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

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MEMORANDUM

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

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

RE: Report of the Advisory Committee on Civil Rules

DATE: May 21, 2021

Introduction

The Civil Rules Advisory Committee met on a teleconference platform that included public access on April 23, 2021. Draft minutes of the meeting are attached.

Part I of this report presents three items for action. The first recommends approval for adoption of Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g). The second recommends approval for adoption of an amendment of Rule 12(a)(4). The third recommends approval for publication of a new Rule 87, as reported with the joint report on emergency rules for the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Part II of this report provides information about ongoing subcommittee projects. The MDL Subcommittee is actively exploring a draft rule that would establish provisions similar to the class action provisions that address the court's role in settlement, and appointment and compensation of

lead counsel, as well as alternatives that would simply focus attention on these issues by the court and the parties. The Discovery Subcommittee is preparing to study suggestions that amendments should be made to Rule 26(b)(5)(A) on what have come to be called "privilege logs," and to create a new rule to address standards and procedures for sealing matters filed with the court. The work of these two subcommittees is described in parts IIA and IIB. There is no need for further description of the work of two other subcommittees. A joint subcommittee with the Appellate Rules Committee has explored possible amendments to address the effects of Rule 42 consolidation in determining when a judgment becomes final for purposes of appeal. That work is quiet for the moment, and it may be appropriate to consider dissolving the subcommittee. Another joint subcommittee continues to consider the time when the last day for electronic filing ends. Work to support further deliberations continues, but it may be some time before enough information has been gathered to support renewed deliberations.

Part III describes continuing work on two topics carried forward on the agenda for further study. One reflects a series of proposals that seek a rule to establish uniform national standards to qualify for *in forma pauperis* status and prescribe the information that must be provided to support the determination. A second is Rule 12(a), which seems to recognize that a statute may alter the time to respond under Rule 12(a)(1), but not to recognize statutes that would alter the time set by Rule 12(a)(2) or (3). This proposal remains on the agenda after failing of adoption by an even vote at the October 2020 meeting and in light of additional relevant information received just prior to the April 2021 meeting.

Part III omits two other topics carried forward on the agenda but not discussed at this meeting. One arises from a potential ambiguity in Rule 4(c)(3) that may affect the procedure for ordering a United States marshal to serve process in an *in forma pauperis* or seaman case. Another is the Rule 5(d)(3)(B) limits on electronic filing by unrepresented parties.

Part IV describes a new item that is being carried forward for further work. This item is a proposal to amend the Rule 9(b) provisions for pleading malice, intent, knowledge, and other conditions of a person's mind. The amendment would supplant the Supreme Court's interpretation of this rule in *Ashcroft v. Iqbal*, 556 U.S. 662, 686-687 (200().

Part V describes five proposals that are not being pursued further. One addressed the fit between the provisions in Rule 4(f)(1) and (2) for service abroad under an international convention. A second asked why Rule 65(e)(2) refers only to preliminary injunctions in statutory interpleader actions, but not to permanent injunctions. The third, suggested by a pro se litigant, sought extra time for post-judgment motions when the clerk serves notice of entry of judgment by mail, and also addition to Rule 60(c)(1) of a cross-reference to the provision of Appellate Rule 4(a)(4)(a)(vi) that governs the effect of a Rule 60(b) motion on appeal time. Two others, removed from the agenda on recommendation of the Discovery Subcommittee, would address attorney fees as sanctions for failure to preserve electronically stored information, and create a new independent action to preserve testimony.

I. Action Items

A. Social Security Rules (for Final Approval)

The Rules. The Advisory Committee recommends adoption of the proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) that were published for comment in August 2020. The proposed Supplemental Rules and a summary of public comments are included in the appendix to this report.

As compared to many published proposals to amend one of the general Civil Rules, there were only a modest number of comments, and only two witnesses at a single hearing. Most of the comments and testimony reiterated themes made familiar during the conferences held by the Social Security Review Subcommittee and in its many exchanges with interested organizations and practitioners through the formal conferences and less formal exchanges. Those who participated included the Administrative Conference of the United States, which initially proposed that special social security rules be adopted; the Social Security Administration (SSA); the National Organization of Social Security Claimants' Representatives; the American Association for Justice; federal district judges and magistrate judges; individual claimants' attorneys; and academics, including one of the coauthors of the exhaustive survey of current practices that stimulated the Administrative Conference to propose new rules. Two changes were made in the published rules texts, as noted below. Summaries of the comments and testimony are attached.

Much of what emerged from the comments and testimony was anticipated in discussion at the Standing Committee meeting on June 23, 2020, that approved publication. There is widespread, essentially universal agreement that the rules themselves establish an effective and nationally uniform procedure for these cases. They are appeals on an administrative record, little suited for disposition under civil rules designed for cases that are shaped for trial through motions to dismiss, scheduling orders, discovery, motions for summary judgment, and occasionally for actual trial on the merits. The extensive and painstaking work that developed these rules has produced a procedure as good as can be developed.

This approval of the rules themselves led to widespread support for their adoption. District judges and the Federal Magistrate Judges Association support adoption, including the chief judges of two districts that are among the three districts that entertain the greatest number of social security review actions. These two districts already follow local procedures similar to the proposed national rules, as do several others that have become dissatisfied with attempts to provide an efficient review procedure under the general civil rules. Support is provided by other organizations, including vigorous support grounded on the belief that these rules will be a great help to pro se claimants.

Despite agreement on the quality of the proposed rules, some opposition remains. Claimants' representatives are comfortable with the widely diverse range of practices they confront now. Even those who practice across two or more districts say they can comfortably conform to local differences. They think there is no pressing need to establish a uniform national practice. And they fear that judges who now provide efficient review under accustomed local

procedures will not be as efficient if forced to conform to a different national procedure. Some also predict that the effort to achieve uniformity will be thwarted by the insistence of some judges on adhering to their own preferred practices.

A distinctive ground of opposition has been offered by the Department of Justice. Although the Department has promoted adoption of a model local rule drawn along lines proposed by earlier drafts of the supplemental rules, it fears that adopting a set of supplemental rules for these cases will encourage efforts to promote distinctive rules for other substantive areas and for purposes less aligned with the public interest. That concern ties to the broader questions about adopting transsubstantive rules that are discussed below.

Given the general agreement that the proposed rules are well suited to the task, they can be summarized briefly.

Supplemental Rule 1(a) defines the scope of the rules. They apply to § 405(g) actions brought against the Commissioner of Social Security for review on the administrative record of an individual claim. More complicated actions are governed only by the general Civil Rules. Supplemental Rule 1(b) confirms that the general Civil Rules also apply, "except to the extent that they are inconsistent with these rules."

