have since been appointed. The court also created a registry, which allowed for the filing of a 4-page "census plus" form for unfiled claimants; in broad terms, registry claimants received tolling of the statute of limitations from participating defendants and certain assistance with medical/ purchase records. The census plus form, which was also required for all filed plaintiffs, required information on which product(s) were used, the injuries alleged, and a certification by the plaintiff/claimant. In addition, the form required plaintiffs/claimants to either attach documents showing proof of use and injury, state that they were already ordered privately or through the registry but not yet received, or indicate that no records are expected to exist. The census plus forms are due on a rolling basis, with the first due date (for filed plaintiffs) having passed in July; the second tranche of forms were due in August, but this was extended for certain claimants due to a technical error with a private vendor to September, and was to have been completed in November. [This report includes developments at the time the Advisory Committee agenda book for the October meeting was submitted.]

tort proceedings, called for a right to immediate review without the "veto" that 28 U.S.C. § 1292(b) provides the district court by permitting review only when the district judge certifies that the three criteria specified in the statute are met. Under § 1292(b), the court of appeals has discretion whether to accept the appeal. But the original proposal was to remove that discretion with regard to interlocutory appeals in MDL proceedings, and require the court of appeals to accept the appeal.

From that beginning, the discussion evolved. The notion of mandatory review was dropped relatively early on, and proponents of a rule instead urged something like Rule 23(f), giving the court of appeals sole discretion whether to accept the appeal, and including no provision for input from the transferee district judge on whether an immediate appeal would be desirable. In addition, proponents of a new rule made considerable efforts to provide guidance on distinguishing among MDL proceedings (limiting the new appellate opportunity to only certain MDLs), and on distinguishing among orders, to focus the additional opportunity for interlocutory review on the situations in which it was supposedly needed.

The proponents of expanded interlocutory review came mainly from the defense side, and principally from those involved in defense of pharmaceutical or medical device litigation. The basic thrust of those favoring an additional route for interlocutory review was that interlocutory orders can sometimes have much greater importance in MDL proceedings, which may involve thousands of claims, than in individual litigation. So there might be greater urgency to get key issues resolved, particularly if they were "cross-cutting" issues that might dispose of many or most of the pending cases. One example of such issues was the possibility of preemption of state law tort claims.

Another concern was that some transferee judges might resist § 1292(b) certification when it was justified in order to promote settlement. On the other hand, some suggested that permitting expanded interlocutory review might actually further settlement; defendants unwilling to make a substantial (sometime very substantial) settlement based on one district judge's resolution of an issue like preemption might have a different attitude if a court of appeals affirmed the adverse ruling.

In addition, it was urged that the final judgment rule leads to inequality of treatment. Should defendants prevail on an issue such as preemption, or succeed in excluding critical expert testimony under *Daubert*, plaintiffs often could appeal immediately because that would lead to entry of a final judgment in defendants' favor. But when they failed to obtain complete dismissal of plaintiffs' claims, defendants urged, they would not get a similar immediate route to appellate review.

There was strong opposition from plaintiff-side lawyers. One argument was that the existing routes to interlocutory review suffice in MDL proceedings. There are already multiple routes to appellate review, particularly under 28 U.S.C. § 1292(b), via mandamus and, sometimes, pursuant to Rule 54(b). For recent examples of interlocutory review sought or obtained in MDL proceedings, *see In re National Opiate Litig.*, 956 F.3d 838 (6th Cir. 2020) (granting writ of mandamus on defendants' petition); *In re General Motors LLC Ignition Switch Litig.*, 427 F. Supp. 3d 374 (S.D.N.Y. 2019) (certifying issue for appeal under § 1292(b) on plaintiffs' motion; court of appeals granted review); *In re Blue Cross Blue Shield Antitrust Litig.*, 2018 WL 3326850 (N.D. Ala., June 12, 2018) (certifying issue for appeal under § 1292(b) on defendants' motion; court of appeals did not grant review). Expanding review assertedly would lead to a broad increase in appeals and produce major delays without any significant benefit, particularly when the order is ultimately affirmed after extended proceedings in the court of appeals. And, of course, the "inequality" of treatment complained of is a feature of our system for all civil cases, not just MDLs.

Both sides provided the subcommittee with extensive submissions, including considerable research on actual experience with interlocutory review in MDL proceedings. There was very serious concern, including among judges, about the delay consequences of such review.

In addition, the Rules Law Clerk provided the subcommittee with a memorandum. Some conclusions seem to follow from these materials:

1. There are not many § 1292(b) certifications in MDL proceedings.

2. The reversal rate when review is granted is relatively low (about the same as in civil cases generally).

3. A substantial time (nearly two years) on average passes before the court of appeals rules.

4. The courts of appeals (and district courts) appear to acknowledge that there may be stronger reasons for allowing interlocutory review because MDL proceedings are involved.

The subcommittee has received a great deal of input and help in evaluating these issues. Representatives of the subcommittee have attended (and often spoken at) at least 15 conferences around the country (and one in Israel) dealing with issues the subcommittee was considering. Two of them were full-day events

organized by Emory Law School to focus entirely on the interlocutory review issues.

The most recent conference——on June 19, 2020——involved lawyers and judges with extensive experience in MDL proceedings more generally, not only "mass tort" litigation. Two members of the Standing Committee participated. In all, the participants included ten district judges and four court of appeals judges. Both the current Chair of the Judicial Panel and the previous Chair participated. Two former Chairs of the Standing Committee participated, as well as a number of other judges with experience on the Rules Committees. There were also two judicial officers from the California state courts——a Superior Court judge who is in the Complex Litigation Department of Los Angeles Superior Court and a Justice of the California Court of Appeal who provided the subcommittee with a memorandum on a 2002 statute adopted in California that provided for interlocutory review on grounds very similar to those in § 1292(b).

After this conference, the subcommittee met by conference call to discuss its recommendation to the full Advisory Committee on whether to pursue a rule for expanded interlocutory review. The starting point is that the many events attended by members of the subcommittee, entirely or largely addressed to the appellate review question, have provided a thorough examination of the subject. And an additional starting point was that the existing routes to interlocutory review provide meaningful review in at least some cases. Particularly in light of the low rate of reversal when review is granted, it is difficult to conclude that there is evidence of a serious problem to be solved by expanding interlocutory review.

Against this background, all subcommittee members concluded that proceeding further with this idea was not warranted in light of the many difficulties with doing so (some of which are mentioned below in a footnote, as they would remain important were the subcommittee to continue down this path). Some of the reasons mentioned by subcommittee members can be summarized as follows:

Delay: There is clearly a significant issue with delay, and in some circuits it may be more substantial than in others. Though allowing expanded avenues for review need not be linked to a stay of proceedings in the district court, the more that one focuses review on "cross-cutting" issues, the greater the impulse to pause proceedings until that issue is resolved.

Broad judicial opposition: Though there are some judges who have participated in events attended by members of the subcommittee who expressed willingness to consider expanded interlocutory review, by and large judges were opposed. Court

of appeals judges often resisted any idea of "expedited" treatment on appeal of MDL matters (suggested as an antidote to the delay problem), and many regarded existing avenues for interlocutory review as sufficient to deal with real needs for review.

Undercutting the federal court's potential "leadership" role when there is parallel litigation in state courts: When there are federal MDL proceedings, particularly in "mass tort" litigation, it often happens that there is also parallel state court litigation, and the federal MDL court can provide something of a "leadership" role and coordinate with the state court judges. But if the progress of the federal MDL were stalled by an interlocutory appeal, at least some of the state courts likely would not be willing to wait for the resolution of a potentially lengthy period of appellate review. Resulting fragmentation of the overall litigation would be undesirable and inconsistent with the overall objective of § 1407, which seeks consistent management and judicial efficiency. That would be an unintended consequence, but still could be serious; indeed, a judge who participated in the June 19 event called it the "Achilles heel of MDL."

Difficulties defining the kinds of MDL proceedings in which the new avenue for appeal would apply: Originally, the proposal for expanding interlocutory review focused on "mass tort" MDLs. That category does seem to include most of the MDLs with very large claimant populations. But it's not clear that it would include all of them. The VW Diesel litigation, for example, involved tens of thousands of claimants, but was mainly claiming economic rather than personal injury damages. And data breach MDLs may become more common, raising potentially difficult issues about what is a "personal injury" claim.

An additional difficulty is to determine whether there should be a numerical cutoff to trigger the opportunity for review. Whatever number were chosen to trigger the right to expanded review (e.g., 500 claimants, 1,000 claimants), there could be difficulties determining when that milestone was passed. Some research suggests that some MDL proceedings receive huge numbers of new entrants long after the centralized proceedings were begun. Triggering a new interlocutory review opportunity then would not seem productive. Moreover, there could sometimes be a question about whether one should "count" the unfiled claims on a registry, as in the Zantac litigation.

