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

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

FROM: Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 11, 2023

Introduction

The Civil Rules Advisory Committee met in West Palm Beach, FL, on March 28, 2023. Members of the public attended in person, and public on-line attendance was also provided. Draft Minutes of that meeting are included in this agenda book.

Part I of this report presents three items for action at this meeting:

(a) Rule 12(a) amendment for final approval: A small amendment to Rule 12(a) was published for public comment in August 2022. Only three comments were received. The Advisory Committee recommends approving this amendment and forwarding it to the Judicial Conference.

(b) Rule 16(b)(3) and 26(f)(3) amendments—privilege logs: These small amendments were presented to the Standing Committee at its January 2023 meeting. At that time the Standing Committee had no problems with the rule changes, but questioned the length of the Committee Note. The Note has been shortened, and the Advisory Committee unanimously recommends that this preliminary draft of rule amendments be published for public comment in August 2023.

(c) New Rule 16.1 on managing MDL Proceedings: After several years of work by its MDL Subcommittee, the Advisory Committee unanimously recommended that the preliminary draft of a new Rule 16.1 to deal with MDL proceedings be published for public comment in August 2023.

Part II provides information regarding ongoing subcommittee projects:

(a) Rule 41(a)(1) Subcommittee: The Rule 41(a) Subcommittee, chaired by Judge Bissoon, is addressing concerns (raised by Judge Furman, a former member of this committee, among others) about possible revisions to that rule to resolve seemingly conflicting interpretations in the courts. The work is ongoing on this topic, and outreach to bar groups is in progress to determine whether this interpretive divergence has caused difficulties for the practicing bar. The Subcommittee has not reached consensus on whether an amendment should be proposed, or what one should be if an amendment is pursued.

(b) Additional Discovery Subcommittee projects: Besides producing the "privilege log" amendments on the action items list above, the Discovery Subcommittee, chaired by Chief Judge Godbey, is also addressing (i) whether Rule 45(b)(1) should be amended to clarify what methods are required in "delivering a copy [of the subpoena] to the named person," as the rule directs. Courts have reached different conclusions on whether this rule requires in-hand service. As with the Rule 41(a)(1) issues mentioned above, efforts are under way to ascertain from bar groups whether divergent interpretations have caused actual problems in practice; (ii) whether rules changes are warranted with regard to court authorization of filing under seal or the procedures used to obtain such authorization; (iii) a possible change to Rule 28 very recently proposed by Judge Baylson (E.D. Pa.), and (iv) consideration whether the thorough report prepared by the FJC on the Mandatory Initial Discovery Project indicates that some targeted rule amendments might be pursued.

In addition, the Advisory Committee on Civil Rules continues to participate, through its Reporters, in the inter-committee project on pro se E-Filing.

Part III describes new or continuing work on a variety of other topics:

(a) possible revision of Rule 7.1 regarding disclosure of possible grounds for recusal;

(b) Rule 23 issues raised by an Eleventh Circuit panel opinion regarding "incentive awards" for class representatives and a Lawyers for Civil Justice suggestion that Rule 23(b)(3) be amended to permit a court to decline class certification if presented with evidence that a non-adjudicatory solution would provide superior relief to class members.

(c) Promulgation of nationwide standards for determining eligibility for in forma pauperis (ifp) status.

Part IV identifies matters the Advisory Committee has concluded should be removed from its agenda, including

(a) A change to Rule 38 to minimize the risk of inadvertent waiver of the right to jury trial, in light of FJC research that such waiver is a rare thing;

(b) Issues raised by Senators Leahy and Tillis regarding Rule 53 and the practice of at least one district judge of regularly appointing "technical advisers" to handle a large volume of patent infringement cases.

(c) A proposed amendment to Rule 11 to forbid state bar associations from imposing discipline on lawyers for activities in federal-court litigation unless the federal court first imposed sanctions on the attorney.

I. Action Items

A. For final approval: Amendment to Rule 12(a)

In August 2022, a preliminary draft of a proposed amendment to Rule 12(a) was published for public comment. The stimulus was principally that some litigants encountered difficulties obtaining summonses in FOIA cases that called for responsive pleadings within the statutory 30-day deadline because it was not clear that a federal statute prescribing a different time would apply to the United States under Rules 12(a)(2) and 12(a)(3). To avoid unintended preemption of such statutory time directives, the invocation of federal statutes was moved up to apply to the whole of Rule 12(a), as follows:

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

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

(1) In General.

(A) A defendant must serve an answer:

* * * * *

Committee Note

Rule 12 is amended to make it clear that a federal statute that specifies another time supersedes the times to serve a responsive pleading set by paragraphs (a)(2) and (3). Paragraph (a)(1) incorporates this provision, but the structure of subdivision (a) does not seem to extend it to paragraphs (2) and (3). There is no reason to supersede an inconsistent statute by any part of

Rule 12(a). The amended structure recognizes the priority of any statute for all of paragraphs (1), (2), and (3).

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Only three comments were received, and they are summarized below. One supports the proposed amendment, citing the potential problem in FOIA cases. Another is from Andrew Straw, who also has submitted a proposal to amend Rule 11 (discussed below), seemingly objecting to something that happened in a case between him and the state of Indiana.

The third comment is from the Federal Magistrate Judges Association (FMJA). The FMJA recognizes that the amendment clarifies that the response times specified in the rule may be superseded by a federal statute even in cases in which the United States is a party.

The FMJA suggested, however, that there should be some recognition that other federal rules, including various Supplemental Rules, may have response provisions inconsistent with Rule 12(a). It therefore proposes that the amendment "restore" language stricken in the published preliminary draft as follows:

> Unless another time is specified by these rules or a federal statute, the time for serving a responsive pleading is as follows:

This addition might do no harm, but does not seem to serve an important purpose. The FMJA submission does not cite any such rule, but instead says some such rules "might also" contain divergent response times, and that they are "potentially conflicting" rules. Yet the only such rule that has been called to our attention is Rule 15, and the current rule did not exclude it, so there does not appear to be a problem on this account. Some little-known federal statutes (in addition to the FOIA) were mentioned when the rule change was under discussion, and the amended rule would deal with them.

Moreover, this change would go beyond "restoring" the stricken language, which referred only to a different time specified by "this rule."

At its March 2023 meeting, the Advisory Committee voted to seek final approval of this amendment.

Summary of Comments on Rule 12(a) Amendment

Andrew Straw (CV-2022-0003-0003): "Rule 12 has been disregarded to favor the State of Indiana and its Attorney General. A deputy AG asked for more time to file a motion to dismiss on day 29 after service and the trial judge allowed it even with the lie that 29 days was still timely. When I objected to the 7th Circuit, I was slapped with a $500 fine and a ban on using any federal court for 2 years. This represents a COURT CLOSURE to hide and protect violations of Rule 12(a). Straw v. Indiana Supreme Court, 18-2878 (7th Cir. 2018)."

Federal Magistrate Judges Association (CV-2022-0003-0006): The amendment clarifies that the response times fixed by Rule 12 may be superseded by statute even in cases where the

United States is a party. The current rule does not recognize that possibility. But other rules may contain response provisions that are inconsistent with Rule 12, so the rule could be amended to read: "Unless another time is specified by these rules or a federal statute, the time for serving a responsive pleading is as follows:"

Anonymous (CV-2022-0003-0007): I support the proposed amendment. The FOIA gives federal agencies 30 days to respond, which should supersede the 60 days provided in Rule 12(a)(2). I have had a court clerk issue a 60-day summons even though the statute provides a 30-day time limit. Part of the problem may be the standard A.O. form used by courts to issue a summons. That form says the U.S. has 60 days to respond, but does not note that there may be a different time limit.

B. For publication: Amendments to Rule 26(f) and Rule 16(b) to call for development early in the litigation of a method for complying with Rule 26(b)(5)(A)

These amendment proposals deal with what is called the "privilege log" problem. During the Standing Committee's January 2023 meeting, the proposed rule amendments elicited no concerns, but the length of the Committee Note was questioned by several members of the Standing Committee. The matter was remanded to the Advisory Committee. The Committee Note was shortened, and the Advisory Committee unanimously approved recommending that the amendment and Note be published, as revised, for public comment in August 2023.

After the Standing Committee's action in January 2023, Judge Facciola and Mr. Redgrave submitted 23-CV-A, urging that an amendment to Rule 26(b)(5)(A) be added to the package. This proposal is addressed below. Neither the Discovery Subcommittee nor the Advisory Committee favors making an amendment to Rule 26(b)(5)(A).

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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

* * * * *

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

* * * * *

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

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DRAFT COMMITTEE NOTE

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

Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility. Nevertheless, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens.

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

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

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

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

Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements in this regard is a key purpose of this amendment. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an appropriate description of the nature of the withheld material. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution.

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

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling and Management.

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

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(B) *Permitted Contents.*

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

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DRAFT COMMITTEE NOTE

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

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

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

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

the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement.

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23-CV-A, from Judge Facciola and Mr. Redgrave

Possible addition of
cross-reference in Rule 26(b)(5)

The original proposal the Advisory Committee received was to amend Rule 26(b)(5)(A) to endorse "categorical" listing in the rule. The Discovery Subcommittee studied that idea and concluded it was not promising. Instead, The Subcommittee came to focus on the rules we proposed be amended.

At the end of January, Judge Facciola and Mr. Redgrave submitted 23-CV-A. One thing they discuss is addressing "materiality" in the Notes. That was not in the Notes the Standing Committee asked be reconsidered. Adding things to the Notes was not the seeming objective of the Standing Committee in remanding. And it's worth noting that the word "materiality" has produced tensions in related areas before. With regard to Fed. R. Evid. 401, it was studiously avoided. And on occasion, in regard to the approach to relevance in Rule 26(b)(1) it was urged by some that saying "materiality" would tighten up the rule's standards, but that suggestion was not pursued.