Supplemental Rule 2(a) provides for commencing the action by filing a complaint. Supplemental Rule 2(b)(1) provides the elements that must be stated in the complaint: identifying the action as a § 405(g) action and the final decision to be reviewed, the person for whom benefits are claimed, the person on whose wage record benefits are claimed, and the type of benefits claimed. Subdivisions (b)(1)(B) and (C) are one of the parts of the rules modified in response to public comment and testimony. As published, they required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. This feature drew steady fire during the period leading up to publication and after publication, but was retained because the SSA maintained that it resolves so many claims that often it could not identify the administrative proceeding and record by name alone. The comments and testimony revealed that the SSA is in the process of implementing a practice of assigning a unique 13-character alphanumeric identification, now called the Beneficiary Notice Control Number, for each notice it sends. This process is expected to be adopted for all proceedings by the time the Supplemental Rules could become effective. The amended rule text requires the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." The final part of Supplemental Rule 2, subdivision (b)(2), permits – but does not require – the plaintiff to add a short and plain statement of the grounds for relief. One of the reasons this provision is supported by claimants' representatives is that it can be used to inform the SSA of reasons that may lead it to request a voluntary remand.

Supplemental Rule 3 dispenses with service of summons and complaint under Civil Rule 4. Instead, the court is directed to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate the SSA office and to the United States Attorney for the district. This rule is modeled on practices established in a few districts. It has been welcomed on all sides.

Supplemental Rule 4(a) and (b) set the time to answer and provide that the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c). "Civil Rule 8(b) does not apply," leaving the Commissioner free to decide whether to respond to the allegations in the complaint. Claimants' representatives would prefer that Rule 8(b) apply, but framing the dispute through the briefs is more in keeping with the appellate nature of these actions. Supplemental Rule 4(c) and (d) address motions, incorporating Civil Rule 12 as a convenient cross-reference for the parties.

Supplemental Rule 5 is the heart of the new procedure. "The action is presented for decision by the parties' briefs," which must support assertions of fact by citations to particular parts of the record. Briefs establish a suitable procedure for appellate review on a closed administrative record.

Supplemental Rules 6 through 8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for a reply brief by the plaintiff. Supplemental Rule 6 includes the other change made in response to a comment, incorporating language making it clear that the 30 days for the plaintiff's brief run from entry of an order disposing of the last remaining motion filed under Rule 4(c) if that is later than 30 days from filing the answer. From the beginning, these periods have been challenged as too short. Administrative records are long, and plaintiffs' attorneys often practice in small firms without the resources to manage occasional excessive workloads. The SSA attorneys also may be overburdened. Experience in courts that set similarly tight times for briefs shows that extensions are regularly requested and routinely granted. Why not, it is urged, set the periods at 60 days, 60 days, and 21 days? The Advisory Committee has resisted these arguments, believing that shorter times can be met in many cases, and that setting them in the rule will encourage prompt briefing, and perhaps prompt decision. Claimants commonly have had to engage with the administrative process for at least a few years, and often are in urgent need of benefits. The Civil Rule 6(b)(1) authority to extend time remains available.

Transsubstantivity Widespread agreement that the Supplemental Rules establish a strong, sensible, and nationally uniform procedure for resolving appeals on the administrative record moves the question to concerns about adopting rules for a specific substantive subject. These concerns have accompanied the project from the beginning. They were discussed during the June 23, 2020, Standing Committee meeting that approved publication. The discussion is summarized at pages 20-22 of the meeting minutes, pages 48-50 of the agenda materials for the January 5, 2021 meeting. The discussion was valuable, but the vote to approve publication was not intended to conclude the matter. "Transsubstantivity" remains to be considered as the only ground for reluctance to recommend the rules for adoption.

The discussion last June, and at earlier meetings, has made the issues familiar. The theoretical issues may be summarized first, followed by an evaluation of the more pragmatic and more difficult issues.

The theoretical issue is regularly framed around the word in the Rules Enabling Act, 28 U.S.C. § 2072(a), that authorizes the Supreme Court to prescribe "general" rules of practice and procedure. It is common ground that the Civil Rules must be general in the sense that they apply

to all district courts. At the same time, multiple familiar examples demonstrate the adoption of rules that address specific subject matter. Rule 71.1(a) directs that "These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise." Rule A(2) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions directs that "The Federal Rules of Civil Procedure also apply * * * except to the extent that they are inconsistent with these Supplemental Rules." Rule G of those rules, adopted at the urgent request of the Department of Justice, focuses only on "a forfeiture action in rem arising under a federal statute." Special rules have been adopted for § 2254 proceedings, and for § 2255 proceedings as well; each of those sets of rules concludes with a similar Rule 12, applying the Civil Rules – and for the § 2255 rules the Criminal Rules as well – "to the extent that they are not inconsistent with any statutory provisions or these rules." Civil Rule 65(f) provides a much more focused example: "This rule applies to copyright impoundment proceedings." The 2001 committee note explains that this rule was adopted in tandem with "abrogation of the antiquated Copyright Rules of Practice for proceedings under the 1909 Copyright Act." An even more modest illustration is provided by Appellate Rule 15.1, which supplements the general Appellate Rule 15 procedures for petitions to review agency orders by setting the order of briefing and argument in an enforcement or review proceeding that involves the National Labor Relations Board. The 1986 committee note explains that the rule "simply confirms the existing practice in most circuits."

These examples provide powerful support for the proposition that rules aimed at a specific subject matter come within the authority to prescribe "general" rules of practice and procedure.

Powerful support also exists in the pragmatic grounds for adopting the Supplemental Rules for Review of Social Security Decisions under 42 U.S.C. § 405(g). They began, not with a suggestion advanced to promote private interests, however worthy, but with a suggestion advanced by the United States Administrative Conference and based on a comprehensive survey performed by two prominent law professors that showed wide and often deep differences in practice in different districts. This suggestion, advanced to promote a view of the public interest formed by a body deeply immersed in the relationships between administrative agencies and the courts, has been enthusiastically embraced by the Social Security Administration, support that has been strongly maintained even as the drafting process continually whittled away more detailed versions proposed by the Administration.

The opportunity to improve the procedures for review in these actions is particularly attractive because they are brought in great numbers. For several years, the annual average has run from 17,000 to 18,000 review actions, and more recently has surpassed 19,000 actions. Much can be gained by a nationally uniform and good procedure adapted to the needs of appeals to the district courts that raise only questions of law and review for substantial evidence to support the Commissioner's final decision. As noted earlier, the district judges and magistrate judges who explored and commented on these rules became strong supporters.

The initial drafting stages considered the possibility of moving away from this specific subject matter to draft a more general rule for actions brought in a district court for review of other kinds of administrative action. The possibility was put aside. A major problem is presented by the wide variety of actions that challenge administrative action. Some prove, either in theory or in

application, to be equally pure examples of review on a closed administrative record. Others, however, provide reasons to resort to ordinary civil procedure, including discovery and perhaps summary judgment. And it likely would prove difficult to establish an appropriate scope for any such rule, drawing lines to exclude actions aimed at executive actions that follow procedures perhaps more, and perhaps less, like administrative procedure. Even if a workable scope provision could be adopted, developing a suitable procedure for all these actions would be truly difficult. Nor is there any reason to suppose that the total number of actions that might be reached would approach the number of social security review actions.