Finally, if the new appellate route were available in all MDLs (perhaps because no sensible line of demarcation among MDL proceedings could be articulated in a rule), rather than only

some of them, there might be questions about why an MDL centralization order would expand the opportunity for interlocutory review when individual cases or consolidated actions in a given district might involve many more claimants (perhaps hundreds or thousands) but not be eligible for expanded interlocutory review.

Difficulties defining the kind of rulings that could be reviewed, and burdening the court of appeals: Another narrowing idea that was proposed was to limit the new route to review to rulings on certain legal issues——e.g., preemption motions or *Daubert* decisions or jurisdictional rulings——but none of those limitations appeared easy to administer, and these rulings did not seem so distinctive as to support a special route to immediate review.

Another idea was to focus on "cross-cutting" rulings, those that are "central" to a "significant" proportion of the cases pending in the district court. That determination could be particularly challenging for a court of appeals, as it might mean that the appellate court would need to become sufficiently familiar with all the litigation before the district court to determine whether the rule's criteria were satisfied. A Rule 23(f) petition for review, by way of contrast, would not require consideration of such varied issues dependent on the overall and individual characteristics of what is often sprawling litigation.

Undercutting the district court: As noted below, the subcommittee has concluded that if it is to proceed further along this path, it is important to ensure a central role for the district court, if not a "veto" as provided in § 1292(b). Only the district court will be sufficiently familiar with the overall litigation to advise the court of appeals on the role of the ruling under challenge in the overall progress of the litigation. Though one might rewrite § 1292(b) to change the "materially advance the ultimate termination of the litigation" standard in the statute to take into account the limit of § 1407 to "pretrial" proceedings, the existing standard does not seem to have deterred transferee judges from certifying issues for interlocutory review. Any new rule would have to ensure that the district court's perspective was included, not only to assist the court of appeals but also to recognize the need to avoid unnecessary disruption of proceedings in the district court.

For these reasons and others, the subcommittee recommended that further efforts on expanding interlocutory review not be pursued at this time, and the Advisory Committee accepted that

recommendation at its October meeting.[2]

[2] The subcommittee also reported to the Advisory Committee on additional issues that would likely have to be confronted if further work on this subject were done:

Appeal as of right: The original proposal was for a right to appeal from any ruling falling within a defined category in any MDL proceedings involving "personal injury" claims. The subcommittee has reached consensus that no rule should command that the court of appeals entertain such an appeal. Any rule would have to provide the court of appeals discretion to decide whether to accept a petition for review.

Expedited treatment of an appeal in the court of appeals: Another suggestion was that a Civil Rule direct that the court of appeals "expedite" the resolution of appeals it has decided to accept under the hypothetical new rule. It is not clear how a Civil Rule could require such action by a court of appeals. Putting that issue aside, the subcommittee has reached consensus that there is no persuasive reason for requiring that the court of appeals alter the sequence of decisionmaking it would otherwise adopt and advance these appeals ahead of other matters, such as criminal cases, broad-based (even national) injunctions regarding governmental activity, cases accepted for review under existing § 1292(b) or Rule 23(f), or ordinary appeals after final judgment.

Ensuring a role for district court: As noted above, the subcommittee is committed to ensuring a role for the district court in advising the court of appeals on whether to grant review. Not only is that advice likely critical to provide the court of appeals with sufficient information to permit it to make a sensible determination whether to grant review, but it is also critical to safeguarding against disrupting the district court's handling of the centralized litigation. The goal of § 1407 transfer is to provide a method for coordinated and disciplined supervision of multiple cases (perhaps inclining state courts to follow federal "leadership" with regard to cases pending in state courts) and, as noted above, the delays that can attend interlocutory review could disrupt that coordinated supervision.

Devising a method for the district court's input to be provided: The best method for providing a district court role likely would present drafting challenges, however. Numerous models already exist, including § 1292(b) (district court certification required); Appellate Rule 21(b)(4) (the court of appeals may invite or order the district judge to address a petition for mandamus); Cal. Code Civ. Pro. §166.1 (permitting any party to request, or the trial court judge to provide without a request, an indication whether the trial court judge believes immediate review would materially advance the conclusion of the litigation). Alternatively, a rule could give the district court a period of time (say 30 days) to express its views on the value of immediate review, perhaps including specifically the question whether immediate review would be useful only if the appeal were resolved within a specified period of time. The subcommittee has not reached consensus on which method would be best to ensure a role for the district court should this effort continue.

Court Role in Supervision of Leadership Counsel and Reviewing Global Settlements——Ongoing Study and a Miniconference

The third and final issue presently on the subcommittee's agenda is the possibility of developing a rule addressing appointment of leadership counsel, judicial supervision of compensation of leadership counsel, and judicial oversight of "global" settlements sometimes negotiated by leadership counsel. This set of issues appears in important ways to be the most challenging of the questions the subcommittee has confronted.

Owing to the attention focused on the two other issues that the subcommittee has been reviewing, it has thus far given little attention to this topic. On September 10, 2020, the subcommittee met by conference call to discuss ways forward on this topic. The consensus view was that the subcommittee needed more information about these issues. Though it has had the benefit of important FJC research on the use of the PFS method to organize MDL mass tort litigation, and of numerous conferences and submissions about the possibility of a rule expanding interlocutory review, it has not received comparable input on this third topic.

The method identified for providing the needed perspective is to convene a conference involving experienced participants who present a variety of perspectives. The objective would be to make certain that there were diversity among the invitees, not only in terms of defense-side and plaintiff-side lawyers, but also emphasizing the need for diversity in race, gender, age, and other ways. One thing emphasized was involving lawyers who had sought leadership appointment in MDLs but not been selected. Academic participants should also be included, hopefully representing a range of attitudes on this subject. And of course, it will be critical to involve experienced judges.

Scope of a rule——types of MDL cases: As noted above, limiting a rule to "personal injury" MDL proceedings seems unlikely to work. Similarly, the prospect of limiting a rule to a certain kind of ruling (e.g., preemption or a "cross-cutting" issue) seems unpromising. It may be, then, that interlocutory review under the rule would have to be available in all MDL proceedings and as to any type of ruling. But that might prompt a question: Why should there be a special route to review in an MDL proceeding with eight cases, but not in a single-district consolidated proceeding with 800 claimants? Moving toward a rule that applied to all cases (as does the Cal. Code Civ. Pro. § 166.1, mentioned above) could raise questions about whether the rulemaking process really is authorized to relax the statutory criteria in § 1292(b) for all cases. True, § 1292(e) says that rulemaking may provide for interlocutory appeals not otherwise provided under existing sub-sections of the statute, but a rule that in effect could be said to relax one or more requirements of § 1292(b) in all cases might be resisted on the ground it really goes beyond the rulemaking power authorized by § 1292(e).

The subcommittee invites the Standing Committee's help in identifying suitable participants for this planned event. The goal will be to hold the event in advance of the Advisory Committee's Spring 2021 meeting, and perhaps be able to report then with more definite views on how and whether to proceed along these lines.

Because less work has been done on this subject than others, the following introduction is similar to previous presentations on this subject, but it identifies the issues and challenges of this part of the project.

A starting point is to recognize that, fairly often, it seems that the gathering power of MDL proceedings might on occasion bear a significant resemblance to the class action device, perhaps to approach being a de facto class action from the perspective of claimants. But the history of rules for these two semi-parallel devices has differed considerably, particularly regarding supervision of counsel, attorney's fees for leadership counsel, and settlement review.

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

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

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

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

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

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

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

So sometimes——again perhaps particularly in "mass tort" MDLs——the actual evolution and management of the litigation may resemble a class action. Though claimants have their own lawyers (sometimes called IRPAs——individually represented plaintiffs' attorneys), they may have a limited role in managing the course of the MDL proceedings. A court order may forbid the IRPAs to initiate discovery, file motions, etc., unless they obtain the approval of the attorneys appointed by the court as leadership counsel. In class actions, a court order appointing "interim counsel" under

Rule 23(g) even before class certification may have a similar consequence of limiting settlement negotiation (potentially later presented to the court for approval under Rule 23(e)), which might be likened to the role of the court in appointing counsel to represent one side or the other in MDL proceedings.

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

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

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

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

The absence of clear authority or constraint for such judicial activity in MDL proceedings has produced much uneasiness among

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

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

But it is not clear that judges who have been handling these issues feel a need for either rules-based authority or further direction on how to wield authority already widely recognized. Research has found that judges do not express a need for greater or clarified authority in this area. And the subcommittee has not, to date, been presented with arguments from experienced counsel in favor of proceeding along this line. All participants——transferee judges, plaintiffs' counsel and defendants' counsel——seem to prefer avoiding a rule amendment that would require greater judicial involvement in MDL settlements.[3]

For the present, the subcommittee has begun discussing this subject. This very preliminary discussion has identified a number of issues that could be presented if serious work on possible rule proposals occurs. These issues include the following:

[3] One more recent development deserves mention. In September 2019, Judge Polster used Rule 23 to certify a "negotiation class" to negotiate a settlement on behalf of local governmental entities with claims involved in the Opioids MDL. After accepting an appeal under Rule 23(f), the Sixth Circuit, by a 2-1 vote, ruled that such certification was not authorized by Rule 23. *In re National Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020). A petition for rehearing en banc has been filed.