This submission also urges that there be an amendment to Rule 26(b)(5)(A) itself on p. 3 of the submission. Something like that could be added, along the following lines:

> **(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. Under Rule 26(f)(3)(D), the parties must include the intended method for complying with this rule in their discovery plan.

It is not clear what that change would add to what the Subcommittee proposed, which is to be added to Rule 26(f), the pertinent rule. The goal is to get parties to address these issues during their Rule 26(f) conference, and that rule seems the right place to tell them what to do during that conference. Putting the same thing into Rule 26(b)(5)(A) does not seem to add much. And one might also ask why this change was not proposed originally and instead appears now. The Standing Committee "remanded" the matter to shorten the Notes, not to add new amendment proposals. Neither the Advisory Committee nor the Discovery Subcommittee recommends adding this amendment proposal to the package.

C. New Rule 16.1 on MDL proceedings—recommendation to publish for public comment

After a great deal of effort, the MDL Subcommittee of the Advisory Committee has developed an amendment proposal set forth below—the addition of a new Rule 16.1 on managing MDL proceedings. The MDL Subcommittee was originally appointed in 2017. It has had three chairs (two of whom went on to become Chairs of the Advisory Committee). After considering many proposed rule amendments, it reached a consensus on the appropriate way to address MDL proceedings in the Civil Rules—adoption of new Rule 16.1, addressed particularly to those proceedings.

Because the process of development involved consideration of a wide variety of issues and took a long time, it seems useful to introduce the current proposal with some background on the evolution of the Subcommittee's work. The initial submissions to the Committee raised a wide variety of issues. At the Committee's April 2018, meeting the MDL Subcommittee made its first report to the full Committee, listing ten discussion issues:

(1) The scope of any rule;

(2) The handling of master complaints and answers;

(3) Use of plaintiff fact sheets or requiring particularized pleading or requiring immediate submission of evidence by plaintiffs;

(4) Requiring each plaintiff to pay a full filing fee; with possible effect on Rule 20 joinder;

(5) Sequencing discovery;

(6) Requiring disclosure of third party litigation funding;

(7) Handling of bellwether trials, and requiring consent to holding such trials:

(8) Expanding interlocutory review of certain decisions in certain MDL proceedings;

(9) Coordinating MDL proceedings with parallel proceedings in state courts or other federal courts; and

(10) Formation of leadership counsel for plaintiffs and common fund arrangements.

A great deal of effort was spent examining the proposal to require disclosure of third party litigation funding. Eventually, the conclusion was that this topic, while perhaps very important, was not particularly salient in MDL proceedings. So TPLF remains on the Committee's agenda, and disclosure of such arrangements has been endorsed in some bills introduced in Congress, but it is no longer a feature of the MDL Subcommittee's work.

Even more effort was spent examining the possibility of expanded interlocutory review. As it developed, the proposal was to emulate Rule 23(f) on immediate review of class certification

decisions. Very helpful submissions favoring and opposing such a rule change were submitted, and Subcommittee members participated in a large number of conferences and meetings with bar groups about this possibility. Eventually the decision was made that there was not such a need for expanded review in light of existing methods (including certification under 28 U.S.C. § 1292(b)), and that idea was put aside.

Attention focused, instead, on adding provisions specifically calibrated to MDL proceedings to Rule 26(f) and Rule 16(b), which were included in the agenda book for the full Committee's March 2022 meeting. By the time that meeting occurred, however, further outreach by the Subcommittee (including a conference involving transferee judges, plaintiff attorneys and defense attorneys organized by the Emory University's Institute for Complex Litigation and Mass Claims) had pointed up some difficulties with relying on Rule 26(f) as a vehicle for managing MDL proceedings. In particular:

> (1) It might often happen that a Rule 26(f) conference had already occurred in some actions before a Panel transfer order centralizing them in the transferee court, and perhaps that a schedule for activity in those actions had already been adopted in the transferor court. There would ordinarily be no occasion under Rule 26(f) for a second planning conference or report to the court. And after transfer by the Panel, there might not be any Rule 26(f) conferences in actions in which they had not already occurred before transfer.
>
> (2) It increasingly seemed valuable to provide the transferee court in MDL proceedings with the opportunity to appoint "coordinating counsel" to oversee the initial organization of the proceedings and assist the court in making its initial management order to guide the future course of the MDL proceedings.

These issues prompted the idea of a new Rule 16.1 to address MDL proceedings. Such a rule could assist the transferee court in addressing a variety of matters that often proved important in MDL proceedings. It could also provide a substitute for MDL proceedings for the Rule 26(f) meeting that is to occur in ordinary litigation. Initial sketches of such a rule, including alternative versions, were appended to the agenda book for the Standing Committee's June 2022 meeting.

After that Standing Committee meeting, these Rule 16.1 sketches were the focus of several further conferences. Both the American Association for Justice and the Lawyers for Civil Justice arranged for representatives of the Subcommittee to participate in conference with members of their organizations about the Rule 16.1 ideas. Importantly, three judicial representatives of the Subcommittee also attended the transferee judges conference, put on by the Judicial Panel. At that conference there was a special session with the transferee judges to receive feedback about the Rule 16.1 sketches, including the question which alternative approach seemed most suitable.

At its January 2023 meeting, the Standing Committee received a thorough report about progress on this front along the lines initially introduced during its June 2022 meeting.

With the extensive resulting information base, the Subcommittee went to work refining the Rule 16.1 proposal. This work included multiple meetings via Zoom and many more exchanges of email about evolving drafts. Eventually, the Subcommittee reached consensus on a proposal to

recommend for public comment. At its March 2023 meeting, the Advisory Committee unanimously recommended publication of this proposal for public comment in August 2023. The proposal has been revised since the Advisory Committee's March 2023 meeting in accordance with the suggestions of the style consultants.

One point discussed during the Advisory Committee meeting deserves mention. Proposed Rule 16.1(a), (c), and (d) all use the verb "should" with regard to the court's management of MDL proceedings. During the Advisory Committee meeting, concerns were raised about whether use of this verb made the proposed rule mere advice and not a genuine rule. One alternative suggested was "must, if appropriate."

The MDL Subcommittee caucused during the lunch break in the Advisory Committee meeting and concluded that the rule ought to use "should" in the points where the draft used that word. On the one hand, as the Committee Note recognizes, there may be some MDL proceedings in which no initial management conference is needed, so "must" would be too strong. And "must, if appropriate" would seem not significantly different from "should." The view was that "should" is the correct word to use in 16.1.

As also noted during the Advisory Committee meeting, quite a few other rules already use "should." See, e.g., Rule 1 (the rules "*should* be construed * * * to secure the just, speedy, and inexpensive determination"); 15(a)(2) (court "*should* freely give leave [to amend]"); 15(b)(1) (court "*should* freely permit an amendment" if there is an objection at trial that evidence is not within the issues raised in the pleadings): 16(d) (after a pretrial conference "the court *should* issue an order reciting the action taken"); 25(a)(2) (if a party dies, the death "*should* be noted on the record"); 54(c) (final judgment "*should* grant the relief to which each party is entitled"); 56(a) (if the court grants summary judgment it "*should* state on the record the reasons for granting the motion"). At the same time, it might also be noted that the use of "must" in some rules may be questioned. See Rule 55(b)(1) (clerk "must" enter default judgment if a claim "is for a sum certain or that can be made certain by computation"). Though the public comment period may raise questions about this choice of word, "should" has been retained for purposes of publication.

Rule 16.1. Managing Multidistrict Litigation

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

(b) DESIGNATING COORDINATING COUNSEL FOR THE CONFERENCE. The transferee court may designate coordinating counsel to:

(1) assist the court with the conference; and

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

(c) PREPARING A REPORT FOR THE CONFERENCE. The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must address any matter designated by the court, which may include any matter addressed in the list below or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

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

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

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

(C) their role in settlement activities;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DRAFT COMMITTEE NOTE

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

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

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

Rule 16.1(b). Rule 16.1(b) recognizes the court may designate coordinating counsel—perhaps more often on the plaintiff than the defendant side—to ensure effective and coordinated discussion and to provide an informative report for the court to use during the initial MDL management conference.

While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference. The court may designate coordinating

counsel to assist the court before appointing leadership counsel. In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.

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

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

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

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

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. If the court has appointed coordinating counsel under Rule 16.1(b), experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position, but appointment under Rule 16(b) is primarily focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the court for use at the initial MDL management conference under Rule 16.1(a).

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

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

Subparagraph (C) recognizes that, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible settlement. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that—a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions about resolution. It is often important that the court be regularly apprised of developments regarding potential settlement of some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.

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

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

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

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

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

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

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

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Whether early exchanges should occur may depend on a number of factors, including the types of cases before the court. For example, it is widely agreed that discovery from individual class members is often inappropriate in class actions, but with regard to individual claims in MDL proceedings exchange of individual particulars may be warranted. And the timing of these exchanges may depend on other factors, such as whether motions to dismiss or other early matters might render the effort needed to exchange information unwarranted. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

Rule 16.1(c)(5). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

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

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

Rule 16.1(c)(8). The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally

conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(c)(9). Even if the court has not appointed leadership counsel, it may be that judicial assistance could facilitate the settlement of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that—a decision to be made by the parties. But as recognized in Rule 16(a)(5) and 16(c)(2)(I), the court may assist the parties in settlement efforts. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate settlement.

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

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

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

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

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

Rule 16.1(d). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated

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

II. SUBCOMMITTEE REPORTS

A. Rule 41(a) Subcommittee

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon, continues to address whether Rule 41(a)(1)(A) should be revised. The rule provides, in pertinent part, that "the plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Per Rule 41(a)(1)(B), such dismissals are without prejudice unless the plaintiff has previously dismissed a federal or state court action including the same claim, in which case the dismissal "operates as an adjudication on the merits."