Several concerns have been advanced to counter these favorable considerations, drawing not from these specific rules but from more general issues that surround subject-specific rules. They deserve consideration, even if they do not prove persuasive.

One concern is that subject-specific rules may favor plaintiffs or defendants on a regular basis. The social security rules were developed in close consultation with claimants' representatives as well as with the SSA. Many proposals by the SSA were rejected, and many suggestions by claimants were adopted. Comments and testimony after publication recognize these elements of neutrality. The rules, as a whole, are designed to advance alike the interests of claimants, the SSA, and the courts. They offer no sound ground even for a perception that they favor the SSA, despite some lingering protests on that score, including a perception that the rules are designed to reduce burdens on the SSA staff attorneys as they work to comply with different local procedures.

Another concern is that subject-specific rules can be developed only on the basis of deep familiarity with the realities of litigating the subject. That is a serious concern. The years of work undertaken by the subcommittee in collaboration with experts on all sides of social security review appeals, however, have supported development of rules that all agree are well shaped for these actions.

Perhaps the most serious concern might be described as the weakened levee concern. The fear is that adding one more substance-specific set of rules to those that have already been adopted will undercut resistance to self-interested pleas and pressure to develop still more substance-specific rules. Little optimism is needed to predict that the several entities engaged in the Rules Enabling Act process will resist such pressures, supporting subject-specific rules only when strongly justified. There may be better reason to fear that advocates in Congress will argue that their favorite procedures can be adopted because the Supreme Court has prescribed other subject-specific rules and Congress has accepted them. That fear must be considered, but it should not deter adoption of good rules that will improve litigation practices, and at times improve outcomes, to the benefit of claimants, the SSA, and the courts themselves.

The draft minutes of the April 23, 2021, Civil Rules Committee meeting describe the deliberations that led the Advisory Committee to recommend adoption, with one member abstaining because absent from the meeting up to the moment of the vote, and over the dissent of the Department of Justice based on the fear of reducing the ability to resist pressures to adopt other and less well executed and designed substance-specific rules. The Advisory Committee has

debated the Department's concern repeatedly during the years-long development of these rules. The concern has been recognized as valid, but the conclusion is that these Supplemental Rules serve party-neutral and important purposes so well that they should be adopted.

B. Rule 12(a)(4) (for Final Approval)

The Advisory Committee recommends for adoption the proposal to amend Rule 12(a)(4)(A) that was published last August. The proposed rule and a summary of public comments are included in the appendix to this report.

The proposed amendment was brought to the committee by the Department of Justice. It rests on experience with the difficulties the Department has encountered in one class of cases with the provision in Rule 12(a)(4)(A) that, unless the court sets a different time, directs that a responsive pleading must be served within 14 days after the court denies a motion under Rule 12 or postpones its disposition until trial. These are cases brought against "a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The Department often provides representation in such cases.

The difficulty in responding within 14 days rests in part on the need for more time than most litigants need, at times in deciding whether to provide representation, and more generally in providing representation. And the need is aggravated by an additional factor. The individual defendant often raises an official immunity defense. Denial of a motion to dismiss based on an official immunity defense can be appealed as a collateral order in many circumstances. Time is needed both to decide whether appeal is available and wise, and then to secure approval by the Solicitor General. Allowing 60 days is consistent with the recognition of similar needs in Rule 12(a)(3), which provides a 60-day time to answer in such cases, and in Appellate Rule 4(a)(1)(B)(iv), which sets appeal time at 60 days.

There were only three comments on the proposal. The New York City Bar supports it. The American Association for Justice and the NAACP Legal Defense Fund oppose it. The reasons for opposition reflect concern that plaintiffs in these actions often are involved in situations that call for significant police reforms, parallel concerns about established qualified immunity doctrine, the general issues arising from delay in resolving these actions, and the breadth of the proposal in applying to actions in which there is no immunity defense.

The proposed amendment was discussed at length. Doubts were expressed about the need for more time than 14 days, particularly when the motion to dismiss does not rely on an official immunity defense. This doubt in turn led to the suggestion that the amendment is overbroad – at most it should be limited to cases with an immunity defense. In turn, that led to a request for information on actual experience: In how many cases does a motion to dismiss raise an official immunity defense? How often does the Department consider an appeal from denial of the motion? How often does the Department request an extension of the present 14-day period to respond, and how often is the request denied?

These questions were met initially by framing the question as one of competing burdens: The court can set a different time, whether the rule sets it a 14 days or 60 days. Should the burden lie on the government to show reasons that justify an extension beyond 14 days, or on the plaintiff to show needs for speed that justify a restriction below 60 days? Or, in somewhat different terms, how likely is it that the court will deny a government motion to extend beyond 14 days?

The Department responded by emphasizing that it needs more than 14 days in cases that do not present the prospect of an immunity appeal as well as in cases that do. These needs were recognized in the 2000 amendment of Rule 12(a)(3) that set the time to answer in these individual-capacity cases at 60 days, and the 2011 amendment of Appellate Rule 4(a)(1)(B)(iv) that embraced the reasoning of the Rule 12(a)(3) amendment by bringing these cases into the 60-day appeal time provisions for actions in which the United States, its agency, or its officer sued in an official capacity is a party.

The need for 60 days is enhanced when there is a prospect of a collateral-order immunity appeal. Time is needed to decide whether an appeal is available within the sometimes murky contours of this corner of appeal doctrine, and whether it is wise to appeal even when appeal jurisdiction seems relatively clear. Once a determination to appeal is made, it must be approved by the Solicitor General, a careful process that takes time.

Nor is seeking an extension of the 14-day time to respond a sufficient safeguard. The motion must be filed quickly, and the Department must proceed with preparing a response until it knows whether an extension will be granted. In some cases it also has been forced to proceed toward the merits by a scheduling conference, or even the start of discovery.

The empirical questions were renewed. The Department recognized that it does not have clear data to quantify its actual experience. It believes that immunity defenses are raised in most of these cases, but cannot provide a count. Nor can it enumerate the frequency of motions to extend the 14-day period or how often they are denied. It can say that extensions are sometimes denied, and that sometimes it cannot even win a stay of discovery pending a decision whether to appeal. If a notice of appeal is filed, however, further proceedings are stayed.

These responses led to renewed suggestions that providing a 60-day response time in all these cases is too broad. At most, it
should be available only in cases in which an immunity defense is raised.

The suggestion that only cases with an immunity defense should be provided extra time prompted renewal of the question where to allocate the burden of moving for a response time different from the time presumed by the rule. Motions to extend or reduce the time command the court's attention, commonly on an expedited basis. If government motions to extend are regularly granted, these are waste motions. Significant amounts of court time can be saved by setting the presumed time at 60 days.