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

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

Interim lead counsel: Rule 23(g) explicitly authorizes appointment of interim class counsel. The goal is that the person or persons so appointed would be subject to the requirements of Rule 23(g)(4) that counsel act in the best interests of the class as a whole, not only those with whom counsel has a retainer agreement. In some MDL proceedings, an initial census or other activity may precede the formal appointment of leadership counsel. Whether such interim leadership counsel can negotiate a proposed global settlement (as interim class counsel can negotiate before certification about a pre-certification classwide settlement) could raise issues not pertinent in class actions. It may be that the more appropriate assignment of such interim counsel should be——as seems to be true of the MDL proceedings where this has occurred——to provide effective management of such tasks as an initial census of claims.

Duties of leadership counsel: Appointment orders in MDL proceedings sometimes specify in considerable detail what leadership counsel are (and perhaps are not) authorized to do. Such orders may also restrict the actions of other counsel. Significant concerns have arisen about whether leadership counsel owe a duty of loyalty, etc., to claimants who have retained other lawyers (the IRPAs). Some suggest that detailed specification of duties of leadership counsel from the outset

would facilitate avoiding "ethical" problems later on. The subcommittee has heard that some recent appointment orders productively address these issues.

It seems true that the ordinary rules of professional responsibility do not easily fit such situations. Regarding class actions, at least, Restatement (Third) of the Law Governing Lawyers § 128 recognized that a different approach to attorney loyalty had been taken in class actions. It may be that similar issues inhere in the role of leadership counsel in MDL proceedings. Both the wisdom of rules addressing these issues, and the scope of such rules (on topics ordinarily thought to be governed by state rules of professional responsibility) are under discussion. Given that most (or all) claimants involved in an MDL actually have their own lawyers (not ordinarily true of most unnamed class members), it may be that rule provisions ought not seek to regulate these matters.

Common benefit funds: Leadership counsel are obliged to do extra work and incur extra expenses. In many MDLs, judges have directed the creation of "common benefit funds" to compensate leadership counsel for undertaking these extra duties. A frequent source of the funds for such compensation is a share of the attorney fees generated by settlements, whether "global" or individual. In some instances, MDL transferee courts have sought thus to "tax" even the settlements achieved in state-court cases not formally before the federal judge. From the judicial perspective, it may appear that the IRPAs are getting a "free ride," and that they should contribute a portion of their fees to pay for that ride.

Capping fees: Somewhat in keeping with the "free ride" idea, judges have sometimes imposed caps on fees due to IRPAs at a lower level than what is specified in the retainer agreements these lawyers have with their clients. The rules of professional responsibility direct that counsel not charge "unreasonable" fees, and sometimes authorize judges to determine that a fee exceeds that level. It is not clear whether this "capping" activity is as common as orders creating common benefit funds. Whether a rule should address, or try to regulate, this topic is uncertain.

Judicial settlement review: As some courts put it, the court's role under Rule 23(e) is a "fiduciary" one, designed to protect unnamed class members against being bound by a bad deal. But ordinarily in an MDL each claimant has his or her own lawyer. There is no enthusiasm for a rule that interferes with individual settlements, or calls for judicial review of them (although those settlements may result in a required payment into a common benefit fund, as noted above).

So it may seem that a rule for judicial review of settlement provisions in MDL proceedings is not appropriate. But it does happen that "global" settlements negotiated by leadership counsel are offered to claimants, with very strong inducements to them or their lawyers to accept the agreed-upon terms. In such instances, it may seem that sometimes the difference from actual class action settlements is fairly modest. Indeed, in some instances there may be class actions included in the MDL, and they may become a vehicle for effecting settlement.

As noted above, it appears that some leadership appointment orders include negotiating a "global" settlement as among the authorities conferred on leadership counsel. Even if that is not so, it may be that leadership counsel actually do pursue settlement negotiations of this sort. To the extent that judicial appointment of leadership can produce this situation, then, it may also be appropriate for the court to have something akin to a "fiduciary" role regarding the details of such a "global" settlement.

Ensuring that any MDL rules mesh with Rule 23: As noted, MDLs include class actions with some frequency. So sometimes Rules 23(e), (g) and (h) would apply. But it is certainly possible that in some MDLs there are both claims included in class actions and other claims that are not. If the MDL rules for the topics discussed above do not mesh with Rule 23, that could be a source of difficulty. Perhaps that is unavoidable; this potential dissonance presumably already exists in some MDL proceedings. But the possibility of tensions or even conflicts between MDL rules and Rule 23 merits ongoing attention.

At present, the basic question is whether there should be some formal statement of many practices that have been adopted——and sometimes become widespread——in managing MDL proceedings. Whether such a statement ought to be in the rules is not clear. There are alternative locations, including the Manual for Complex Litigation, the annual conference the Judicial Panel puts on for transferee judges, and the JPML's website. Perhaps it could be sufficient to expect that experienced MDL litigators will carry the issues and related practices from one proceeding to another, and experienced MDL transferee judges will communicate among themselves and with those new to the fold.

The idea of relying on informal circulation of information about such practices prompted a repeated concern——there is good reason to make efforts to expand and diversify the ranks of lawyers who take on leadership positions. That is one of the reasons why the subcommittee conference call on September 10 included emphasis on involving younger lawyers and, perhaps particularly, those who

had sought but not yet received appointment to a leadership position. Anything that formalizes best practices should not impede progress on this important effort. On the other hand, some formal statement might be advantageous by making these practices known more widely and more accessible to those not steeped in this realm of practice.

Another consideration is the possibility that some judges or litigators might entertain doubts about the courts' authority to do the sorts of things that have commonly been done to manage MDL proceedings. Though Rule 23 is a secure basis for judicial authority to review the terms of proposed settlements, in MDL proceedings not involving Rule 23 the judicial role is more advisory or supervisory. There may be serious questions about whether a rule can authorize a judge to "approve" or perhaps even comment on the terms of a proposed settlement in an MDL. There seems scant basis for judicial authority to bind individual parties to a proposed settlement simply because they have been aggregated, sometimes unwillingly, under § 1407.

So it may be that if more formalized provisions are needed the anchor could be the court's authority to designate a leadership structure, something that has been widely recognized. The reality is that judges may prescribe specific duties for leadership counsel (and also on occasion restrict the authority of non-leadership lawyers to act for their clients). A judge's authority to appoint and prescribe responsibilities for leadership counsel might also include continuing authority to supervise the performance of the leadership lawyers, including in connection with settlement negotiation. This undertaking could introduce further complexity in addressing the nature of possible responsibilities leadership counsel have to claimants who are not their direct clients.

In the background, then, are questions about whether the mere creation of an MDL proceeding provides authority for a federal judge to regulate attorney-client contracts, ordinarily governed by state law. One thought is that establishing a leadership structure is a matter of procedure that can properly be addressed by a Civil Rule. Establishing the structure in turn requires definition of leadership roles and responsibilities, and also requires providing financial support for the added work and attendant risks and responsibilities assumed by leadership counsel. Even accepting these structural elements, however, does not automatically carry over to creating a role for the MDL court in reviewing proposed terms for settlements, particularly of individual claims. Judges have differing views on the appropriate judicial role in providing settlement advice. Even in terms of broader "global" settlements, a wary approach would be required in considering an attempt to regularize a role for judges in working toward settlements in MDL proceedings.

At least the following questions have already emerged:

1. Is there any need to formalize rules of practice——whether in structuring management of MDL proceedings or in working toward settlement——that are already familiar and that continue to evolve as experience accumulates?

2. Do MDL judges actually hold back from taking steps that they think would be useful because of doubts about their authority?

3. There are indications that any formal rulemaking would initially be resisted by all sides of the MDL bar and by experienced MDL judges. Is that an important concern that should call for caution? Or is it a good reason to look further into the arguments of some academics that it is important to regularize the insider practices that characterize a world free of formal rules?

4. Even apart from concerns about the reach of Enabling Act authority, would many or even all aspects of possible rules interfere improperly with attorney-client relationships?

5. Would rules in this area unwisely curtail the flexibility transferee judges need in managing MDL proceedings?

6. Would rule provisions for common-benefit fund contributions, and for limiting fees for representing individual clients, impermissibly modify substantive rights, even though courts are often enforcing such provisions without any formal authority now?

7. Would formal rules for designating members of the leadership somehow impede efforts to bring new and more diverse attorneys into these roles?