As noted in submissions from Judges Furman and Halpern (S.D.N.Y.) (21-CV-O) and Messrs. Wenthold and Reynolds (former W.D. Ky. Law clerks) (22-CV-J), courts are divided in their interpretation of the rule. The circuits are split with regard to whether the rule requires a plaintiff seeking to dismiss without a court order to dismiss the entire case, all claims against all defendants, or whether the rule allows for additional flexibility. Some circuits, for instance, allow a voluntary dismissal without a court order when a plaintiff dismisses all claims against a single defendant. Some district courts have gone even further, sanctioning dismissals of only single claims under the rule. In essence, then, it is fair to say that the rule's application is disuniform and varied throughout the country.

Nevertheless, one issue the subcommittee is considering is whether, despite the apparent lack of clarity or agreement on the rule's requirements, there is a need for an amendment. Although courts interpret the rule differently, it is not clear whether there is a serious "real-world problem" to solve, or whether a rule amendment, with its attendant risks of unanticipated consequences, is prudent. The original purpose of the rule was to shorten the time frame in which a plaintiff could dismiss unilaterally and without prejudice. Prior to the adoption of the Federal Rules-and apparently presently in some states-a plaintiff could voluntarily dismiss without a court order when the litigation was well advanced, including at trial, and start from scratch in another court. The federal rule therefore served to restrict the time period in which a plaintiff could unilaterally dismiss without prejudice to prior to the filing of an answer or motion for summary judgment.

There does not appear to be any suggestion that the original drafters of the rule considered the question that causes confusion today-perhaps understandably given the increase in complex multiparty and multiclaim litigation since 1938. To the extent the purpose of the rule is to streamline cases as they move toward trial, there are other available mechanisms in the rules, such as amending the pleadings under Rule 15 or dropping a party under Rule 21. A plaintiff seeking dismissal without prejudice may also do so after an answer or motion for summary judgment is

filed by seeking a court order. Based on conversations with some judges and lawyers, courts sometimes employ more homespun ways to narrowing a case. As part of the subcommittee's work, it has recently met with representatives from Lawyers for Civil Justice and the American Association for Justice, and further outreach is likely.

Should the Advisory Committee decide to propose an amendment to the rule, there are numerous paths it could take. Perhaps the simplest would be to endorse a "plain meaning" reading of the rule as currently drafted by making clear only an "entire action," and nothing less, may be voluntarily dismissed by the plaintiff without prejudice. But, perhaps as demonstrated by many courts' unwillingness to read the rule this way currently, this may be too inflexible an approach in a system where complex litigation proliferates. Alternatively, the rule could be drafted to permit voluntary dismissal of something less than the entire action, such as all of the claims against a single defendant, or even individual claims. While the flexibility of this approach may aid in efficiently streamlining cases as they wend their way through pretrial proceedings, too much flexibility on this score may prejudice defendants who invest time and resources into responding to claims only to see them dropped from the litigation. Moreover, amendments to the rule could also include tweaking other aspects of it, such as reducing the amount of time a plaintiff has to voluntarily dismiss prior to a Rule 12 motion. An even more ambitious project would be to address the panoply of rules that permit modification of the case after it is filed, including amendments under Rule 15.

Thus far, the Subcommittee has taken the approach that any amendment ought to be a narrow one, focused on simply clarifying a rule that has come to be interpreted in various ways across the circuits. But both a narrow amendment and a more ambitious project would require that the committee address the deeper policy question about how much flexibility the plaintiff (and perhaps defendants asserting counter- or cross-claims) ought to have to modify a case, and at what points throughout the litigation.

At its March 2022 meeting, the Advisory Committee considered the question and left these questions open while the subcommittee continues its work. Although the Subcommittee continues to recognize the disuniform application of the rule, there is not yet consensus on what policy should underlie any amendment, and whether such a policy warrants only a narrow change, or a more ambitious package. If courts are muddling through reasonably well with the tools they have, and parties do not find themselves prejudiced by the varying interpretations, it may be best to leave well enough alone. The committee will continue its work to address these questions and consider the way forward.

B. Discovery Subcommittee

In addition to shortening the Committee Note to the recommended amendments to address the "privilege log" issues included in the action items section of this agenda book, the Discovery Subcommittee (chaired by Chief Judge David Godbey) has additional issues before it. This report summarizes these issues, on which it has made no recommendation.

673 Method of serving a subpoena

674 The Advisory Committee has discussed the concern that Rule 45(b)(1) is ambiguous about
675 exactly how one should go about "delivering" a subpoena to a witness (probably most importantly
676 to a nonparty witness). The issue was first raised by a bar group in 2005, and was discussed during
677 the Rule 45 project about five years later. It was addressed at the last Advisory Committee meeting,
678 and also presented to the Standing Committee.

679 Thus far, it has not seemed that there are strong concerns within the bar about what the rule
680 currently says. It is unnerving that courts seem to interpret it differently. A similar sort of issue has
681 arisen in relation to Rule 41(a)(1), on whether unilateral dismissal by a plaintiff must drop the
682 whole "action" or may be limited to one claim or one defendant or one plaintiff, etc. There have
683 been divergent judicial approaches to Rule 41(a)(1) also, and similar uncertainty about whether
684 those divergent interpretations have created real problems in cases.

685 Members of the Subcommittee regard it as important to examine this issue further. Recent
686 events point up the sort of issues that may emerge. For example, during February 2023, Judge
687 Rakoff (S.D.N.Y.) entered an order authorizing service of a subpoena by certified mail on a witness
688 sought in regard to a suit against JPMorgan Chase Bank alleging it had facilitated Jeffrey Epstein's
689 sexual abuse. In a suit by the Virgin Islands against the bank, the plaintiff had made seven
690 unsuccessful efforts to serve the subpoena on a billionaire former associate of Epstein. Among
691 other things, process servers were twice turned away by security guards at the Ohio home of the
692 witness and a lawyer for him refused to accept service. See Ava Benny-Morrison, Leslie Wexner
693 Can Be Mailed Subpoena in Epstein Suit, Bloomberg Law News, Feb. 21, 2023.

694 *In re Three Arrows Capital, Ltd.*, 647 B.R. 440 (S.D.N.Y., Dec. 29, 2022), involved service
695 of subpoenas on persons who could not be served inside the United States. The court did not focus
696 primarily on the issue of "delivering" the subpoena under Rule 45(b)(1), but instead the application
697 of Rule 45(b)(3) on serving a United States national in a foreign country, which it found to be
698 governed by 28 U.S.C. § 1783. Regarding manner of service, the court said Rule 45(b)(1) "only
699 expressly endorses personal service," but that district courts in the Second Circuit "routinely
700 authorize service via other means" so long as it is reasonably calculated to give actual notice.

701 With regard to Rule 45, if amendment is in order one important question is what the rule
702 should say instead. One possibility is "delivering <u>in hand</u>" or "delivering <u>personally</u>." That might
703 be important with nonparties subpoenaed to testify in court or in a deposition scheduled on short
704 notice; during the Rule 45 project there was some concern about making it absolutely clear to the
705 nonparty witness what was required. And since the rule requires not only "delivering" a copy of
706 the subpoena to the witness, but also "tendering the fees for 1 day's attendance and the mileage
707 allowed by law," that might seem to depend on a face-to-face interaction (though fees could
708 presumably be tendered in other ways, given the variety of methods of payment now available for
709 many things—Venmo, etc.).

710 The specific proposal made by Judge McEwen, our liaison from the Bankruptcy Rules
711 Committee, is to say delivery by "overnight courier" be allowed. On that score, one might note
712 that Rule 29.1(3) of the Supreme Court rules says that anything those rules require be served be

served "personally, by mail, or by third-party commercial carrier for delivery within 3 calendar days on each party to the proceeding." But the setting for that rule is surely very different from the service of a subpoena on a nonparty witness.

So a clearly desirable solution does not seem yet to have emerged, but within the rules committees it seems that there is no strong feeling how to proceed either. Instead, two ideas for making progress have been suggested:

1. Rules Law Clerk research on state rules for service of subpoenas might either show that they are all are pretty much the same as Rule 45, or that some states have identified simplified methods, which could permit the Subcommittee to try to gather information about how those are working. It is hoped that this research could call attention to state court innovations on methods of service.

2. Outreach to bar groups might provide insight on whether the uncertainty about interpretation of the rule is a real problem, and whether there are solutions these bar groups favor. As noted above, a bar group sent us a 17-page memo more than 15 years ago urging that this rule be changed. And at least one additional bar group has urged a rule change more recently. The Rule 41(a) Subcommittee is also trying to gauge whether in practice that rule produces problems that warrant taking on a rule change. Perhaps something along that line would be useful on this front as well. It is hoped that these efforts to get input from the practicing bar can proceed in tandem. Some consultation has already occurred.

Filing under seal

This topic was raised originally in 2021 by Prof. Volokh, who submitted a very elaborate proposal for a rule seemingly calling for distinctive requirements for motions to seal that would not apply to other motions, such as posting outside the case file for the given case, forbidding decision on such a motion in fewer than seven days after it was posted, and requiring somebody (the Clerk's Office) to unseal after the "final decision" in the case, which presumably might be on appeal, something the Clerk's Office might not even hear about.

There have been quite a few additional submissions. At least one (from LCJ) opposed adopting any rule change. Others provided a large amount of information about sealing practices in many district courts, and urged national controls. There is also a 54-page Sedona Conference "Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal." In addition, section 12 of H.R. 7706, the Judicial Ethics and Anti-Corruption Act of 2022, would add a new section 1660 to Title 28 entitled "Restrictions on Protective Orders and Sealing of Cases and Settlements." In addition, a submission of about 100 pages detailed the local rules on procedures for handling filing under seal from all or most districts.