A further complication arises when an action includes two or more defendants, and not all of them raise an immunity defense. Should there be a different time to respond when some are

represented by the government, while others are not? And there may be cases in which an immunity appeal cannot be taken because the motion to dismiss does not rest on the immunity defense or disposes of it on terms that do not appear to deny further pretrial consideration.

At the end of Advisory Committee discussion, a motion was made to limit the 60-day period to cases in which "a defense of immunity has been postponed to trial or denied." The motion was defeated, six votes for and nine votes against.

A motion to recommend approval for adoption of the amendment as published passed, ten votes for and five votes against.

C. New Rule 87 (for Publication)

The Advisory Committee's report on Rule 87 is included in the joint report recommending publication of proposed Appellate, Bankruptcy, Civil, and Criminal Rules that would authorize the Judicial Conference to declare rules emergencies.

Only one point is repeated here. The recommendation to publish draft Rule 87 for comment does not rest on an Advisory Committee conclusion, even provisional, that it will recommend adoption of any general rules emergency provision in the Civil Rules. The Advisory Committee has identified only a narrow range of Civil Rules that may be appropriate for revision in a rules emergency. If no more are identified by comments and testimony during the publication process, it may prove better to amend the regular rules or even to do nothing. The proposed Emergency Rules 4 might be revised to add new methods to the regular rules for serving summons and complaint that are desirable in ordinary, nonemergency circumstances and sufficient in times of emergency. The Rule 6(b)(2) prohibition on extending the times for post-judgment motions might be amended to provide a narrow but adequate authority to order an extension that does not require the elaborate structure that Rule 87 would establish. Or Rule 6(b)(2) might be left as it is, at least if publication does not lead to any illustrations of opportunities to move or appeal thwarted by the COVID-19 pandemic.

II. Subcommittee Work

A. MDL Subcommittee

As reported during the Standing Committee's January meeting, the MDL Subcommittee reached a consensus that further consideration of a rule expanding interlocutory review in some or all MDLs was not warranted. The Advisory Committee accepted that recommendation.

This means that the subcommittee still has pending before it another issue that remains somewhat in abeyance. Originally it was presented as "vetting" claims in MDL proceedings, based on reports that often a significant proportion of claims turn out to be unsupportable. One reaction to this concern has been to call for early completion of a plaintiff fact sheet (PFS) by each claimant, showing at least that the claimant had used the product in question and manifested the harmful condition alleged to have resulted from use of the product. (This issue seems frequently to be raised

in product liability cases premised on personal injury due to use of a product.) Research by the FJC showed that in nearly 90% of large MDLs a PFS is already employed, and that these questionnaires are often tailored to the specific issues of the MDL proceeding, so that a uniform rule on contents did not seem promising. It also appeared that drafting a PFS is often challenging and time-consuming, so a uniform rule on time limits could cause difficulties.

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

The main topic under active study at this time is the remaining issue the subcommittee has identified – rule provisions addressing judicial appointment and oversight of leadership counsel and supervision of certain settlement activities. This set of issues has long seemed the most challenging for the subcommittee. It involves a potpourri of topics partly addressed by the *Manual for Complex Litigation*, such as appointment of leadership counsel and creation of common benefit funds to compensate leadership counsel for the work they do organizing and preparing the centralized cases. Largely since the most recent edition of the *Manual* appeared in 2004, there has also emerged the possibility that the transferee judge may "cap" the compensation to non-leadership counsel at an amount lower than the percentage specified in their retention agreements, and a judicial role in supervising some settlements, sometimes under the label "quasi class action."

On March 24, all members of the subcommittee participated in a conference organized by the Emory Law School Institute for Complex Litigation and Mass Claims. This event involved many very experienced lawyers on both the defense and the plaintiff side, and a number of experienced judges, including members of the Standing Committee. This event was extremely informative, but did not necessarily make the path forward clear.

For one thing, it presently appears that there is little enthusiasm among counsel on either side of the "v" for adoption of a rule. And it also appears that most MDL transferee judges do not favor adoption of rules. At the same time, it may be important for the rules to recognize that MDL proceedings – and particularly mass tort MDLs – account for a very significant proportion of the federal courts' civil docket.

In that portion of the civil docket, things do not proceed in exactly the same way they proceed in ordinary civil litigation, to a considerable extent because the cases are in an MDL. In ordinary individual litigation plaintiffs could instruct their attorneys on conduct of the case, and the lawyers would be free to file motions and pursue discovery. And defendants could initiate discovery from individual plaintiffs and, perhaps, move for summary judgment.

But that is not how things often work in mass tort MDL proceedings. Defendants may be limited in their ability to initiate discovery about the claims of individual plaintiffs, and the court

may sometimes focus discovery on "common" issues, which may largely be those relating to defendants' overall liability rather than the claims of individual plaintiffs. Often non-leadership counsel are forbidden to do, or constrained in doing, such things as pursuing discovery or making motions. These limitations on counsel often result from the court's early order appointing leadership counsel, which ordinarily puts those lawyers selected by the judge in charge of the management and development of the litigation from the plaintiffs' side. And the fee entitlements of those non-leadership lawyers are often "taxed" to create a common benefit fund used to compensate leadership counsel, at least as to settlements achieved by those non-leadership lawyers.

Those appointment orders may also confer on lead counsel authority to discuss settlement with defendants, sometimes subject to review by the court. In addition, experience has shown that there may be significant advantages to careful preparation of a detailed appointment order. But *Manual for Complex Litigation (4th)* § 10.222 (2004) says that "it is usually impractical or unwise for the court to spell out in detail the functions assigned or to specify the particular decisions that designated counsel may make unilaterally and those that require an affected party's concurrence." That may have been more appropriate in 2004, and something more may be appropriate now. It does not appear that the Civil Rules presently offer any guidance on this topic.

Several academic critics of MDL practice urge that procedures in MDLs should be modeled on Rule 23. Because MDLs are sometimes settled using the class action vehicle, Rule 23 may come into play eventually, but ordinarily not at the beginning. Under Rule 23(g), of course, the court must appoint class counsel upon certifying a class, and may appoint "interim class counsel" to act on behalf of the class before certification is decided. That appointment by the court empowers class counsel to conduct the litigation and conduct settlement negotiations, which may lead to a package deal – class certification only for purposes of presenting the proposed settlement for judicial review.

Rule 23(e) requires the court to determine whether a class settlement is fair, reasonable, and adequate. Since the 2018 amendments to that rule, it has provided additional detail about factors courts should consider in making that determination. As the committee note to the 2018 amendments to Rule 23(e) explained, those factors focus on both the "procedural" and the "substantive" aspects of proposed class settlements:

> "Procedural" scrutiny under Rules 23(e)(2)(A) and (B) asks whether class counsel has adequately represented the class and whether the proposal was negotiated at arm's length.
>
> "Substantive" scrutiny under Rules 23(e)(2)(C) and (D) asks whether the relief provided class members under the settlement is adequate, and whether the settlement treats class members equitably relative to each other.