During the Advisory Committee's October 2020 discussion, the plan for a conference on these issues met with approval. Standing Committee insights and guidance would be helpful. The Appendix below offers a sketch of a possible rule approach to some of these issues, along with notes raising questions. The inclusion of this sketch does not imply that the subcommittee or the Advisory Committee is convinced that proceeding down this rulemaking road is warranted. It also should be noted that while the sketch attempts to raise the full range of issues that have surfaced on this very broad topic, the subcommittee may decide after further study to narrow its focus to a much smaller subset of these issues——or, of course, not to recommend pursuit of any of them.

APPENDIX
Sketch of Possible Rule approach

The sketch below is offered solely to provide a concrete example of how the topics discussed above might be addressed in a rule. As emphasized in this agenda memo, the subcommittee has not made any decision about whether to recommend attempting to draft a rule. Indeed, even if some provisions regarding these matters would be useful, it need not follow that they should be embodied in a rule, as opposed to a manual or instructional materials for the Judicial Panel.

Rule 23.3. Multidistrict Litigation Counsel

(a)(1) *Appointing Counsel.* When actions have been transferred for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407, the court may appoint [lead][4] counsel to perform designated [acts][responsibilities] on behalf of[5] all counsel who have appeared for similarly aligned parties.[6] In appointing [lead] counsel the court:

(A) must consider:

(i) the work counsel has done in preparing and filing individual actions;

(ii) counsel's experience in handling complex litigation,

[4] It may work to leave the many tiers of counsel to the committee note. There may or may not be a single "lead" counsel——it is at least possible to designate an executive committee or some such without identifying a single lead counsel. In addition to lead counsel, there may or may not be a steering or executive committee, subcommittees for discovery or whatever, liaison counsel to work with other counsel in the MDL proceeding, liaison counsel to work with lawyers and actions in state courts, and so on through the needs of a particular MDL. The court may or may not want to be involved in appointing all of these various roles.

[5] It is not clear that we want to designate class counsel to represent parties other than their own clients. Probably we cannot say "to represent" other lawyers who represent clients in the MDL proceeding. "Manage" the proceedings might imply too much authority. "Coordinate" addresses the basic purpose. "Coordinate the efforts of all counsel [on a side]" might work, but it may leave the way open to disruption by individual lawyers not appointed to any role.

[6] This is an elastic concept, but perhaps better than "[all] plaintiffs" or "[all] defendants." Large numbers of third-party defendants have not appeared in our discussions, but the more general phrase may be better.

multidistrict litigation, and the types of claims asserted in the proceedings;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to the proceedings;

(B) may consider any other matter pertinent to counsel's ability to perform the designated [acts][responsibilities];

(C) may order potential [lead] counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and taxable costs;

(D) may include in the appointing order provisions about the role of lead counsel and the structure of leadership, the creation and disposition of common benefit funds under Rule 23.3(b), discussion of settlement terms [for parties not represented by lead counsel] under Rule 23.3(c), and matters bearing on attorney's fees and nontaxable costs [for lead counsel and other counsel] under Rule 23.3(d); and

(E) may make further orders in connection with the appointment[, including modification of the terms or termination].

(2) *Standard for Appointing Lead Counsel.* The court must appoint as lead counsel one or more counsel best able to perform the designated responsibilities.

(3) *Interim Lead Counsel.* The court may designate interim lead counsel to report on the ways in which an appointment of lead counsel might advance the purposes of the proceedings.

(4) *Duties of Lead Counsel.* Lead counsel must fairly and adequately discharge the responsibilities designated by the court [without favoring the interests of lead counsel's clients].

(b) COMMON BENEFIT FUND. The court may order establishment of a common benefit fund to compensate lead counsel for discharging the designated responsibilities. The order may be

modified at any time, and should [must?]:
(1) set the terms for contributions to the fund [from fees payable for representing individual plaintiffs]; and
(2) provide for distributions to class counsel and other lawyers or refunds of contributions.

(c) SETTLEMENT DISCUSSIONS. If an order under Rule 23.3(a)(1)(D) authorizes lead counsel to discuss settlement terms that [will? may?] be offered to plaintiffs not represented by lead counsel, any terms agreed to by lead counsel:
(1) must be fair, reasonable, and adequate;[7]
(2) must treat all similarly situated plaintiffs equally; and
(3) may require acceptance by a stated fraction of all plaintiffs, but may not require acceptance by a stated fraction of all plaintiffs represented by a single lawyer.

(d) ATTORNEY FEES.
(1) *Common Benefit Fees.* The court may award fees and nontaxable costs to lead counsel and other lawyers from a common benefit fund for services that provide benefits to [plaintiffs? parties?] other than their own clients.[8]

[7] This is a particularly difficult proposition. In one way it seems obvious, and almost compelled by the analogy to Rule 23(e). But the justification depends on the proposition that a leadership team may face the same de facto conflicts of interests as class counsel. The incentive to settle on terms that produce substantial fees——both for representing individual plaintiffs and for common-benefit activities——may be real. But the comparison to Rule 23 is complicated by the right of each individual plaintiff to settle, or refuse to settle, on whatever terms that plaintiff finds adequate.

[8] Another tricky question. Lead counsel services often provide benefits both to lead counsel's clients and to other parties, usually——perhaps always?——other plaintiffs. But some services may provide benefits only to others' clients. A particular member of the leadership team, for example, may have clients who used only one version of a product that, in different forms, caused distinctive injuries to others, but the work can easily cross those boundaries. And we have occasionally heard hints about leadership counsel who have no clients at all. Is it feasible to write anything about the distinction into rule text? And is there any reason to try: if my hard work would be just as hard if I were representing only my own clients, but it confers great benefit on other lawyers who are spared the need to duplicate the work, why not provide some compensation for the benefit?

(2) *Individual Contract Fees.* The court may modify the attorney's fee terms in individual representation contracts when the terms would provide unreasonably high fees in relation to the risks assumed, expenses incurred, and work performed under the contract.

2. Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee

More than two years ago, the Supreme Court ruled that complete disposition of all claims among all parties to what began as an independent action is a final judgment for appeal purposes even if the action was completely consolidated with one or more other actions for all purposes. At the same time, it suggested that if this interpretation of Rule 42(a) with 28 U.S.C. § 1291 creates problems, the Rules Enabling Act process provides the means for addressing the problems. *Hall v. Hall*, 138 S. Ct. 1118 (2018).

The Appellate Rules and Civil Rules Committees have formed a joint subcommittee to study this question. The Federal Judicial Center has completed an exhaustive docket study requested by the subcommittee. The study explored all civil actions filed in the federal courts in the years 2015, 2016, and 2017. Because all of those actions were filed before *Hall v. Hall* was decided, and because final dispositions take time, final judgments in these actions were about evenly divided between the period before and the period after the decision. The actions filed before the decision had the potential to show the effects of the four different finality rules adopted in different circuits before the Court picked one of them without discussing the others.

The search included actions swept into MDL proceedings, but excluded them from the study. Among the remaining actions, the search found 20,730 originally independent actions that became consolidated into 5,953 "lead" actions. A sample of 400 lead actions yielded 385 that fit the *Hall v. Hall* template. Forty-eight percent of them were resolved by settlement, and another nineteen percent were voluntarily dismissed. The dispositions of those that remained included nine in which an originally independent action was finally concluded before final disposition of the whole consolidated action. Appeals were taken in six of these. Study of these cases did not reveal any appeal problems arising from the new finality rule.

Extension of the FJC study would be costly. It is not clear whether this sort of docket study can reveal any problems that may emerge even at the simple level of appeal opportunities lost for failure to understand or to remember this corner of finality

doctrine. It is clear that a docket study cannot explore the practical problems that this finality rule may generate for district courts, the courts of appeals, and the parties. These problems reflect issues similar to those that led to adoption and revision of the partial final judgment provision in Rule 54(b).

When an appeal is taken in compliance with the *Hall v. Hall* rule, the district court may face difficult choices in managing the parts of the consolidated action that remain before it. Consolidation ordinarily reflects commonalities among the consolidated cases. A ruling that completely disposes of one of them may affect others, and often all. It may be tempting, even important, to defer further proceedings until the appeal provides guidance on the common issues. But there may be offsetting reasons to press ahead, at the risk of investing in proceedings that will have to be undone after the appeal is decided.

The courts of appeals face the inevitable risk that decision of a first appeal will be followed by subsequent appeals that raise the same or similar questions on a common record.

The parties are similarly affected. A losing party may be forced to take an appeal even though it would be better to await complete disposition of the consolidated action and join an appeal taken by others. The parties who remain in the district court may feel it is important to provide support for the appeal, even recognizing that as nonparties to the appeal they may choose to duplicate their efforts on a later appeal if the first does not succeed. And they have interests parallel to the interests of the district court and court of appeals in avoiding either the delay of suspending proceedings pending appeal or the waste of continuing proceedings that may need to be repeated.