In short, there is a lot of attention directed toward at least the general topic. But in 2021, the A.O. embarked on a larger project on sealed court filings. Having learned of that project, the Discovery Subcommittee decided to await the results of that project. Sealing issues did not seem to deal solely with civil cases; criminal cases, bankruptcy cases, and even appellate cases might

involve such issues. It has recently emerged, however, that this A.O. effort seems to be focusing on other sealed filings topics, so this project is being revived.

Recent discussions have also identified an additional wrinkle. To date, the Subcommittee has focused (as invited by the original submission) on "sealed" filings. But it appears that, in at least some districts, there may be another category called "restricted" filings that are not accessible to the public, but only to the court and the parties. Whether this wrinkle calls for attention is not presently certain.

To re-introduce the prior discussion, below is the agenda book report on this topic for the October 2021 Advisory Committee meeting. There remain some questions about whether any of the many proposals made to the Advisory Committee overlap with the ongoing work of the A.O. project. Since no further action has been taken since the October 2021 meeting, the report for that meeting can serve to introduce, or re-introduce, the issues.

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[From agenda book for
October 2021 Advisory Committee meeting]

Several parties—Prof. Volokh, the Reporters' Committee for Freedom of the Press, and the Electronic Frontier Foundation—submitted a proposal to adopt a new Rule 5.3, setting forth a fairly elaborate set of requirements for motions seeking permission to seal materials filed in court.

The submission asserted that it is universally, or almost universally, recognized that the showing required to justify filing under seal is very different from the standard that supports issuing a Rule 26(c) protective order regarding materials exchanged through discovery. Research done by the Rules Law Clerk confirms that report. Filings may be made under seal (unless that is required by statute or court rule) only on a showing that sufficiently addresses the common law and First Amendment rights of public access to court files.

Proposed Rule 5.3 also had a number of features that do not apply to most, or any other, motion practice. It seemed to propose that motions to seal be posted on the court's web site or perhaps on a shared website for many courts, rather than only in the file for the case in which the motion was filed. It provided that, unlike other motions, motions to seal could not be decided until at least seven days had passed since such posting had occurred.

The proposal also asserted that local practices on motions to seal diverged from district to district. That led to research about a "sample" of local rules—the ones applying in the nine districts "represented" on the Advisory Committee. There is no claim that these local rules are "representative" of local rules on sealing in other districts. But it is clear that the local rules in these nine districts differ from one another. It is also clear that many features of proposed Rule 5.3 differ from provisions in the local rules of at least some of these districts, and that if the proposed rule were adopted portions of the local rules in each of those districts would become invalid under Rule 83(a)(1).

As with the privilege log issues, a recent development suggests that this report can only introduce pending issues rather than presenting the Subcommittee's views. The Subcommittee has learned that the Administrative Office has begun a study of sealed filings, but it does not have details on that study. It is hoped that by the time the Advisory Committee meets on Oct. 5 there will be more information available.

There may be reason to defer thought of adopting a new Civil Rule if the A.O. is addressing sealing issues more broadly. Considering that one of the proponents of a new rule is the Reporters' Committee, one might suggest that media interest in filings in criminal cases might be stronger than the interest in civil cases. And sealing of matters related to criminal cases may be more pervasive. For example, an FJC study of "sealed cases" about 15 years ago showed that a great many of those were miscellaneous matters opened for search warrant applications that did not lead to a prosecution. Though technically they should not have remained sealed after the warrant was executed, they were not unsealed.

In addition—particularly to the extent sealing issues depend on the internal operations of clerks' offices—it may be more appropriate for some body other than the rules committees to take the lead on those issues. The Court Administration and Case Management (CACM) Committee comes to mind.

Thus, it seems that the matter now before this Committee might be divided into two somewhat discrete subparts—(a) adopting rule amendments recognizing in the rules the distinctive requirements for sealed filings in civil cases and distinguishing those requirements from the more general protective order practice, and (b) adopting nationally uniform procedures for handling motions for leave to file under seal.

Before turning to those two issues, it is useful to add some information provided by Judge Boal, who consulted informally with other members of the Federal Magistrate Judges Association rules committee, of which she is a member (and former co-chair), and from Susan Soong (our clerk liaison) based on some inquiry among court clerks. Both these reports were based on informal inquiries, but they may shed light on the issues presented here.

Judge Boal reported that the magistrate judges she consulted saw frequent motions to seal, but did not think they had seen notable increases in the frequency of such motions, though they also thought that there are too many of these motions. It appears that the various circuits have developed their own bodies of case law applying the common law and First Amendment standards in different sealing contexts. So circuit law is the source of guidance on the standards for deciding whether to grant a motion to seal. Though these circuit standards are not identical, they all differ from the "good cause" standard for a Rule 26(c) protective order. But there seemed no reason for rules to address these distinctive circuit approaches to the standards for sealing under the common law and First Amendment rights of public access. There was, however, some support for considering a uniform set of procedures for handling motions to seal. Those procedures vary widely under the local rules of different courts. The most productive rulemaking goal might be to focus on procedures for presenting sealing requests, notifying parties and non-parties, and providing a mechanism for objection to proposed filing under seal and for unsealing previously

sealed materials. Though these reactions were informal (compared to the formal comments about privilege issues submitted by the FMJA), they were instructive for the Subcommittee.

Susan Soong made informal inquiries of other court clerks, and found that the general view seemed to be that there is nothing about motions to seal that calls for any distinctive treatment of those motions. Indeed, it might be that singling out such motions for additional handling in the clerk's office would potentially burden court clerks. For example, these motions—like all motions—can be made available on PACER. That would not require any distinctive treatment in the clerk's office. Her inquiries also confirmed what others have said—that practices on motions to seal (and probably on other motions) vary among districts. It is not easy to say for certain why these differences exist; they may be a result of judge preferences, historical practices, the fact that different courts have caseloads of different types, and the different approaches of various courts to managing discovery. As with the informal reactions from magistrate judges, these views were instructive for the Subcommittee in regard to possible rulemaking addressing the procedures for motions to seal.

(a) Recognizing the different standards

A relatively simple pair of rule changes could confirm in the rules what we have been told about actual practice:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

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

The Committee Note to such a rule could simply state that the standard for sealing materials filed in court is different from the standard for issuing protective orders under Rule 26(c)(1).

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

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

The idea is to use a generalized statement that encompasses the stated standards for filing under seal that prevail in all the circuits. The Committee Note could say that the goal is not to

displace any circuit's standard nor to express an opinion about whether they really differ from one another. Instead, the goal is to reinforce the point in proposed Rule 26(c)(4) that the standard is different from the standard for granting a protective order. On that, it seems, all agree.

There are statutes (the False Claims Act, for example) that direct filing under seal, so the introductory phrase recognizes such directives. The additional phrase "or these rules" might seem to create a potential problem—it might seem to be circular—if a protective order entered in accordance with these rules were sufficient to fit within the exception. But that would seem to violate proposed Rule 26(c)(4). And there are other rules that do explicitly authorize or direct filing under seal. See Rules 5.2(d) (filing under seal to protect privacy); 26(b)(5)(B) (party that received information through discovery the other side belatedly claims to be privileged may "promptly present the information to the court under seal for a determination of the claim").

Making changes such as these likely would not conflict with whatever the A.O. is doing or may be doing about filing under seal more generally. To the extent that filing under seal is limited by the common law or the First Amendment, it may be difficult for an A.O. policy to make it easier. Perhaps for policy reasons, an A.O. policy might make filing under seal more difficult to justify. But if it could do that presently, it likely could do so if the Civil Rules were so amended.

Another consideration here might be to proclaim by rule a nationally uniform standard for applying the common law and First amendment rights of public access to court filings. A rule could, for example, declare that the party seeking sealing bear the burden of justifying it in the face of common law and First Amendment limitations. (That would be somewhat consistent with the approach to deciding motions for a protective order—the moving party bears the burden of establishing good cause with a fairly specific showing.) Under Rule 26(c), there is no specific rule provision about burdens of proof, and it is likely that if this seemed a suitable topic to address it could be addressed in a Committee Note. This is not to say that sealing must always be granted if not forbidden on common law or First Amendment grounds. Those preclude the entry of a sealing order; a court may well decide that even if sealing is not forbidden in a given case, it is not warranted.

But there may be a distinct limitation on the extent to which a rule can, or should attempt to, regulate these matters. The First Amendment, for example, applies as it applies without regard to what the rules say.

The basic question on this point is whether there is any real value in this sort of rule change. If it adopts what the courts are already doing, it might be regarded as somewhat "cosmetic."

(b) Uniform procedures on motions to seal

The FMJA suggestions were that the standard for sealing remain as directed by the various circuits but that rulemaking attention should focus on adopting more uniform procedures for doing deciding motions to seal. It is relatively apparent that the procedures are not uniform now. Indeed, the N.D. Cal. has had an entirely new local rule changing its procedures out for comment during August.

More generally, it's likely that there are differences among districts on how to handle other sorts of motions. In the N.D. Cal., for example, 35 days' notice is required to make a pretrial motion in a civil case, absent an order shortening time. The local rules also limit motion papers to 25 pages in length, and provide specifics on what motion papers should include. Oppositions are due 14 days after motions are filed and also subject to length limitations. There is also a local rule about seeking orders regarding "miscellaneous administrative matters," perhaps including filing under seal, which have briefer time limitations and stricter page limits.

In all likelihood, most or all districts have local rules of this sort. In all likelihood, they are not identical to the ones in the N.D. Cal. An initial question might be whether motions to seal should be handled uniformly nationwide if other sorts of motions are not.

One reason for singling those motions out is that common law and constitutional protections of public access to court files bear on those motions in ways they do not normally bear on other motions. Indeed, in our adversary litigation system it is likely that if one party files a motion for something the other side will oppose it. But it may sometimes happen not only that neither side cares much about the public right of access to court files, but that both sides would rather defeat or elude that right. So there may be reason to single out these motions, though it may be more difficult to see why notice periods, page limits, etc. should be of special interest in regard to these motions as compared with other motions.