In performing this review in class actions, courts are undertaking what some courts say is a "fiduciary" responsibility to the members of the class. That responsibility could be said to derive

from the facts that (a) the court, not the class members, selected class counsel, and (b) the court may approve the settlement over the objections of class members.

MDLs may have some features that appear like class actions, particularly to claimants whose lawyers are not selected for leadership roles. Those lawyers may not be permitted to engage in active litigation because the court has appointed leadership counsel and directed that non-leadership lawyers not undertake ordinary litigation activities unless those activities are approved by leadership counsel.

But it is not clear what obligations, if any, leadership counsel owe to the clients of other lawyers. In class actions, Rule 23(g)(4) directs class counsel to "fairly and adequately represent the interests of the class." Even in the pre-certification stage, if attorneys are appointed as interim class counsel they are bound by the duty to fairly represent the interests of the class, not just the class representatives. In the MDL mass tort setting, one might expect that leadership counsel, empowered by the court at least to manage the litigation and perhaps also to discuss settlement, could also have some obligation, perhaps specified in the order of appointment, to those other claimants whose lawyers are disabled from ordinary litigation activities under the court's order.

So one way to look at the issue of the court's role in an MDL is to consider that the court may properly regard itself as having responsibilities to the many claimants before it to ensure that they are treated fairly. As in a class action, the court's appointment orders may significantly affect the conduct of the litigation and the settlement terms these claimants confront. It may be that there is ground for something akin to a "fiduciary" obligation from the court to these claimants.

Against this theoretical background, the very informative March 24 conference suggested some complications for the MDL Subcommittee to consider going forward. As of this time, it should be emphasized that the subcommittee is far from a consensus on these matters, and also on whether any rule amendment (as opposed, for example, to a manual or JPML education materials) is in order. The March 24 Emory conference was extremely informative, but it did not produce an "epiphany" about the right way forward.

One thing that became clear is that settlements in MDL proceedings have many different attributes. We are all familiar with the idea of a "global" settlement including all claimants. The March 24 event introduced the concept of "continental" settlements and the more familiar "inventory" settlements. And, of course, there are also "individual" settlements.

One point repeatedly made during the March 24 conference was that in MDL proceedings claimants may be situated differently depending in part on who represents them. Some lawyers reportedly do much more thorough workups of their clients' cases (medical records, proof of exposure, proof of losses, etc.) than other lawyers. Indeed, it appears that some plaintiff-side lawyers would be receptive to some sort of "vetting" process that screens out unsupported claims. In addition, it seems that some plaintiff counsel worry (perhaps one could say "scare") defendants more than other plaintiff counsel, in terms of track records or other indicia that going to trial against these lawyers puts defendants at considerable risk of facing a high verdict.

Other lawyers may not be equally prepared with details on each of their cases, and may not have a "profile" that worries defendants as much.

Taken together, these insights suggest that a judicial role in making a "substantive" review of proposed settlements would not be easy to do. To take "inventory" settlements as an example, it could be very difficult for a judge to appreciate why a defendant might be willing to make what appears to be a significantly better offer to the clients of Lawyer A than to the clients of Lawyer B. It would be particularly difficult for the judge to feel obliged to try to ensure that (in keeping with Rule 23(e)(2)(D)) all these claimants (the clients of Lawyer A and Lawyer B) are treated "equitably relative to each other."

But it might be possible for a rule to direct a judge to consider the "procedural" underpinnings of a settlement, and thereby perhaps to satisfy something akin to a "fiduciary" role vis-a-vis the claimants. Of course, the judge could not forbid or require claimants to accept a proffered settlement. But perhaps the court could direct that claimants be apprised of the judge's assessment – positive or negative – of the process that led to the settlement. That could be analogized to the notice to the class required by Rule 23(e) in connection with proposed class action settlements.

Another abiding point to keep in mind is that not all MDL proceedings are the same. The range of matters involved in such proceedings is quite large. Data breach MDLs, for example, may be very different from MDLs involving product liability claims against pharmaceutical manufacturers. Beyond that, it appears that even in somewhat similar MDLs the issues involved may be quite case specific. Moreover, there is a significant range among MDLs in terms of the number of cases centralized by the Panel, ranging from under ten to tens of thousands.

But the potential importance of the initial orders in MDL proceedings during the entire course of those proceedings may make it particularly important to call attention to them in the rules. And doing so might be particularly important for judges and lawyers who are not already "insiders" to the MDL process.

One possible place to put such rule provisions would be in Rule 16. That rule (substantially recast in 1983 to emphasize the importance of case management in most cases) has grown longer over time. Adding to it should be done cautiously, but this may be time to "update" Rule 16, at least as it can be employed in MDL proceedings. Possible topics to consider include:

(1) Gathering details early about individual claims: This idea resembles the "vetting" originally proposed, but might be more effectively accomplished using some sort of "census" approach. Rather than serving only as a method for identifying and removing unsupportable claims, it might serve as well to "jump start" discovery. These topics might also justify some inclusion in Rule 26(f) of attention to the possibility.
(2) Appointment of leadership counsel: This judicial activity is not unique to MDL proceedings, but is most predominant in them. The value of early attention to various matters such as (a) latitude accorded non-leadership plaintiff counsel to

engage in litigation activities; (b) authority of leadership counsel to discuss "global" settlements potentially involving claimants with whom they have no formal attorney-client relationship; (c) the obligations of leadership counsel towards claimants not formally their clients, particularly in regard to possible settlements; and (d) other matters suitable to early regulation by the court that might benefit from early judicial guidance to avoid problems later on.

(3) A judicial role in supervising settlement: It may be that this topic could be taken up without rule provisions about topic (2) above, but that could prove difficult. Free standing judicial authority to "review" or supervise settlement not tethered to appointment of leadership counsel might be hard to justify, though under Rule 16 the court is understood to have authority to promote settlement in all cases. And it does seem that any review ought to focus on "process" issues, perhaps including "adequate representation" of claimants who are not direct clients of leadership counsel, rather than the "merits" of the settlement itself.

(4) Common benefit funds: The use of such devices was upheld in case law in the 1970s. It is recognized in the *Manual for Complex Litigation*. But there are no rule provisions that address either authority to employ these funds or provide guidance on using them. And there are a number of specifics that might be considered, such as (a) whether the court should be concerned with the overall amount of compensation leadership counsel will receive; (b) whether there is an upper limit to the percentage contribution required by non-leadership lawyers; (c) whether settlements of cases in state court should lead to a duty to contribute to the fund; and (d) the method by which the court determines the amount to be awarded individual lawyers or firms from such funds. It may be that some directions could be developed, and also that authority in the rules would be more secure than the current reliance on case law. At present, it appears that all these things are regarded as matters of contract law based on contracts entered into by "participating" lawyers, but one could say that leadership counsel might have overweening negotiating power in negotiating such contracts with non-leadership counsel due to the court's appointment order.