The subcommittee will undertake informal inquiries in a few courts of appeals to see whether judges and court staffs can shed light on how the new finality rule is working. There is no special urgency about determining whether to develop alternative rules of finality for consolidated proceedings. The new rule is clear. When known and remembered, it is easy——even if inconvenient——to comply. Better empirical information may become available, whether to support or allay the concerns.

3. E-Filing Deadline Joint Subcommittee

All but the Evidence Rules include identical provisions defining the end of the last day for electronic filing. Civil Rule 6(a)(4)(A), like the others, sets the end “at midnight in the court’s time zone.”

The question addressed by the subcommittee is whether the time

should be set earlier. One possibility, among others, would set the time at the close of the clerk's physical office.

The FJC has undertaken a comprehensive study of electronic filing patterns. The subcommittee will resume active deliberations when the FJC study is completed.

III. Information Items: Proposals Carried Forward

A. Rule 12(a): Filing Times and Statutes
Suggestion 19-CV-O

Discussion of this item, sketched below, failed to gain a recommendation to publish by an evenly divided Advisory Committee vote. It will be carried forward for consideration at the spring meeting.

Paragraphs (1), (2), and (3) of Rule 12(a) set the general times to respond at 21 days in (1), and 60 days in (2) and (3). Rule 12(a)(1) begins by deferring to statutes that set different times: "Unless another time is specified by this rule or a federal statute * * *." Rules 12(a)(2) and (3) do not include a similar recognition of different statutory times in actions against the United States, its agencies, or its officers sued in an official capacity (2) or in an individual capacity for official acts (3). The structure of Rule 12(a) makes it at best difficult to transport the qualification in (1) to (2) and (3). But there are federal statutes——the Freedom of Information Act and the Government in Sunshine Act——that set the time to answer at 30 days, not the 60 days provided by Rule 12(a)(2). No statute setting a different time for actions covered by Rule 12(a)(3) has been found, but there may be such a statute and it is always possible that one or more may be enacted.

The Advisory Committee believes there is no reason to supersede statutory provisions by Rule 12(a), nor to complicate the task of persuading a court that a later-enacted statute has superseded Rule 12(a) when it applies. A clarifying amendment is readily drafted:

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

Both practical and conceptual reasons were advanced for making the

amendment.

As a practical matter, it may require some advocacy to persuade a court clerk to issue a summons requiring a response within a statutory period that supersedes the general 60-day provisions in subdivision (2) or, if a statute be found, in subdivision (3). The lawyer who proposed an amendment encountered just such a situation.

As a conceptual matter, it is unseemly to have a rule that reflects deference to statutes in one setting but not in others where inconsistent statutes exist or may come to exist. It does not seem likely that a court would accept an argument that by negative implication from paragraph 12(a)(1), paragraphs (2) and (3) supersede any inconsistent statute adopted before they were adopted. But the argument may well be made, and the rule text may create unnecessary work for court clerks and attorneys who seek to honor statutory provisions.

The argument against making the amendment is pragmatic. The Department of Justice reports that it responds within the statutory 30 days for actions that present only claims under the Freedom of Information Act or the Government in Sunshine Act, although it may request an extension. In actions that combine claims under those statutes with other claims that fall into the general 60-day response period, they ordinarily seek an extension to allow the response within 60 days. They believe there is no practical problem, and are concerned that reflecting the statutory periods in amended rule text might make some judges more reluctant to extend the time to respond.

B. Rule 4(c)(3): Service by the U.S. Marshals Service in *In Forma Pauperis* Cases

Suggestion 19-CV-A

An ambiguity may lurk in the Rule 4(c)(3) provision for service by a United States marshal in actions brought *in forma pauperis* or by a seaman. It can be read to mean that the court must order service by the marshal in every such case. But it also might be read to mean that the court must order service by the marshal only if the plaintiff requests it.

This item was added to the agenda in response to a suggestion made in the Standing Committee at the January 2019 meeting. It is easy to draft rule text that escapes any possible ambiguity. But it has not proved so easy to determine what the unambiguous answer should be——a motion is always required to win an order, a motion is never required to win an order, or an order is made unnecessary by an order that recognizes i.f.p. or seaman status. Attempts to gain insights from the Marshals Service that go beyond recognizing the

burdens they bear when required to make service have not yet been successful, and have stalled in face of the COVID-19 pandemic.

C. Rule 5(d)(3)(B): E-Filing by Unrepresented Person

Suggestions 20-CV-J, K, L, M, N, O, P, Q, S, U, V, W, and X

The electronic filing provisions of Rule 5(d)(3) were amended in 2018. After careful debate, Rule 5(d)(3)(B) permits an unrepresented party to file electronically "only if allowed by court order or by local rule."

The COVID-19 pandemic has brought the question back for further consideration. Filing by nonelectronic means often presents unrepresented parties with still greater challenges than before, including both the physical acts required to file and attendant risks of infection. Courts have responded to these problems in different ways. A preliminary survey of experience in the district courts of the Ninth Circuit showed different responses and different experiences. The flexibility built into Rule 5(d)(3)(B), as with so many other Civil Rules, enables courts to adopt the responses that best fit their local circumstances. An emergency rule does not seem necessary.

The Advisory Committee concluded that it should continue to gather information about experience under the pandemic before considering possible amendments of the current rule.

D. *In Forma Pauperis* Disclosures

Suggestion 19-CV-Q

Last April the Advisory Committee considered a proposal that included serious challenges to the many items of information that are commonly required to apply for i.f.p. status. It concluded then that these questions are better addressed elsewhere, including in the Administrative Office as they relate to the i.f.p. forms it provides, and perhaps in the Committee on Court Administration and Case Management. The topic was retained on the agenda, however, on the understanding that the Appellate Rules Committee is considering these matters in relation to Appellate Rules Form 4.

This topic will carry forward to consider the deliberations of the Appellate Rules Committee.

IV. New Items Carried Forward

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

Suggestions 20-CV-R and 20-CV-DD

Two suggestions focus on practice under Rule 26(b)(5)(A). The

specific focus is on privilege logs, which have become the routine method of satisfying the rule's requirement that a party that withholds information on grounds of privilege make that claim and provide information about what is withheld. The proposal is that the rule be amended to add specifics about how parties are to provide details about materials withheld from discovery due to claims of privilege or protection as trial-preparation materials. These submissions identify a problem that can produce waste. But it is not clear that any rule change will helpfully change the current situation.

The basic difficulty is that an extremely detailed listing of the withheld materials may sometimes be unworkable or extremely costly to produce without providing significant benefit to the parties or the court. But there is no enthusiasm for retracting the general requirement that parties provide notice about what they have withheld. The subject is being carried forward for further study.

1993 adoption of Rule 26(b)(5)

Before 1993, parties withheld materials covered by a privilege from discovery without enumerating what was withheld. Often they relied on some sort of "general objection" that no privileged materials would be produced. Indeed, since Rule 26(b)(1) says only "nonprivileged matter" is within the scope of discovery, one might have asserted that the objection was not needed. In any event, it would often be very difficult for other parties to determine what had not been turned over based on a claim of privilege. There were suspicions that sometimes parties were overly aggressive in their privilege claims.

In 1993, therefore, Rule 26(b)(5)(A) was added. It now provides:

> (A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
> (i) expressly make the claim; and
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

This provision (modeled on a similar provision added to Rule 45 in 1991) sought to dispel the uncertainty that existed

before it went into effect, but did not seek to impose a heavy new burden on responding parties. Hence, the committee note accompanying the 1993 amendment advised:

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

Notwithstanding this directive, there is reason to worry that overbroad claims of privilege still occur. As Judge Grimm noted in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008): "[B]ecause privilege review and preparation of privilege logs is increasingly handled by junior lawyers, or even paralegals, who may be inexperienced and overcautious, there is an almost irresistible tendency to be over-inclusive in asserting privilege protection."

But privilege logs——the customary expectation for complying with Rule 26(b)(5)(A)——were a poor solution to the problem, as Judge Grimm also recognized (id.):

> In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or in camera review of the documents themselves.

For further discussion, *see* 8 Fed. Prac. & Pro. § 2016.1.

2008-09 Advisory Committee Consideration

At the April 2008 Advisory Committee meeting, Prof. Gensler (then the academic member of the Advisory Committee) raised concerns about the actual experience implementing Rule 26(b)(5)(A). Thereafter, further background work was done and the question was further discussed at the Advisory Committee's November 2008 meeting. This discussion was about both the content of privilege logs and the timing for them. One point made was: "Vendors have become insistent that electronic screening software can do the job at much lower cost." Several members of the Advisory Committee reported then that the parties usually work out arrangements that cope with the potential difficulties. The matter was continued on the Committee's calendar, but no further action has been taken.

Pertinent Post-1993 Rule Changes

Since 1993, other rule changes have added provisions that could affect the possible burden of complying with Rule 26(b)(5)(A).