A different set of considerations flows from the reality at present that local rules diverge on the handling of motions to seal. At least sometimes, districts chafe at "directives from Washington." There have been times when rule changes insisting on uniformity provoked that reaction. Though this committee might favor one method of processing motions over another, it is not clear that this preference is strong enough to justify making all districts conform to the same procedure for this sort of motion.

Without meaning to be exhaustive, below are some examples of issues that might be included in a national rule designed to establish a uniform procedure:

Procedures for motion to seal: The submission proposes that all such motions be posted on the court's website, or perhaps on a "central" website for all district courts. Ordinarily, motions are filed in the case file for the case, not otherwise on the court's website. The proposal also says that no ruling on such a motion may be made for seven days after this posting of the motion. A waiting period could impede prompt action by the court. Such a waiting period may also become a constraint on counsel seeking to file a motion or to file opposing memoranda that rely on confidential materials. The local rules surveyed for this report are not uniform on such matters.

Joint or unopposed motions: Some local rules appear to view such motions with approval, while others do not. The question of stipulated protective orders has been nettlesome in the past. Would this new rule invalidate a protective order that directed that "confidential" materials be filed under seal? In at least some instances, such orders may be entered early in a case and before much discovery has occurred, permitting parties to designated materials they produce "confidential" and subject to the terms of the protective order. It is

frequently asserted that stipulated protective orders facilitate speedier discovery and forestall wasteful individualized motion practice.

Provisional filing under seal: Some local rules permit filing under seal pending a ruling on the motion to seal. Others do not. Forbidding provisional filing under seal might present logistical difficulties for parties uncertain what they want to file in support of or opposition to motions, particularly if they must first consult with the other parties about sealing before moving to seal. This could connect up with the question whether there is a required waiting period between the filing of the motion to seal and a ruling on it.

Duration of seal: There appears to be considerable variety in local rules on this subject. A related question might be whether the party that filed the sealed items may retrieve them after the conclusion of the case. A rule might also provide that the clerk is to destroy the sealed materials at the expiration of a stated period. The submission we received called for mandatory unsealing

Procedures for a motion to unseal: The method by which a nonparty may challenge a sealing order may relate to the question whether there is a waiting period between the filing of the motion and the court's ruling on it. A possibly related question is whether there must be a separate motion for each such document. Perhaps there could be an "omnibus" motion to unseal all sealed filings in a given case.

Requirement that redacted document be available for public inspection: The procedure might require such filing of a redacted document unless doing so was not feasible due to the nature of the document.

Nonparty interests: The rule proposal authorizes any "member of the public" to oppose a sealing motion or seek an order unsealing without intervening. Some local rules appear to have similar provisions. But the proposal does not appear to afford nonparties any route to protect their own confidentiality interests. Perhaps a procedure would be necessary for a nonparty to seek sealing for something filed by a party without the seal, or at least a procedure for notifying nonparties of the pendency of a motion to seal or to unseal.

Findings requirement: The rules do not normally require findings for disposition of motions. See Rule 52(a)(3) (excusing findings with regard to motions under Rule 12 or Rule 56). There are some examples of rules that include something like a findings requirement. See Rule 52(a)(2) (grant or denial of a motion for a preliminary injunction). The rule proposal calls for "particularized findings supporting its decision [to authorize filing under seal]." Adding a findings requirement might mean that filing under seal pursuant to court order is later held to be invalid because of the lack of required findings.

Treating "non-merits" motions differently: The circuits seem to say different things about whether the stringent limitations on sealing filings apply to material filed in connection with all motions, or only some of them. (This issue might bear more directly on the standard for sealing.) The Eleventh Circuit refers to "pretrial motions of a nondiscovery nature." The Ninth Circuit seems to attempt a similar distinction regarding non-dispositive motions.

The Seventh Circuit refers to information "that affects the disposition of the litigation." The Fourth Circuit seems to view the right of access to apply to "all judicial documents and records." And another question is how to treat matters "lodged" with the court.

No doubt there are others. For the present, the basic question is whether the Subcommittee should attempt to devise a set of procedural features applicable to motions to seal. One thing to be kept in mind on this subject is that doing these things could require more aggressive surgery on the current rules than the simple changes noted in section (a) above. Depending on what they are, these sorts of procedures might have to be housed in a new rule on "Motions to Seal." Perhaps that could be added to Rule 7(b). There might also be some difficulty defining motions to seal in a rule.

As should be apparent, the Subcommittee remains near the beginning of its process of examining these proposals. But it has already made considerable progress in clarifying issues and working through them. It looks forward to hearing the views of the full Committee on the matters before it.

* * * * *

Rule 28

Rule 28 is not a rule that most lawyers or judges use very often. Judge Michael Baylson (E.D.Pa.) (a former member of the Advisory Committee) submitted 23-CV-B on Feb. 3, 2023.

The appropriate method of addressing privacy concerns and other concerns about American discovery with regard to information located outside this country can be delicate. The Sedona Conference some time ago undertook a major project on this topic.

FJC Report on Mandatory Initial Discovery Project

During the Advisory Committee's March 2023 meeting, there was a presentation regarding the FJC's 100-page analysis of the results of the Mandatory Initial Discovery Project conducted in the District of Arizona and the Northern District of Illinois. Though the report did not show that aggressive rule changes should now be pursued, it was suggested that the Discovery Subcommittee review the report to determine whether it indicates that some targeted changes to the national rules should be considered seriously. That review has not occurred, but ought to be under way by the time the Advisory Committee meets in October 2023.

III. INFORMATION ITEMS

A. Rule 7.1—Recusal Disclosure

Recusal issues involving judicial ownership of stock in companies that are involved in litigation have recently received a great deal of attention, including from Congress. For example, the Courthouse Ethics and Transparency Act (Pub. L. 117-125, May 13, 2022), amends the Ethics in Government Act of 1978 and provides for establishment of "a searchable internet database to enable public access to any report required to be filed under this title by a judicial officer, bankruptcy judge, or magistrate judge," which became available on Nov. 9, 2022.

Another proposed bill, sponsored by Senator Warren and introduced on December 20, 2022, the Anti-Corruption and Public Integrity Act (S. 5315) also contains various provisions dealing with judicial conflicts of interest. Section 404(a) of the bill would amend 28 U.S.C. § 455 to require judges to "maintain and submit to the Judicial Conference a list of each association or interest that would require such justice, judge, or magistrate to recuse under subsection (b)(4)," and for the Judicial Conference to set up and maintain a searchable database of such lists. The bill has been referred to the Committee on Finance, and no other action has yet been taken. Whether the bill will advance is uncertain, but ongoing legislative attention to the general issues seems likely.

Meanwhile, the Judicial Ethics and Anti-Corruption Act of 2022 has been introduced in both the Senate and the House (S. 4177 and H.R. 7706). Section 2 would place limits on judicial ownership of securities. Section 4 would place limits on judicial participation in privately-funded educational events. Section 6 of this bill would add a new subsection (g) to 28 U.S.C. § 455 to require an online listing of speeches by federal judges. Section 7 would provide an "oversight process" for judicial disqualification and permits any litigant to request disqualification of a judge. The bill has been referred to the Committee on Finance, and whether it will advance is uncertain, but ongoing attention to the general issues seem likely.

Two submissions to the Advisory Committee have addressed related concerns. 22-CV-H, from Judge Ralph Erickson (8th Cir.), addresses concerns raised by a number of judges about their holdings in companies such as Berkshire Hathaway. The illustrative example given involves Orange Julius. If it is a party to a suit before a judge, under current Rule 7.1 Orange Julius would have to disclose that it is wholly owned by International Dairy Queen. But that disclosure would not go farther, even though Dairy Queen is wholly owned by Berkshire Hathaway, so the disclosure would not alert the judge to the problem if the judge had Berkshire Hathaway holdings. Berkshire Hathaway is an example of a possibly more general problem. As Judge Erickson notes in his submission, CitiGroup has a controlling interest in some 300 companies, so a judge who owns CitiGroup shares face similar problems if a CitiGroup-owned company owns an entity that is a party to a suit. Judge Erickson therefore suggests amending Rule 7.1 to require disclosure of companies that hold the parent companies of parties to a case.

This might be informally called the "corporate grandparent problem." Because Rule 7.1 requires nongovernmental corporate parties to identify "any parent corporation and any publicly held corporation owning 10% or more of its stock," a "grandparent" might never be disclosed.

Some courts have interpreted the current rule as calling for disclosure of a "grandparent," but it is not clear how far that interpretation might go or if it will be broadly adopted. Given the endless permutations of corporate relationships, there may be many examples of such interests that go undisclosed.

Whether there is a suitable way to describe additional entities that must be disclosed and solve the notice problem Judge Erickson identifies is not certain. Phrases like "grandparent corporation" may be suitable. Perhaps it would suffice to say something like " . . . and any parent corporation of any such parent corporation and any publicly held corporation owning 10% or more of the stock of any such parent corporation." But even that might not reach "great-grandparent corporations."

Separately, Magistrate Judge Barksdale (M.D. Fla.) proposed that Rule 7.1 be amended to add a certification requirement that appears to build on the soon-to-be-available database on judges' stock holdings. (22-CV-F) This proposal would be to require a disclosure statement that:

> certifies that the party has checked the assigned judge or judges' publicly available financial disclosures and, if a conflict or possible conflict exists, will file a motion to recuse or a notice of a possible conflict within 14 days of filing the disclosure.

This proposal does not appear to address the corporate "grandparent" issue identified by Judge Erickson.

It may be that somewhat similar issues could be raised for the Appellate Rules Committee and the Bankruptcy Rules Committee, but this advisory committee may be a suitable venue for initial consideration of these questions. Whether the disclosure requirements of Rule 12.4 of the Criminal Rules raise similar issues is less clear. But it does seem clear that difficult and delicate issues are presented, so considerable careful study seems necessary.