The subcommittee's discussions remain at a preliminary point, and it hopes to gather more information in the future. But it is presently possible to recognize that additional issues are likely to arise, similar to those identified in prior reports to the Standing Committee:

(1) Scope – All MDLs without regard to type of claims asserted?: As noted above, MDLs come in very different shapes and sizes. Various dividing lines have been suggested. For example, one might try to define "mass tort" MDLs. But would data breach cases fall within that definition? Would the VW Diesel MDL fall within it?

(2) Scope – Number of claimants as determinative?: Alternatively, one could focus on the number of claimants before the transferee court. That might seem an easy method to employ (e.g., by saying that a "mega" MDL is one with more than 1,000

claimants). However, the number of claimants may rise over time, and some MDLs have a large number of claims lodged in a registry rather than formally filed in the court. Should those be counted?

(3) Scope – Which settlements?: During the March 24 Emory Conference, the subcommittee learned that settlements in MDL proceedings come in many shapes and sizes. One is the "global" settlement (often achieved using the class action device – *see* (5) below). Another is the "inventory" settlement, involving all the clients of a given lawyer. There may be something else called a "continental" settlement that is not "global" but also not limited to the clients of one lawyer or law firm. And there surely may be "individual" settlements. Initial reactions are that judicial involvement is not appropriate for individual settlements. And it may be that the "inventory" settlements reached by some lawyers look, in the abstract, more favorable to the clients of those lawyers (Lawyer A) than those achieved by some other lawyers (Lawyer B). "Global" settlements, meanwhile, may be accompanied with rather forceful levers to prompt all claimants, or at least all clients of "participating" lawyers, to accept the settlement.

(4) Judicial role in implementing settlements?: It may be that the settlement agreement itself provides that the court may have a role in implementing the settlement provisions. Should such arrangements be fostered? Should there be limits on such practices?

(5) "Fit" with Rule 23?: With some frequency, the eventual resolution of MDL proceedings is achieved using the class action device. That brings the provisions of Rule 23(e), (g), and (h) into play, but usually that development occurs only as the MDL proceeding approaches its endpoint. If there is already a detailed order appointing leadership counsel, as discussed above, how well does that order fit with the provisions of Rule 23? Does Rule 23 supersede all that went before?

* * * * *

As the foregoing attempts to make clear, the subcommittee has learned much and clarified its focus on this remaining topic since the Standing Committee's last meeting. And it may return to the "vetting"/"census" topic as it moves forward from this point. For the present, then, it seeks the Standing Committee's insights and reactions. Whether this will lead to actual amendment proposals remains uncertain.

B. Discovery Subcommittee

The Advisory Committee again has a Discovery Subcommittee, chaired by Judge David Godbey, which has a relatively full agenda. The subcommittee held a meeting via Teams on February 26, 2021, and addressed the four items on its agenda:

(1) Privilege logs
(2) Sealing of filed materials
(3) Attorney fee shifting under Rule 37(e)
(4) Amending Rule 27(c) to authorize a pre-litigation application for an order to preserve evidence

The subcommittee recommended that work continue on the first and second listed items, and that the third and fourth items be dropped from the agenda. At its April 23 meeting, the Advisory Committee accepted these recommendations.

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

Two suggestions (20-CV-R [Lawyers for Civil Justice] and 20-CV-DD [Jonathan Redgrave]) focus on practice under Rule 26(b)(5)(A). The subcommittee's discussion on February 26 supported the idea behind the submissions – that that privilege logs often cost too much and nevertheless provide insufficient information.

a. Background

Rule 26(b)(5)(A) was added in 1993, to require parties withholding materials requested in discovery to disclose information about what has been withheld on privilege grounds. The rule was often interpreted to require a privilege log, modeled on practice under the Freedom of Information Act. The proposal is that the rule be amended to add specifics about how parties are to provide details about materials withheld from discovery due to claims of privilege or protection as trial-preparation materials. These submissions identify a problem that can produce waste. But it is not clear how or whether a rule change will helpfully change the current situation.

Rule 26(b)(5)(A) provides:

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

The committee note to the 1993 rule amendment cautioned that elaborate efforts need not be required in cases involving many documents:

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

The basic difficulty is that soon after the 1993 rule amendment went into effect, many courts borrowed the idea of a "privilege log" from practice under the Freedom of Information Act and a document-by-document listing became common. These logs might be quite long, but often did not provide sufficient information for the opposing party or the court to assess the claim of privilege. Consider Judge Grimm's comments:

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

Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 2501, 265 (D. Md. 2008).

Since 1993, other rule changes have added provisions that could affect the possible burden of complying with Rule 26(b)(5)(A). In 2006, Rule 26(b)(5)(B) was added, providing that any party could "claw back" privileged material inadvertently produced, and Rule 26(f) was amended to direct that the parties' discovery plan discuss issues about claims of privilege. Then in 2008, Evidence Rule 502 became effective by Act of Congress. In Rules 502(d) and 502(e), that rule gives effect to party agreements that production of privileged material will not constitute a waiver of privilege. In addition, even in the absence of an agreement, Rule 502(b) insulates inadvertent production against privilege waiver if the producing party "took reasonable steps to prevent disclosure."

So rule changes have somewhat responded to concerns about waiver risks, though perhaps not about the burdens associated with privilege logs. But technological developments in the last quarter century have magnified some of the burdens. E-Discovery, virtually unknown in 1993, is now the most challenging form of discovery.

Locating materials that can be withheld on grounds of privilege may be more difficult now, due to the huge increase in the amount of digital data that must be subjected to a privilege review. Technology has also reportedly provided some potential solutions to the problems of privilege review, but it is not clear that these solutions fully address the problem. It may be that the difficulty of identifying materials that are privileged is the most significant part of the process necessary to

comply with Rule 26(b)(5)(A), but that does not appear to be the problem that is the focus of these submissions.

Instead, the submissions focus on the preparation of the privilege log itself. The use of technology to do that has proven unsatisfactory in many instances, as Judge Facciola emphasized in *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 98-99 (D.D.C. 2012):

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

b. Current Submissions

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

The LCJ submission urges that a rule provide for "presumptive exclusion of certain categories" of material from privilege logs, such as communications between counsel and the client regarding the litigation after the date the complaint was served, and communications exclusively between in-house counsel or outside counsel of an organization. Invoking proportionality, it emphasizes that "flexible, iterative, and proportional" approaches are more effective and efficient than document-by-document privilege logging.