First, in 2006 Rule 26(b)(5)(B) was added, providing that any party could make a belated assertion of privilege, after production, which would require all parties that received the identified information to sequester the information unless the court determined that the privilege claim was unsupported. At the same time, Rule 26(f) was amended to add what is now in Rule 26(f)(3)(D), directing that the parties' discovery plan discuss issues about claims of privilege. But these rule changes did not precisely address the question whether production constituted a waiver, particularly a subject-matter waiver.

Second, in 2008 Congress enacted Fed. R. Evid. 502. In Rules 502(d) and 502(e), that rule gives effect to party agreements that production of privileged material will not constitute a waiver of privilege. In addition, even in the absence of an agreement, Rule 502(b) insulates inadvertent production against privilege waiver if the producing party "took reasonable steps to prevent disclosure." Rule 502 *does* directly address the question whether a waiver has occurred.

Owing to these post-1993 rule changes, therefore, one may conclude that the burdens of complying with Rule 26(b)(5)(A) have abated somewhat. A significant concern had been that failure to log a particular item would work a waiver even if the item was not produced. But it seemed that courts finding such waivers did so only as a sort of sanction for relatively flagrant disregard of the Rule 26(b)(5)(A) obligation, not for a simple slip-up. Due to Rule 26(b)(5)(B), there is now a procedure to retrieve a mistakenly-produced privileged item, leaving it to the party that

obtained the item to seek a ruling in court that it is not privileged. Rule 502, then, directs that no waiver be found for inadvertent production of a privileged item if reasonable steps were taken to review before production, and that even if reasonable steps were not taken the parties could guard against waiver by making an agreement under Rule 502(d). In short, the pressure of a waiver due to oversight——particularly the risk of a subject-matter waiver——has abated considerably since 1993.

Meanwhile, it may be that technology now exists to provide a useful assist to the parties in preparing a privilege log. Technology-assisted review (TAR) is often or routinely employed to review large volumes of electronically-stored information to identify responsive materials. As discussed in 2008 by the Advisory Committee, software was then being promoted as effectively identifying not only responsive materials, but also materials that might be claimed to be privileged. It may be that such programs could then also generate at least a draft privilege log.

Nonetheless, there have also been criticisms of the reported requirement of some courts that parties prepare a "document-by-document" privilege log. As Judge Facciola observed in *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 98-99 (D.D.C. 2012):

> [I]n the era of "big data," in which storage capacity is cheap and several bankers' boxes of documents can be stored with a keystroke on a three inch thumb drive, there are simply more documents that everyone is keeping and a concomitant necessity to log more of them. This, in turn, led to the mechanically produced privilege log, in which a database is created and automatically produces entries for each of the privileged documents. * * *
>
> But, the descriptor in the modern database has become generic; it is not created by a human being evaluating the actual, specific contents of that particular document. Instead1q 7` ;l4aZBg45s35to99i657, the human being creates one description and the software repeats that description for all the entries for which the human being believes that description is appropriate. * * * This raises the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive as it is useless.

Cost of Responding to Discovery and Withholding Privileged Materials Without Preparing a Privilege Log

It seems worth noting that preparing the privilege log may often be a relatively minor cost in comparison to responding to discovery of ESI more generally. Whether or not a privilege log is

prepared, much work is necessary to respond to discovery of ESI. Responsive materials must be located in what is sometimes an enormous quantity of digital data. In addition, either simultaneously or after the responsive materials are extracted, the specific items potentially covered by privilege must be identified and set apart.

After those potentially privileged items are identified and set apart, a legally trained person must verify that it would indeed be legitimate to withhold them from production on that ground. And then care must be taken at least to keep a record of what was withheld on this ground. It would seem that all of these steps would have been required under the pre-1993 rules, and that they would continue to be necessary if Rule 26(b)(5)(A) were amended. So it may be that the additional cost of preparing a privilege log is not a large part of this overall cost of responding to discovery, even though preparing a document-by-document log may in many cases require a disproportionate effort, or at least be a waste of time.

Current Submissions

The LCJ submission (20-CV-R) stresses the difficulties of privilege logs in an era of ESI, emphasizing Judge Facciola's views. Indeed, along with Jonathan Redgrave (20-CV-DD), Judge Facciola proposed in 2010 that "the majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel's cooperation supervised by early, careful, and rigorous judicial involvement." Facciola & Redgrave Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework, 4 Fed. Cts. L. Rev. 19 (2010). Implementing what Judge Facciola urged by rule could be difficult, however.

The LCJ submission describes some local district court rules about privilege logs, and also some state court rules. It acknowledges the good sense of what the committee note to the 1993 amendment to Rule 26(b)(5)(A) (quoted above) said about discussion and cooperation among counsel, but reports that "the suggestion has been largely ignored." It also urges that a rule provide for "presumptive exclusion of certain categories" of material from privilege logs, such as communications between counsel and the client regarding the litigation after the date the complaint was served, and communications exclusively between in-house counsel or outside counsel of an organization. Invoking proportionality, it emphasizes that "flexible, iterative, and proportional" approaches are more effective and efficient than document-by-document privilege logging. As mentioned above, even though the 1993 committee note accompanying Rule 26(b)(5)(A) recognized that detailed logging is not generally appropriate, "the case law has

largely missed the Committee's perspicacity." One might say that the Advisory Committee's urging did not produce the desired outcome.

The specific LCJ proposal seems more limited. It is to add the following to Rule 26(b)(5) and also to Rule 45(e)(2) on subpoenas:

> If the parties have entered an agreement regarding the handling of information subject to a claim of privilege or of protection as trial-preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim of privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

Would a Rule Amendment Improve Matters?

There is a limit to what rules can prescribe. The more general concern with proportionality calls for common-sense judgments about what discovery is really warranted under the circumstances of specific cases. That is difficult or impossible to prescribe in the abstract in a rule.

It may be that improvement by rule of the handling of what Rule 26(b)(5)(A) requires is not really possible because so much depends on the circumstances of the individual case. "Presumptive exclusion of certain categories" (not actually proposed by the submission, as quoted above) could introduce additional grounds for litigation about whether the categories apply in specific circumstances. And it may be worth noting something said during the November 2008 Advisory Committee meeting:

> An observer suggested that an effort to come up with a rule will only intensify costs. There is no real problem. "People work it out." The log is the last thing produced. And in some cases the parties may tacitly agree not to produce them at all, or to generate them only for particular categories of documents.

Alternatively, one might ultimately urge that Rule 26(b)(5)(A) should be abrogated. Perhaps the experience for more than a quarter century under this rule shows that it did not work, or does not now work. This submission does not urge doing that, and it is likely that valid concerns about unrevealed but overbroad claims of privilege mean that the rule should be retained.

But it is not clear that a rule can do more than the rule already does, particularly when augmented by the directive in Rule 26(f)(3)(D), calling for the parties to address "any issues

about claims of privilege." And it seems that the committee notes accompanying the original rule in 1993 and the revision of Rule 26(f) in 2006 speak to the concerns raised by the LCJ submission.

Introductory Discussion at Advisory Committee Meeting

At the Advisory Committee's October meeting, there was considerable discussion of the burdens and costs of privilege logs. Lawyer members of the Advisory Committee, in particular, reported that privilege logs can raise serious problems, particularly if the parties fail to work out an agreed method of satisfying Rule 26(b)(5)(A). At the same time, some judicial members reported not seeing problems frequently, but also that the lawyers (and perhaps magistrate judges) would be more likely to have experience with possible problems.

The resolution was to pursue the subject and study both the extent of the problems and the possibility that a rule change could make things better. There was no enthusiasm for going back to the pre-1993 situation in which no notice about withheld materials was required, but it was unclear how a rule change could materially improve matters. These issues remain under study, and would benefit from Standing Committee input.

B. Sealing Court Records
Suggestion 20-CV-T

Prof. Eugene Volokh (UCLA) has submitted a proposal for adoption of a Rule 5.3 on sealing of court records, on his own behalf and also on behalf of the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation. The rule proposal is presented in the Appendix below. It is being carried forward for further study.

The focus of this rule proposal is sealing of materials filed in court. In a broad sense, it focuses on a topic that has been on the Advisory Committee's agenda repeatedly over the last few decades. In the mid 1990s, there were two published drafts of possible amendments to Rule 26(c) that would have modified the standards for protective orders, in part by addressing the question of stipulated protective orders and filing confidential materials under seal pursuant to such orders or local rules. These proposals drew much attention and caused some controversy, and were eventually withdrawn. In March 1998 the Advisory Committee concluded that it would no longer pursue possible rule amendments on this topic.

Meanwhile, in Congress there have been various versions of a Sunshine in Litigation Act during recent decades, directed toward

protective orders regarding materials that might bear on public health.