During its March 2023 meeting, the Advisory Committee discussed the issues raised by these submissions, and it may be taking something of a leadership role on this set of issues. It seems clear that this set of issues can be both difficult and delicate, and that a considerable amount of attention is presently being focused on such issues. One suggestion that was proposed was to look at local rules dealing with these issues. And it was suggested that the forms of doing business are "changing by the minute." There is concern that any more general term like "all affiliated entities" might be impossibly elastic—what exactly is an "entity," and how does one know with what other "entity" it is "affiliated"?

At the outset, it may be possible to identify certain issues that likely will arise. A starting point is 28 U.S.C. § 455(b)(4), which requires recusal when the judge "individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding." Section 455(c) adds that a judge "should inform himself about his personal and fiduciary financial interests." It does not appear that party disclosures modify these judicial recusal obligations, but an expanded disclosure rule could assist a judge in monitoring holdings for possible recusal requirements in a way current Rule 7.1 may not provide. Given the statutory mandate, it is likely that a rule change would not attempt to

modify the statutory recusal mandate even if a party made an incomplete disclosure or failed to check the judge's financial disclosures or did not give notice of a possible conflict within a certain period of time.

But perhaps some ideas are not promising. Failure of a party to check the judge's financial disclosures or to file a motion to recuse within 14 days (Magistrate Judge Barksdale's proposal) likely would not affect the statutory requirement to recuse, but that does not mean that amending the rule is unwise. The fact that the database required by the Courthouse Ethics and Transparency Act has only begun to operate may be a reason for awaiting some experience with that database, at least before considering a rule that requires parties to consult it. It might also be relevant that those who request information from this database reportedly may have to provide information about themselves that is shared with the judge whose disclosure report is requested.

There might also be concern about a rule requiring parties to certify that they have checked the judge's disclosures. At least some parties—self-represented litigants, for example—might experience difficulty in complying. And the likelihood that failure to check the judge's disclosures, or to file a recusal motion, would have no bearing on whether the statute required recusal has been noted. Another possibility that has been raised was whether these issues are well suited to resolution through the Rules Enabling Act process, or whether another Judicial Conference committee might more suitably address these problems. And it may be that some circuits are engaged in improving their systems for financial disclosures by judges.

The Advisory Committee continues to work on these issues. A Subcommittee chaired by Justice Jane Bland of the Texas Supreme Court (a newly-appointed Advisory Committee member) has been appointed. Suggestions and reactions from Standing Committee members are welcome.

B. Rule 23

Two issues have arisen with regard to Rule 23. No current action is occurring, but as an information item it seems useful to introduce the issues. In the past, there has been intense controversy about amendments to Rule 23. The rule remained unamended for 30 years after the major changes in 1966, which introduced the "modern class action." Then, in 1998 Rule 23(f) was added to permit a court of appeals to accept an appeal from a district court's grant or denial of class certification. But several proposed changes to the certification standards of Rule 23(b) were not pursued after public comment. In 2003, the procedures for handling class actions were revised, with new provisions in Rule 23(e) (on settlement approval in class actions), and new Rules 23(g) and (h) added to the rule. Then in 2018, Rule 23(e) was expanded to give additional guidance on judicial approval of class settlements. If the current Rule 23 issues are pursued, they may generate similar interest.

Incentive awards to class representatives

During the Advisory Committee's October 2022 meeting attention was drawn to the 2-1 decision of a panel of the Eleventh Circuit in *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020). The Eleventh Circuit declined to rehear the case en banc, 43 F.4th 1138 (11th Cir. 2022), and it appears that there are two petitions for certiorari (No. 22-389 and No. 22-517).

At the Advisory Committee's March 2023 meeting, the discussion included observations about it being unrealistic to expect class representatives to invest substantial effort in superintending a class action without the prospect of some compensation for that effort. But the principal question was whether the Supreme Court would address the issue. On April 17, 2023, the Supreme Court denied the petition for certiorari. *Dickenson v. Johnson*, ___ S.Ct. ___, 2023 WL 2959370 (S.Ct. April 17, 2023). It thus seems that the Court is not presently taking it up.

The Eleventh Circuit majority relied on two 19th century Supreme Court cases—*Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527 (1881), and *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

Other courts of appeals have not followed the Eleventh Circuit decision. A recent illustration is provided by *Murray v. Grocery Delivery E-Services USA, Inc.*, 55 F.4th 340 (1st Cir. 2022), in an opinion by Judge Kayatta. Presented with a challenge to incentive awards for class representatives, the court said (id. at 352-53):

> Courts have blessed incentive payments for named plaintiffs in class actions for nearly a half century, despite *Greenough* and *Pettus*. Two of our sister circuits have distinguished *Greenough* and declined to categorically prohibit incentive payments. *Melito v. Experian Mktg. Sols, Inc*., 923 F.3d 85, 96 (2d Cir. 2019); *In re Cont'l Ill Sec. Litig.*, 962 F.2d 566, 571-72 (7th Cir. 1992).
>
> The Eleventh Circuit (in somewhat of an about-face) did recently bite on the *Greenough* argument in *Johnson v. NPAS Sols, LLC*, 975 F.3d 1244, 1257 (11th Cir. 2020). It stated the class-action incentive awards were "roughly analogous" to the payments for personal services in *Greenough*.
>
> * * *
>
> Rule 23 class actions still require named plaintiffs to bear the brunt of litigation (document collection, depositions, trial testimony, etc.), which is a burden that could guarantee a net loss for the named plaintiff unless somehow fairly shifted to those whose interests they advance. See *Continental Illinois*, 962 F.2d at 571. In this important respect, incentive payments remove an impediment to bringing meritorious class actions and fit snugly into the requirement of Rule 23(e)(2)(D) that the settlement "treats class members equitably relative to each other."
>
> Accordingly, we choose to follow the collective wisdom of courts over the past several decades that have permitted these sorts of incentive payments, rather than create a categorical rule that refuses to consider the facts of each case.

Other courts have agreed. *E.g., Somogyi v. Freedom Mortg. Corp.*, 485 F.Supp.3d 337, 354 (D.N.J. 2020) ("Until and unless the Supreme Court or the Third Circuit bans incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances."). Compare *Fikes Wholesale, Inc. v. HSBC Bank USA, Inc.*, 62 F.4th 704 (2d Cir. 2023), in which the three-judge panel, speaking through Judge Jacobs, unanimously upheld the

authority to make incentive awards. The majority opinion suggested that "practice and usage" under Rule 23 may have "superseded" *Pettus* and *Greenough*, but expressed doubt about whether lower court decisions could actually do such a thing. Relying on 21st century Second Circuit decisions that "are precedents we must follow," however, the court upheld the authority, though it questioned the amount of the awards (some $900,000). In a separate concurring opinion, however Judge Jacobs (the author of the majority opinion) said he was "in accord with" the Eleventh Circuit panel majority in *NPAS*.

For the present, then, this is a reporting item. It is interesting to see that the First Circuit opinion by Judge Kayatta relies in part on the 2018 amendment to Rule 23(e)(2)(D), suggesting that perhaps a rule provision already addresses the issues, at least in part. In light of the Supreme Court's denial of cert., it may be that the Advisory Committee will take up this issue. But it is likely that doing so would involve substantial efforts. The Advisory Committee would benefit from any reactions or suggestions from Standing Committee members.

Expanding "superiority" under Rule 23(b)(3) to include non-adjudicatory responses

The Lawyers for Civil Justice have submitted a proposal to amend Rule 23(b)(3), 22-CV-L. The proposal is to amend the rule as follows regarding criteria for certifying 23(b)(3) class actions:

> **(3)** The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy or otherwise providing redress or remedy. The matters pertinent to these findings include:
>
> > **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions, including the potential for higher value remedies through individual litigation or arbitration and the potential risk to putative class members of waiver of claims through class proceedings;
> >
> > **(B)** the extent and nature of any (i) litigation concerning the controversy already begun by or against the class members, (ii) government action, or (iii) remedies otherwise available to putative class members;
> >
> > **(C)** the desirability or undesirability of concentrated the litigation of the claims in the particular forum; ~~and~~
> >
> > **(D)** the likely difficulties in managing a class action~~.~~;
> >
> > **(E)** the relative ease or burden on claimants, including timeliness, of obtaining redress or remedy pursuant to the other available methods; and
> >
> > **(F)** the efficiency or inefficiency of the other available methods.

No action is presently proposed on this submission, but it seems worthwhile to provide some background on prior Advisory Committee experience with Rule 23 amendment proposals.

The class-action rule was extensively amended in 1966, introducing what has been called the "modern class action." As the Supreme Court has said, Rule 23(b)(3) was the major addition to the federal-court class action, and it has proved something of a workhorse since adoption. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842-43 (1999) ("the [Advisory] Committee was consciously retrospective with intent to codify pre-Rule categories under Rule 23(b)(1), not forward-looking as it was in anticipating innovations under Rule 23(b)(3)"). And during its first years in operation, Rule 23(b)(3) generated substantial controversy. For discussion, see Arthur Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 Harv. L. Rev. 664 (1979).

For three decades after 1966, the Advisory Committee proposed no amendments to Rule 23. Then in 1996, it produced a preliminary draft of proposed changes to Rule 23(b)(3), along with the addition of Rule 23(f) on interlocutory review of class certification decisions. The Rule 23(b)(3) proposals drew very extensive commentary, and eventually all the 23(b)(3) proposals were withdrawn, though Rule 23(f) went forward.

At the time, the Advisory Committee's focus shifted from certification standards to class action procedure. After considerable additional work, that effort produced the 2003 amendments to the rule, revising the timing of certification decisions under Rule 23(c) and 23(e) and adding Rule 23(g) (on appointment of class counsel) and Rule 23(h) (on attorney fee awards to class counsel).

In 2018, further amendments to Rule 23(e) on settlement approval procedures were added. As noted above, Judge Kayatta invoked one of those when discussing the incentive award issues.