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

> If the parties have entered an agreement regarding the handling of information subject to a claim of privilege or of protection as trial-preparation

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

The actual proposal appears to make any court action contingent on party agreement or entry of a court order regarding material covered by a privilege. Thus, it does not propose a "categorical" approach by rule. Doing so by rule might raise concerns that such categories would have to be delineated with great care in order to ensure that they are not overbroad, including items that do not deserve privilege protection.

c. Initial Discovery Subcommittee discussion

During its February 26 conference, the subcommittee spent considerable time discussing the problem presented by privilege logs, and the ways in which the rules might be amended to ameliorate these problems while retaining the basic disclosure requirement. There was considerable agreement that preparation of privilege logs could produce unnecessary costs and few benefits. But there was concern about whether a rule change could significantly improve matters. Several members of the subcommittee reported that in most major cases the parties work these things out.

In particular, several members of the subcommittee stressed that early discussion of the specifics of privilege logging can avoid much difficulty when the logs are actually delivered later in the case. (They often are not delivered until after all or most Rule 34 discovery has been completed, though sometimes the logs are provided on a "rolling" basis.)

Discussion focused on considering revisions to Rules 26(f) and 16(b) to encourage or even mandate such early discussion. There was also discussion of whether such a mandate would be unnecessary in many smaller cases, for which document-by-document logging may work just fine. For the present, then, the subcommittee is considering ways in which the rules could be amended to improve the process of privilege review and preparation of privilege logs. It invites reactions and ideas from the Standing Committee. It presently is contemplating how to gather more information about experience under the present rule.

2. Sealing Court Records

Prof. Eugene Volokh (UCLA), the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation have submitted a proposal (20-CV-T) for adoption of a new Rule 5.3 on sealing of court records.

The focus of this rule proposal is sealing of materials filed in court. It emphasizes that "[e]very federal Circuit recognizes a strong presumption of public access" that is "founded on the common law and the First Amendment." The submission also states that the proposed Rule 5.3 is in large measure drawn from existing district court local rules.

The Rules Law Clerk investigated whether local rules on sealed filings were uniform or relatively uniform across the nation by focusing arbitrarily (at the Reporter's suggestion) on the local rules of the nine districts "represented" on the Advisory Committee. Though there is no reason to conclude that these nine sets of local rule provisions are "representative" of all others, the survey did show that there are significant differences among these local rule provisions. There is no such national uniformity that a national rule would simply implement what districts have already done. (One might say that was the consequence of the 2000 amendment to Rule 5(d), which directs that discovery not be filed in court unless "used in the action," based largely on widespread adoption of that practice by local rules.)

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

The Civil Rules, meanwhile, do not have many provisions about sealing court files. Rule 5.2 provides for redactions from filings and for limitations on remote access to electronic files to protect privacy. In that context, Rule 5.2(d) says that the court "may order that a filing be made under seal without redaction." The committee note to that provision says that it "does not limit or expand the judicially developed rules that govern sealing." Rule 26(b)(5)(B), mentioned above in regard to privilege waiver, permits a party that receives a "claw back" notice from the opposing party to "promptly present the information to the court under seal for a determination of the claim." And Rule 26(c)(1)(G) authorizes a protective order "requiring that a deposition be sealed and opened only on court order" (though note that depositions are not filed unless "used in the action" it may be that such orders are rare).

The current rule proposal urges a fairly elaborate set of procedures for decisions to seal, including such requirements as:

(a) posting the motion on the district's website (presumably not just including it in the case file) or creation of a "central" website for numerous districts (or the entire nation);

(b) a mandatory seven-day waiting period after such posting before decision of a motion to seal;

(c) a requirement for particularized findings for every decision to seal;

(d) a 30-day limitation on sealing after "final disposition" of the case (which could impose a significant burden on the clerk's office, particularly in cases involving an appeal); and

(e) an absolute right to challenge sealing for "any member of the public" without a need to intervene, but no protection for nonparty interests in having materials remain sealed, and other features.

The Discovery Subcommittee's initial discussion did not indicate significant interest in developing a national rule including such specifics, which are handled in different ways in the local rules of different districts.

A starting point might be to consider a rule recognizing that the standard for filing under seal is higher than the standard for a Rule 26(c) protective order. At least some courts have so recognized. For example, *In re Avantia Marketing, Sales Practices and Products Liability Litigation*, 924 F.3d 662 (3d Cir. 2019), the issue was whether materials covered by a protective order that the parties (seemingly both sides) had filed in relation to a motion for summary judgment should be unsealed. The district court denied the motion to unseal after entering summary judgment in favor of defendant.

The court of appeals found this sealing decision was wrong because the district court decided the motion "by applying the rule 26 standard governing protective orders," *id.* at 674, "equating the Rule 26 analysis with the common law right of access analysis." *Id.* at 675. As the court explained: "Analytically distinct from the District Court's ability to protect discovery materials under Rule 26(c), the common law presumes that the public has a right to access to judicial materials." Id. at 672. It vacated the district court's sealing order, directing reconsideration under the proper standard.

The question whether the rules should be amended in some way to distinguish between the "good cause" standard for Rule 26(c) protective orders and the decision to permit filing under seal remains before the Discovery Subcommittee. It may be that, as the submission suggests, this distinction is so widely appreciated that a rule change is not needed. If serious consideration of a rule amendment seems a worthwhile effort, it is likely that it will be necessary to address a number of additional questions, such as the proper articulation of the standard, the question whether the same standard applies to all filed materials (such as materials filed only with regard to discovery motions), and appropriate accommodation for situations (such as False Claims Act cases) in which a statute or rule directs filing under seal.

For the present, the subcommittee would welcome advice from the Standing Committee on these issues. It will continue working on this topic.

3. Attorney's fee shifts under Rule 37(e)

A submission from Judge Iain Johnston (N.D. Ill.) (21-CV-D) raised the question whether a court may, under the 2015 amendment to Rule 37(e), direct that the party that failed to preserve electronically stored information despite having an obligation to preserve the information reimburse the victim of this failure for its attorney fees incurred due to the failure to preserve. Judge Johnston cites his opinion in *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 2021 WL 185082, 2021 U.S. Dist. LEXIS 9513, ___ F. Supp. 3d ___ (N.D. Ill., Jan. 19, 2021) footnote 54

as addressing his concern. That is a very long opinion that mainly chronicles many years of acrimonious litigation and discovery disputes leading up to a spoliation proceeding. Footnote 54 says the following:

> Some courts have held that awards of attorneys' fees are curative measures authorized under Rule 37(e)(1). *See, e.g.*, *Karsch v. Blink Health Ltd.*, 17-CV-3880, 2019 WL 2708125, at *——, 2019 U.S. Dist. LEXIS 106971, at *74 (S.D.N.Y. June 20, 2019). This view is held by ESI gurus. C*at3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 502 (S.D.N.Y. 2016) (Francis, J.). Even knowing it is in the distinct minority on this issue, this Court is not so sure attorneys' fees are available but is open to being convinced otherwise. *Snider*, 2017 WL 2973464, at *—— – – ——, 2017 U.S. Dist. LEXIS 107591, at *12-13 (attorneys' fees are not identified in Rule 37(e) but are specifically identified in all other sections of Rule 37); *Newman v. Gagan, LLC*, No. 2:12-CV-248, 2016 WL 1604177, at *6, 2016 U.S. Dist. LEXIS 123168, at *20-21 (N.D. Ind. May 10, 2016). Because the Court is not imposing an award of attorneys' fees under Rule 37(e), it need not conclusively address this issue now. All attorneys' fees imposed are under other rules. Imposing attorneys' fees as a sanction under this rule at this time would be redundant.