Around 15 years ago, the Standing Committee appointed a subcommittee made up of representatives of all Advisory Committees that responded to concerns then that federal courts had "sealed dockets" in which all materials filed in court were kept under seal. The FJC did a very broad review of some 100,000 matters of various sorts, and found that there were not many sealed files, and that most of the ones uncovered resulted from applications for search warrants that had not been unsealed after the warrant was served.

In short, there has been considerable controversy and concern about sealed court files and discovery confidentiality, but the civil rules have not been amended to address those concerns.

The Civil Rules do not have many provisions about sealing court files. Rule 5(d) does direct that various disclosure and discovery materials not be filed in court until they are used in the action. When filing does occur, that can raise an issue about filing confidential materials under seal. Rule 5.2 provides for redactions from filings and for limitations on remote access to electronic files to protect privacy. In that context, Rule 5.2(d) does say that the court "may order that a filing be made under seal without redaction." The committee note to that provision says that it "does not limit or expand the judicially developed rules that govern sealing."

This submission, however, does propose a rule governing sealing that might limit or expand such judicially developed rules. An initial question might be whether there is a need for such a rule. Prof. Volokh's cover letter says that "[e]very federal Circuit recognizes a strong presumption of public access" that is "founded in both the common law and the First Amendment." It adds that more than 80 districts have adopted local rules governing sealing, and says that the rule proposal "borrows heavily from those local rules." Footnotes to the proposal provide voluminous case law authority for these propositions and cite a large number of existing local rules.

According to the cover letter, nevertheless "a uniform rule governing sealing is needed; despite these local rules and the largely unanimous case law disfavoring sealing, records are still sometimes sealed erroneously."

There is no question that inappropriate sealing of court records is an important concern. But it is not clear that the problem is so widespread that an effort to develop a national rule is warranted. And if a national rule were promulgated, it is worth

noting, that could affect the validity of the cited local rules. *See* Rule 83(a)(1) ("A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075 [the Rules Enabling Act]"). Nor is it clear that a national rule would much reduce the frequency of inappropriate sealing, depending in part on what might be defined as inappropriate.

If there is a problem that warrants an effort to develop a national rule, the draft language submitted by Prof. Volokh would require extensive work. The following are examples of some of the issues:

Possible additional burdens on courts: Various features of the proposal require courts to make "particularized findings." Rule 52(a)(1) directs a court after a nonjury trial to enter findings of fact and conclusions of law. Rule 23(b)(3) does say a court should certify a class only on finding that the superiority and predominance of common questions standards are met (though it does not have a specific findings requirement). It is not clear that there is a "particularized findings" requirement elsewhere in the civil rules. Cases under Rule 26(c) do say that a party seeking a protective order must make a particularized showing to justify entry of the order. *See* 8A Fed. Prac. & Pro. § 2035 at 157-58. But these cases do not require the court to make particularized findings when entering such an order.

Motion or objection by any "member of the public" without a need first to move to intervene: The rule would empower any "member of the public" to make a motion to unseal documents filed under seal "at any time." The proposed rule would explicitly excuse a motion to intervene for this purpose. There is a developed body of case law on intervention to challenge the seal on filed materials. *See* 8A Fed. Prac. & Pro. § 2044.1. This rule would evidently supplant that body of case law.

Challenges to sealing would be authorized by any "member of the public" at any time: The rule would direct that a motion is timely at any time, "regardless of whether the case remains open or has been closed." With CM/ECF it may be that accessing a closed case presents little difficulty, but such open-ended re-opening of cases is not the norm in the rules. Compare Rule 60(c)(1) (limiting a motion under Rule 60(b) to "a reasonable time," and for mistake, newly discovered evidence, or fraud to one year).

Defining "member of the public" could be challenging: The draft does not provide a more specific definition. Ordinarily

a proposed intervenor under Rule 24 must make some showing in support of a motion to intervene. If that is not required, it could become important to determine who is a "member of the public" entitled to challenge filing under seal without intervening. Would that right belong only to U.S. citizens or permanent residents? Would there be a ground for requiring that such a "member of the public" show some recognized interest in the contents of the sealed filing?

Materials filed under seal would automatically be "deemed unsealed" 60 days after "final disposition" of a case: This "final disposition" standard might resemble the final judgment standard for appeals. It likely means completion of all trial court proceedings and exhaustion or disregard of any proceedings on direct appeal, including a petition for certiorari. It might be taken to resemble Rule 54(a) ("'Judgment' a used in these rules includes a decree and any order from which an appeal lies"). But surely that standard would not apply if there were an appeal under 28 U.S.C. § 1292(a)(1) (preliminary injunctions) or § 1292(a)(2) (appointing receivers). It presumably would not apply to interlocutory orders certified for immediate appeal by the district court under 28 U.S.C. § 1292(b). How it would work in cases gathered pursuant to an MDL transfer if final judgment were entered in some but not all is uncertain. Whether the "final disposition" occurs only after all appeals have been exhausted might raise questions. It is not clear who would monitor these developments; if after a notice of appeal was filed, for example, there were a settlement, the clerk's office might not be aware of that development and the need to set the "60 days clock" running.

Motions to renew the seal are presumptively invalid unless filed more than 30 days before automatic unsealing: Coupled with the automatic unsealing mentioned above, this provision could mean, in effect, that 31 days after "final disposition" of a case the court would be without power to keep the materials under seal.

A special website, or a "centralized website" might be required: The proposal seems to direct that there be some special method of posting motions to seal, and suggests that "a centralized website maintained by several courts" might be useful. It also directs that this posting occur "within a day of filing."

A review of the proposal in the Appendix will likely suggest other issues. It does not seem that these issues must arise merely because a sealing rule is promulgated. To the contrary, a rule could likely be drafted that would not raise the specific issues

identified above. But any such rule might be expected to generate considerable controversy. For example, trade secrets and other commercially valuable information are placed under seal with some frequency. Limiting that protection might prompt serious concerns. Although there may presently be occasions in which sealing decisions appear, in retrospect, to be debatable, that alone does not make this topic different from others governed by the rules, on which it may sometimes happen that a court makes a decision later found to be erroneous.

Besides considering whether there is a need for such a rule, one might also reflect on how the rule would relate to existing and future case law on these subjects. The submission emphasizes that the case law is based on the Constitution and a common law right of access. Those grounds for access have developed over decades, and can be found in many cases cited in footnotes in the submission. If a rule were adopted, that might raise questions about whether it is different from that case law. If in a given circuit the case law is arguably more permissive about filing under seal and does not require all that a rule requires, does that mean the rule is supplanting that case law? If the rule is solely implementing the case law, does the rule change if the case law changes?

During the Advisory Committee's October meeting, discussion focused on the importance of court transparency. At least some matters would raise concerns. For example, the False Claims Act directs that a qui tam action be filed under seal. Another example that came up is that petitions to enforce arbitration awards that (which themselves are generally confidential) could raise concerns.

It was also noted that somewhat similar issues might be pertinent to the Appellate Rules. Indeed, there may be notable differences among the circuits on sealing. The Appellate Rules Committee studied these issues a few years ago, but did not conclude that any rule change was indicated.

For the present, the Advisory Committee concluded that the topic deserved further study. In particular, a review of local rules on sealing might shed light on (a) whether there is any need for a national rule along the lines proposed, and (b) whether divergences among local rules themselves are a reason for giving serious thought to a nationally uniform rule.

The Advisory Committee would welcome insights from members of the Standing Committee on the sealing issue.

APPENDIX

Suggestion 20-CV-T: Proposed Rule 5.3[9]

Rule 5.3

(a) PRESUMPTION OF PUBLIC ACCESS TO COURT RECORDS. Unless the court orders otherwise, all documents filed in a case shall be open to the public (except as specified in Rule 5.2 or by statute). Motions to file documents under seal are disfavored and discouraged. Redaction and partial sealing are forms of sealing, and are also governed by this rule, except insofar as they are governed by Rule 5.2. [Proposed Advisory Committee Note: This rule is intended to incorporate the First Amendment and common-law rights of access, and to provide at least as much public access as those rights currently provide.]

(b) REQUIREMENTS FOR SEALING A DOCUMENT. At or before the time of filing, any party may move to seal a document in whole or in part.

(1) Any party seeking sealing must make a good faith effort to seal only as much as necessary to protect any overriding privacy, confidentiality, or security interests. Sealing of entire case files, docket sheets, or entire documents is rarely appropriate. When a motion to seal parts of a document is granted, the party filing the document must file a publicly accessible redacted version of the document.

(2) If the interests justifying sealing are expected to dissipate with time, the party seeking sealing must make a good faith effort to limit the sealing to the shortest necessary time, and the court must seal the document for the shortest necessary time.

(3) There is an especially strong presumption of public access for court opinions, court orders, dispositive motions, pleadings, and other documents that are relevant or material to judicial decisionmaking or prospective judicial decisionmaking.