So returning the focus to certification criteria may present challenges. Much of the litigation about 23(b)(3) has focused on predominance, and superiority (the focus of this proposal) has received less attention. At its simplest, superiority might be a way of recognizing that mass tort personal injury claimants might have a greater interest in controlling their own claims, as Rule 23(b)(3)(A) suggests, than consumer claimants who may have spent modest amounts of money for products they have found unsatisfactory.

It seems, however, that this submission is largely focused on consumer type class actions. To take a leading example cited in the submission, *In the Matter of Aqua Dots Products Liability Litigation*, 654 F.3d 748 (7th Cir. 2011), involved a toy consisting of small, brightly colored beads. Unfortunately, when ingested these beads metabolized into an acid that can induce nausea, dizziness, unconsciousness, and death. As Judge Easterbrook noted for the Seventh Circuit, "it was inevitable given the age of the intended audience and the beads' resemblance to candy that some would be eaten."

On learning of the problem, defendant recalled all of the Aqua Dots products, and honored requests for refunds. More than one million Aqua Dots kits had been sold, and consumers returned roughly 600,000 of them.

Some purchasers did not ask for refunds and instead filed a class action relying on state consumer-protection statutes and seeking punitive damages under state law. The district court

denied class certification under Rule 23(b)(3), however, concluding that the recall program adopted by defendant meant that "the substantial costs of the legal process make a suit inferior to a recall as a means to set things right." Id. at 751.

Judge Easterbrook observed that "[i]t is hard to quarrel with the district court's objective," emphasizing the costs that proceeding with the class action could entail. Id. But the rule does not permit individual district judges to "prefer their own policies" over what the rule says. And the alternative to a class action the rule says should be considered is "adjudication" in another format. "[T]he subsection poses the question whether a single suit would handle the dispute better than multiple suits. A recall campaign is not a form of 'adjudication.'" Id. at 752.

Though holding that the district court could not decline certification on superiority grounds, Judge Easterbrook noted as well that "Rule 23 gives a district judge ample authority to decide whether a class action is the best way to resolve a given dispute." Id. For example, the court should have relied on Rule 23(a)(4), because plaintiffs sought "relief that duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class." Id. In addition, plaintiffs' request for punitive damages under state law could pose considerable manageability challenges. Id. Moreover, it seemed that individual notice would be impossible. "The per-buyer costs of identifying the class members and giving notice would exceed the price of the toys (or any reasonable multiple of that price) leaving nothing to be distributed." Id. at 752-53. In short:

> The principal effect of class certification, as the district court recognized, would be to induce the defendants to pay the class's lawyers enough to make them go away; effectual relief for consumers is unlikely. (Id. at 753.)

On these grounds, the court affirmed denial of certification, while also rejecting the district court's reliance on superiority.

The submission urges that the current rule's focus only on the alternative of adjudication "stifles courts' discretion" (submission at 4) and prevents judges from fulfilling their duty to protect the class. (Submission at 5) "Courts should be allowed to consider whether a company's policy of curing a customer's complaints is superior to what can be achieved with the proposed class action." (Submission at 8) It also rejects the Rule 23(a)(4) "work-around" employed by Judge Easterbrook. (Submission at 10-11)

It may be that the time has come to return the Committee's attention to certification criteria. But pursuing this idea may raise considerable difficulties as well. It may be that the situation in *Aqua Dots* was particularly clear—more than half the items sold had already been returned. One might speculate that the prospect of a class action might have been one stimulus behind defendant's aggressive efforts to satisfy potential class members by alternative means.

The amendment proposal would ask a judge to compare what the defendant offered with what the class action might produce. Since most class actions result in settlements, that might seem to ask the judge to engage in the sort of careful analysis of the proposed alternative non-litigation "solution" that would be needed under Rule 23(e) to approve a settlement offering the same thing.

Yet settlement approval is often timely only after considerable litigation activity has occurred. (True, class certification activity also often follows much litigation activity.)

Under Rule 23(e), class members are entitled to notice of the proposed settlement and an opportunity to object or to opt out. Presumably, accepting the defendant's non-litigation solution could be viewed as a form of opt out. But when called upon to make a determination about whether a proposed settlement is fair, reasonable, and adequate a judge is likely to have significantly more information than would be available to a judge making a decision early in the litigation that the defendant's proposed solution is "fair, reasonable, and adequate." Should the judge decline to endorse the non-litigation route only after a significant proportion of the potential class members (50%, perhaps) had opted for what the defendant was offering?

Another feature of the amendment is that it also asks the judge to consider the alternative of "government action." There is considerable academic literature showing that action by government (for example, the SEC) often produces much smaller remedies, measured in dollars, than private class actions. Trying to guess whether government action would be a suitable substitute for a class action could pose another major challenge for the judge. Suppose, for example, that the governmental enforcement agency potentially involved told the court "We favor allowing the class action go forward." Is the judge to disregard that governmental view?

The general question of courts deferring to private resolutions is sometimes controversial. Consider, for example, the controversy surrounding "class action waivers" in arbitration agreements. Should arbitration be considered one of the alternatives a judge might find superior to a Rule 23(b)(3) class action? The submission does say: "Outside of Rule 23, courts have recognized at least one method of out-of-court resolution—arbitration—as 'adjudication.'" (Submission at 4 n.14) Perhaps, then, a court could decline to certify under Rule 23(b)(3) based on a finding that arbitration would be superior to in-court resolution. Perhaps a court could do so even though there was no right to proceed on a class-wide basis in the arbitral proceeding. That idea seems to be picked up by addition to Rule 23(b)(3)(A) of arbitration as an alternative that the court should take into account in deciding whether to certify under Rule 23(b)(3).

For the present, these issues are not ripe for immediate action, and this report is purely informational. Reactions from Committee members would be useful and welcome.

C. Standards and procedures for deciding ifp status

During the Advisory Committee's March 2022 meeting, there was an update about ongoing attention to in forma pauperis practice. One example is Professor Hammond's article Pleading Poverty in Federal Court, 128 Yale L.J. 1478 (2019). Professor Hammond (Indiana U.) and Professor Clopton (Northwestern) have submitted 21-CV-C, raising various concerns about divergent treatment of ifp petitions in different district courts.

There is strong evidence of divergent practices regarding ifp applications that seem difficult to justify. But it is far from clear this is a rules problem, or that there is a ready solution to this problem. For example, the stark disparities in cost of living in different parts of the country make articulating a national standard (at least in dollar terms) a major challenge. And in terms of

court operations, there may be significant inter-district differences that bear on how ifp petitions are handled. But one might have difficulty explaining significant divergences between judges in the same district in resolving such applications.

At least some districts have recently paid substantial attention to their handling of ifp petitions, sometimes involving court personnel with particular skills in resolving such applications. Those efforts may yield guidance for other districts.

Though the case can be made for action on this front, the content of the action and the source for directions are not clear. The Administrative Office has reportedly convened a working group examining these issues. It may well emerge that the Court Administration and Case Management Committee is the appropriate vehicle for addressing these issues rather than the somewhat cumbersome Rules Enabling Act process. Presently, for example, there is some concern about the varying application of different Administrative Office forms that are used in different districts to review ifp applications. Those forms do not emerge from the Enabling Act process.

For the present, the topic has remained on the agenda pending further developments. There was no significant discussion of this topic during the October 2022 Committee meeting. It is not clear that the submission from Professors Hammond and Clopton can be suitably dealt with in the Civil Rules. The basic starting point is likely the pertinent statute. See 28 U.S.C. § 1915.

At the Advisory Committee's March 2023 meeting, it was noted that various districts may differ in the staffing levels needed to adopt certain practices used in other districts for handling ifp applications; large metropolitan districts might have staffing better equipped to handle new procedures than other districts. Though it was agreed that this is an important one, it may be unsuited to revision through the Enabling Act process, which takes several years to complete. Moreover, there is an A.O. Pro Se Working Group; the resolution was that the topic be retained on the committee's agenda and that Judge Rosenberg would reach out to that A.O. Working Group.

IV. MATTERS TO BE REMOVED FROM AGENDA

A. Rules 38, 39, and 81(c)—jury trial demand

These matters originally arose after a Standing Committee meeting in 2016, at which there was a presentation about a concern that Rule 81(c) might lead to loss of a right to jury trial in removed cases. That Rule 81(c) submission (15-CV-A) remains pending before the Advisory Committee.

After that meeting, two members of the Standing Committee (then-Judge Neal Gorsuch and Judge Susan Graber) submitted 16-CV-F, suggesting that Rule 38 be amended to parallel Criminal Rule 23(a), which directs that there be a jury trial unless the defendant and Government waive jury trial and the judge agrees to hold a court trial. There was a concern that the demand requirements of Rule 38 might sometimes deprive parties—perhaps particularly in removed cases—of the right to jury trial.

The question whether the Rule 38 demand requirements actually did deprive parties of jury trials has been addressed by FJC research. At the Advisory Committee's March 2022 meeting,

there was a report about consideration of proposals to change the current rule provisions on demanding a jury trial. A concern was that one possible explanation for the declining frequency of civil jury trials has been failure to make a timely jury demand.

Meanwhile, a proposal has been made to the Criminal Rules Committee to amend Criminal Rule 23(a) to authorize the court to proceed to court trial without the government's consent if the defendant presents reasons in writing for a nonjury trial and, after giving the government an opportunity to respond, the court finds the reasons presented by the defendant are sufficient to overcome the presumption in favor of jury trial.