(4) Because sealing affects the rights of the public, no document filed in court may be sealed in whole or in part merely because the parties have agreed to a motion to seal or to a protective order, or have otherwise agreed

[9] Footnotes omitted.

to confidentiality.

(c) RETROACTIVE SEALING. Sealing of a document that has already been openly filed is allowed only in highly unusual circumstances, such as when information protected under Rule 5.2 is erroneously made public.

(d) PUBLIC FILING OF MOTIONS TO SEAL. A motion to seal must be publicly filed and must include a memorandum that:

(1) Provides a general description of the information the party seeks to withhold from the public.

(2) Demonstrates compelling reasons to seal the documents, stating with particularity the factual and legal reasons that secrecy is warranted and explaining why those reasons overcome the common law and First Amendment rights of access.

(3) Explains why alternatives to sealing, such as redaction, are inadequate.

(4) States the requested duration of the proposed seal.

(d) NOTICE AND WAITING PERIOD.

(1) Motions to seal shall be posted on the court's website, or on a centralized website maintained by several courts, within a day of filing.

(2) The court shall not rule on the motion until at least 7 days after it is posted, so that objections may be filed by parties or by others, unless the motion explains with particularity why an emergency decision is required.

(e) ORDERS TO SEAL. If a court determines that sealing is necessary, it must state its reasons with particularized findings supporting its decision. Orders to seal must be narrowly tailored to protect the interest that justifies the order. Orders to seal should be fully public except in highly unusual circumstances; and if they are in part redacted, any redactions should be narrowly tailored to protect the interest that justifies the redaction.

(f) UNSEALING, OR OPPOSING SEALING.

(1) Sealed documents may be unsealed at any time on motion of a party or any member of the public, or by the court sua sponte, after notice to the parties and an opportunity to be heard, without the need for a motion to intervene.

(2) Any party or any member of the public may object to a motion to seal, without the need for a motion to intervene.
(3) The motion to unseal or the objection to a motion to seal shall be filed in the same case as the sealing order or the motion to seal, regardless of whether the case remains open or has been closed.
(4) All sealed documents will be deemed unsealed 60 days after the final disposition of a case, unless the seal is renewed.
(5) Any motion seeking renewal of sealing must be filed within 30 days before the expected unsealing date, and the moving party bears the burden of establishing the need for renewal of sealing.

C. Rule 9(b): Pleading Conditions of Mind
Suggestion 20-CV-Z

Dean A. Benjamin Spencer, a committee member, has submitted a proposal to amend the second sentence of Rule 9(b). Rule 9(b) now provides:

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

The proposal would amend the second sentence to provide:

Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred.

Dean Spencer developed this proposal at length in an article, A. Benjamin Spencer, *Pleading Conditions of the Mind under Rule 9(b): Repairing the Damage Wrought by Iqbal*, 41 Cardozo L. Rev. 2015 (2020). As implied by the title, the article focuses on one part of the decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 686-87 (2009). The Court ruled that the complaint did not adequately plead a purpose to discriminate against Iqbal, concluding that permission to plead such matters "generally" does not mean that a conclusional allegation of purpose will do. Instead, "generally" is intended only to distinguish the particularity requirement for alleging fraud or mistake, leaving allegations of purpose, intent, and the like to the general standards of Rule 8(a)(2) as developed in the *Iqbal* opinion.

The article examines lower court implementation of Rule 9(b) in such areas as employment discrimination and the "actual malice" element of defamation claims. The results are found to raise undesirable barriers to valid claims. The history of Rule 9(b) is also explored, starting with the English statute invoked to explain Rule 9(b)'s second sentence in the 1938 committee note. Unbroken interpretation of the English statute, going back many years before 1938, shows that a bare allegation of knowledge, intent, or the like is accepted as an allegation of fact without further elaboration. The language in the proposed amendment is drawn in large part from the English statute.

This proposal will be included in the spring agenda. It raises obviously sensitive issues. The Supreme Court has adopted amendments designed to modify its own interpretations of a rule, and recently has suggested that the Enabling Act process is the appropriate means to address problems that may flow from its procedural rulings. But all such amendments must be studied carefully, searching for strong reasons to depart from the Court's considered judgment.

The setting of *Iqbal* itself suggests another sensitive element, pleading standards for claims that are met by an official-immunity defense. So too the burden of persuasion is set high in proving actual malice in an action for defamation of a public figure. Employment discrimination claims may not involve such sensitivities, but the very process of considering many different types of claims could be the first step along a path that was explored and abandoned several times between 1993 and 2007. The questions then were whether to establish heightened pleading standards for one or another substantive areas, beginning with official immunity. Shifting the focus to establishing reduced pleading standards for one or another substantive areas does not alter the challenges that must be faced.

V. Items Removed from Agenda

A. Rule 17(d): Naming Official Parties

Suggestion 19-CV-FF

This proposal from a regular contributor of rules suggestions would amend Rule 17(d):

> (d) PUBLIC OFFICER'S TITLE AND NAME. A public officer who sues or is sued in an official capacity ~~may~~must be designated by official title rather than by name, but the court may order that the officer's name be added.

Two reasons were offered in support. The amendment would avoid the need for automatic substitution of the successor in office under Rule 25(d) when the originally named officer leaves the office. It also would retain a single caption for the case, making it easier to track its progress by name without having to adjust for what may be a long chain of successive officers.

These potential benefits were met by concerns about the uncertainties that may surround the concept of "official title." A great many public actors wield titles. It is not always clear whether a title is "official" in some meaningful sense. The most likely sense in this context is that there is an office occupied by, but separate from, the individual holder. But determining whether there is an "office" in this sense may prove difficult, not only for federal agents but for the state and local government workers who may sue or be sued in an official capacity.

The Eleventh Amendment raises added concerns when an action is brought against a state actor as defendant. The fiction that an action against a state actor in an official capacity is not an action against the state, when it applies, may be strained by a rule that mandates suit against the title (or office) rather than the actor. The committee note to the 1961 amendments of Rule 25 reflects a confident view that these problems are not significant, but caution is appropriate.

Discussion at two meetings developed the view that as to federal officers there is little practical need for the proposed amendment. The Department of Justice finds that substitution is effected routinely, without fuss or difficulty. The processes that underlie this experience are likely to work for state and local officers as well.

The Advisory Committee removed this proposal from the agenda, concluding that the potential problems combined with the lack of practical need justify removing this proposal from the agenda.

B. Rule 45: Nationwide Subpoena Service Statutes

Suggestion 20-CV-H

A proposal from two Harvard Law School students focused on the interaction of the 2013 amendments to Rule 45 and the provision of the False Claims Act (FCA), 31 U.S.C. § 3731(a), that: "A subpoena requiring the attendance of a witness at trial or hearing conducted under section 3730 of this title may be served at any place in the United States." The concern was that the 2013 amendments might inadvertently have undercut § 3731(a) and some other statutes by nullifying previous nationwide service of process pursuant to those statutes. On its face, this seems curious because, as amended in 2013, Rule 45(b)(1) provides that "A subpoena may be served at any

place within the United States." So it seems to say the same thing as the FCA. But the possibility that the amendment inadvertently worked a change was examined.

The 2013 amendment was certainly not intended to make a change in FCA practice. Though the revisions to the rule did change some provisions about where one must comply with a subpoena (which were consolidated in current Rule 45(c)), none of those directly concerned the statutes addressed in the proposal. Moreover, though there was a considerable amount of comment on the 2013 amendment during the public comment period (including from the Department of Justice), no such concerns emerged.

Investigation of the legislative genesis of § 3731(a) revealed that it was indeed adopted in response to a 1978 request from the DOJ to solve problems that had previously arisen in FCA actions when the witnesses could not be subpoenaed to attend trial in the venue where the action had to be brought. The sparse case law did not indicate that the rule change had produced a problem.

What seems to be the most thoughtful and leading case is *U.S. v. Wyeth*, 2015 WL 8024407 (D. Mass. Dec. 4, 2015), in which the court in an FCA case held that the statutory mandate for nationwide compliance applied despite the 2013 amendments to Rule 45. The court noted some other statutes that might present similar issues——15 U.S.C. § 23 (antitrust suits); 38 U.S.C. § 1984(c) (disputes involving veterans' insurance); 18 U.S.C. § 1965(c) (RICO). Relying on the 1978 amendment to the FCA, the court concluded that "language like that of § 3731(a) not only *can* authorize both nationwide service and nationwide enforcement of a subpoena, but usually does." The court concluded further that "[t]he legislative history of § 3731(a) supports the holdings of the majority of district courts that enforcement of a False Claims Act subpoena is not subject to the geographical limitation now found in Fed. R. Civ. P. 45[(c)]."

During the Advisory Committee meeting, the DOJ representative reported that it had encountered no difficulties in continuing to employ the subpoena power adopted in 1978, and saw no need for a rule revision. There was no support for carrying this matter forward on the agenda.