The FJC undertook docket research regarding the frequency of jury trial demands in civil cases, the frequency of termination after commencement of a civil jury trial, and the frequency of orders for a jury trial despite failure to make a timely demand. The initial FJC report did not show that the rule requirements to demand a jury trial are a major factor in whether jury trial occurs. Type of case seems more prominent. For example, more than 90% of product liability cases show a jury demand, while only about 1% of prisoner cases show such a demand. And the incidence of actual jury trials is affected by settlement. An action may settle before the deadline for demanding a jury. Nor does the study show whether settlement occurs more frequently in cases in which a timely jury demand was not made, something that may not appear on reviewing docket entries. And the effect of facing a prospect of jury trial might be ambiguous in terms of affecting willingness to settle. Though this FJC report might have justified dropping the Rule 38 proposal from the agenda, it was decided at the October 2022 Advisory Committee meeting to await completion of a larger study ordered by Congress of the frequency of civil jury trials in different districts.

That report to Congress was completed in March 2023 and was presented to the Advisory Committee during its March 2023 meeting. It showed that there is very little variation among districts in the frequency of jury trials in civil cases. In general, though the absolute number of jury trials is higher in larger districts, the frequency of civil jury trials is larger in smaller districts. But the variation among districts is not distinctive. The District of Wyoming has 2.75% jury trials, and one other district has more than 2% jury trials. Though the declining rate of civil jury trials may be much lamented, the most recent report does not indicate that Rule 38 contributes to the declining rate. Under these circumstances, it does not seem that revising Rules 38 and 39 would be likely to have a significant effect on the rate of jury trials in civil cases.

The March 2023 report to Congress did, however, provide some insights. One is that the rate of jury trials between civil and criminal cases correlate, which cuts against the notion that jury trial is more frequent in criminal cases than civil cases.

Another insight was that there seems no correlation between the rate of civil jury trials and the rate of resolution of actions by summary judgment. Increasing judicial case management, however, does seem to correlate with declines in the frequency of civil jury trials. For example, in 1962 some 5.5% of civil cases reached jury trial, while in 2019 the rate of civil jury trial was 0.5%.

In light of these findings, the Advisory Committee concluded at its March 2023 meeting that this item could be dropped from its agenda.

B. Rule 53—22-CV-Q

Senators Tillis and Leahy wrote to Chief Justice Roberts concerning "abusive appointment of special masters which is occurring in a single federal district court." This concern was evidently raised by a witness at a hearing of the Senate Intellectual Property Subcommittee.

The senators' letter cites Scott Graham, How a Former Law Clerk Earned $700K This Year as a Court-Appointed Technical Adviser, Nat. L.J. (Aug. 26, 2021). The article reports on "the exploding number of patent cases" before a judge in the Western District of Texas. The story says this judge was "an accomplished patent litigator" before appointment to the bench, and that he "has been a frequent presence at IP bar functions, letting attorneys know that—unlike some judges who dread patent cases—he welcomes them."

Perhaps as a result, the story suggests, this judge says he can't keep up with the patent filings in his court without the help of his "technical advisers," who have hard science backgrounds in addition to law degrees. With that assistance, according to the story, the judge is able to preside over as many as six or seven *Markman* hearings per week. The story says this court now has "about 25% of the nation's patent cases."

There may be advantages to the method adopted by this judge. Prof. Sapna Kumar, for example, published an article entitled Judging Patents, 62 Wm. & Mary L. Rev. 871 (2021), contrasting the American approach to such disputes to the method used in several European patent courts, which rely on technically qualified judges who work side-by-side with their legally trained counterparts to decide patent cases. In Prof. Kumar's view, Congress should designate about a dozen district courts across the country to take on the nation's patent cases.

There may be forceful objections to the American method of adjudicating patent cases. Holding jury trials in patent cases might well be sub-optimal. But that possibility would not be a rules matter. *Markman* itself drew a line between the role of the judge and the jury in adjudicating patent disputes, not something controlled by the Civil Rules.

Rule 53 was extensively revised over several years, leading to the adoption of the current rule (later restyled) in 2003. As Senators Tillis and Leahy recognize in their letter, Rule 53(a)(1)(B)(i) authorizes appointment of a master only when warranted by "some exceptional condition." Rule 53(b) prescribes procedures for appointment of a master and other subdivisions of the rule govern the master's authority (Rule 53(c)) and the procedures for court action on the master's report (Rule 53(f)).

Rule 53(a)(1)(C) authorizes appointment of a master to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." The Committee Note addresses the possible role of a master in patent litigation:

> The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be de novo

> under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone.

It appears that efficient methods of resolving patent disputes are important to our legal and economic system. But it is not clear that revising Rule 53 would be a promising way to achieve that goal. And it is not clear that Senators Tillis and Leahy believe that the provisions of the current rule are deficient. Instead, it seems that they are concerning about the actions of a single judge or single district that might not be consistent with what the rule says. Thus, the senators' letter asks for an investigation of "abuses relating to the appointment of technical advisors" to determine whether the rules permit "this frequent use of technical advisors."

Considering further revisions to Rule 53 focused on patent infringement cases would likely require considerable work on the current handling of those cases, and in particular the use of Rule 53 masters in them. An FJC study could probably shed light on current practice. The 2003 amendments were supported by such a report. See Willging, Hooper, Leary, Miletich, Reagan & Shapard, Special Masters' Independence and Activity (FJC 2000). Whether the instances cited by the senators in their letter warrant that level of effort could be debated. At the same time, it is likely that such a rulemaking effort could generate considerable controversy.

Since this problem does not seem to relate to what Rule 53 says, and may concern a single district judge, a three- to four-year rule-amendment process does not appear warranted.

During the Advisory Committee meeting in March 2023, it was pointed out that the senators sent a copy of their letter to the Chief Judge of the Western District of Texas, which might have produced results not obtainable by rule amendment. A recent newspaper report suggests that a pertinent change has been made. See Abbie VanSickle, Schumer Calls for an End of "Judge-Shopping," N.Y. Times, April 28, 2023 (referring to "a recent change in Texas courts after concerns about judge-shopping * * * the chief judge for that district ordered that new patent cases filed in Judge Albright's court be split among 12 judges in the area").

At the Advisory Committee's meeting, it was concluded that this matter should be dropped from the agenda.

C. Rule 11

Andrew Straw has submitted 22-CV-R, urging that Rule 11 be amended to forbid state bar authorities to impose discipline on attorneys for conduct in regard to federal cases unless the federal courts had first imposed a Rule 11 sanction on the attorney.

Mr. Straw introduced his proposal as prompted by his personal experience:

> My former employer, the Indiana Supreme Court, has taken mere words of criticism from several federal lawsuits I filed to vindicate disability rights and imposed nearly 6 years of suspension on 5 law licenses (4 federal via reciprocal discipline with NO HEARING), absolutely ruining my legal career.

He objected to Indiana's imposition of sanctions in the absence of Rule 11 sanctions in the underlying federal actions. He therefore proposes that "Rule 11 must absolutely prohibit any other court from using 'harsh words' without a Rule 11 sanction as being an ethical violation by the person who filed the lawsuit and pursued it." In his view, "Indiana took the lack of any sanction in 4 federal cases and took this to mean that it has free reign [sic] under its own Rule 3.1 alone to retaliate against those cases after I made an ADA complaint about the Indiana Supreme Court TO the Indiana Supreme Court."

Research indicates that Mr. Straw has already pursued his objections to his treatment by the Indiana state courts in federal court. He sued the Indiana Supreme Court in U.S. district court in Indiana, and appealed to the Seventh Circuit when that case was dismissed. *Straw v. Indiana Supreme Court*, 2018 WL 1309802 (7th Cir., Jan. 29, 2018). He then petitioned for certiorari in the U.S. Supreme Court, but the Court denied the petition. *Straw v. Supreme Court of Indiana*, 138 S.Ct. 1598 (2018).

In addition, some other online research appears to disclose the following: Mr. Straw sued the U.S. District Court for the Southern District of Indiana for $5 million, but that suit was dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B). He also sought to have the federal courts reinstate his right to litigate in federal court. *See In re Andrew Straw*, No. 17-2523 (7th Cir., Dec. 21, 2017). He also sued the State of Indiana to challenge his discipline, but that suit was dismissed for failure to state a claim. *Straw v. State of Indiana*, Court of Appeals of Indiana no. 22A-PL-766 (June 22, 2022). In addition, in 2020 the S.D.N.Y. dismissed his suit alleging defamation against the law firm Dentons and Thomson Reuters, seemingly for blog posts and publishing the official reports of the Indiana Supreme Court decisions about him), including also a claim against his law school alma mater, Indiana University School of Law. *Straw v. Dentons US LLP*, S.D.N.Y. 20-CV-3312 (June 11, 2020). In dismissing this case, Judge Stanton noted that other courts had rejected Straw's efforts to challenge the discipline imposed by the Indiana courts. A Westlaw search suggests there may be additional actions brought by Mr. Straw.

The main change Mr. Straw proposes to Rule 11 is to add a new subdivision (e), entitled "Containment of Discipline and Prevention of State Court Abuse." The thrust of his argument seems to be that no state bar discipline may be imposed for actions taken in regard to federal-court litigation unless the federal court first imposes sanctions.

Mr. Straw seems to have things backwards. By and large, the federal courts leave bar discipline to state bar authorities. On occasion, a federal court may impose discipline on a lawyer for action taken in the federal court (such as suspension from practice before the federal court), but more often federal courts may refer questions of discipline to state bar authorities.

In the 1990s, there was brief consideration of possible adoption of Federal Rules of Attorney Discipline (partly due to urging from the Department of Justice), but that idea soon proved unworkable. So most district courts adopt the professional responsibility rules of the states in which they sit as applicable in their courts as well.

The notion that a Civil Rule could prevent state bar authorities from imposing discipline seems to fly in the face of this experience and misunderstand the relationship of state bar discipline

and federal court admission to practice. And even if this idea had some promise, it would be odd that it should apply only to proceedings governed by the Civil Rules; it surely could happen that attorney misconduct could occur in criminal cases, bankruptcy cases, or before the appellate courts. So a rule of this nature would be an odd addition to the Civil Rules only.

At its March 2023 meeting, the Advisory Committee decided to drop this matter from the agenda.