In his submission, Judge Johnston cited an article by Tom Allman, who provided advice about these issues to the Advisory Committee and prior Discovery Subcommittees over the years. Thomas Allman, *Dealing With Prejudice, How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 Richmond J. Law & Tech. Issue 2, at 1 (2020). At p. 50, Allman begins by asserting that "[c]ourts routinely award monetary sanctions under Rule 37(e)(1) consisting of attorney's fees and expenses. This permits recovery of the expenditure of time and effort necessary to bring the issue of spoliation before the court."

After the agenda book for the Advisory Committee meeting was posted, Mr. Allman submitted a letter to the Advisory Committee affirming that the courts do regularly find that they may direct such reimbursement as a "curative measure" under Rule 37(e)(1). The Rules Law Clerk independently did research and reached the same conclusion – the courts do not encounter any problem with authority to direct the wrongdoer whose failure to preserve has imposed attorney fees on the victim to reimburse the victim for that cost.

In light of these reports, and the absence of any experience by its members with any problem under this rule, the Advisory Committee concluded without dissent that this item should be removed from the agenda.

4. Rule 27 preservation orders?

A law professor submitted a proposal (20-CV-GG) to amend Rule 27(c) to authorize pre-litigation preservation orders. After considering the submission, the Advisory Committee decided that it should be dropped from the agenda.

The proposed change is to amend the rule as follows:

> **(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony and an action involving presuit information preservation when necessary to secure the just, speedy, and inexpensive resolution of a possible later federal civil action.

Rule 27(c) is not a staple of modern litigation. Indeed, it may no longer serve any purpose:

> Subdivision (c) makes it clear that Rule 27 is not preemptive and does not limit the power of a court to entertain an action to perpetuate testimony. However, the statutory procedure for perpetuation of testimony referred to in the Committee Note to the original rule was repealed in the 1948 revision of Title 28.

8A C. Wright, A. Miller & R. Marcus, Fed. Prac. & Pro. § 2071 at 387. The existing rule nonetheless still authorizes "an action to perpetuate testimony" beyond what Rules 27(a) and (b) authorize. It appears that this provision was included in the rules in 1938 only to avoid arguments that adoption of the rules superseded existing authority for an independent action to perpetuate testimony.

Rule 27(a) authorizes the court to enter orders for taking testimony of a witness who may become unavailable before litigation commences, when the petitioner "cannot presently bring it or cause it to be brought." The petitioner is to give notice to "each expected adverse party" and the court may then grant the requested relief if doing so "may prevent a failure or delay of justice." Rule 27(b) permits a similar order pending appeal when the party seeking the deposition can show that failure to take the deposition promptly could cause "a failure or delay of justice."

This submission would create a wholly new "action to preserve evidence," not limited to testimony. In doing so, it could cut against the grain of much that we learned during the Rule 37(e) drafting effort. During that study, it became clear that preservation orders are often blunt instruments, even in ongoing litigation. Rule 37(e)'s recognition that reasonable preservation must begin in many instances before litigation commences cuts against the idea of encouraging pre-litigation court orders of this sort. Indeed, the expectation was that, even after litigation is commenced, some significant showing would be necessary to justify a preservation order. So this proposal (compared to the one just discussed under (3) above) seems to point in a different direction from Rule 37(e).

This proposal goes beyond Rule 37(e) in another way – after considerable consideration, the Advisory Committee decided to limit that rule to ESI. This proposal is not so limited. Indeed, it might be said to come close to the line in Enabling Act authority, to the extent it creates a brand new "action" to "preserve evidence" that might be asserted against an entity not expected to be a party to the contemplated litigation. Rule 37(e) focuses on parties to eventual litigation and their preservation of potential evidence after notice of possible litigation. Rule 27(a) calls for notice to prospective parties to the litigation before an order for prelitigation testimony is entered. After litigation begins, however, any party may issue a subpoena to a nonparty, and presumably a court could enforce that subpoena on a motion to compel. But though the authority contemplated under

the proposed amendment does not rely on a subpoena, it could have consequences similar to a motion to compel enforcement of one, or at least to compel preservation.

The proposal also seems inconsistent with decisions declaring that Rule 27 does not authorize presuit discovery by a plaintiff who wants to find out whether there is actually a claim. One can debate whether such presuit discovery should ever be allowed, and whether "notice pleading" suits followed by broad discovery demands amount to more or less the same thing. But authorizing presuit preservation orders may be a step beyond that.

Ironically, such a rule provision might also narrow the common law preservation duty in some instances. If the court orders certain specified preservation, does that mean that the entity subject to the order is free to discard everything not covered by the order? Would that be true even if, in the absence of the order, there would be a duty to preserve? The idea of the common law obligation to preserve seems, in part, to depend on the awareness of the possessor of the evidence that it should be preserved due to the potential importance of the information. The potential litigant seeking a preservation order, whether a prospective plaintiff or defendant, may not appreciate what should be preserved, and therefore not request an order with regard to all of the things that would be subject to the common law duty absent an order. So there is a risk of under-coverage with such orders.

But given the likely broad initial demands for preservation, under-coverage may be less frequent than overly broad demands. Even without this added court order possibility, prospective plaintiffs reportedly often serve very broad demands for preservation. The proposal contemplates a right for the entity receiving such a preservation demand to seek immediate relief in court. Arguably there may be a value in providing a route to judicial relief for a recipient of an overbroad prelitigation preservation demand, but the prospect of such applications may not be welcomed by district courts. And the proposal also suggests that there should be appellate review of such orders, perhaps not a prospect welcomed by the appellate courts. Ordinarily, a Rule 27 order will be regarded as a final judgment subject to immediate appellate review. *See* 8 C. Wright, A. Miller & R. Marcus, Fed. Prac. & Pro. § 2006 at 93-94 (3d ed. 2010).

There is no doubt that preservation of evidence is important, and that Rule 37(e) currently requires parties to make difficult decisions about when and what preservation is required. But it does not seem that this proposal would likely be helpful, and there is a possibility that it could create rather than solve problems. Accordingly, the Advisory Committee concluded without dissent that this item should be dropped from the agenda.

III. Continuing Projects Carried Forward

A. *In Forma Pauperis* Standards and Procedures

Several suggestions have been made in recent years that serious improvements should be made in the standards and procedures for granting *in forma pauperis* status. The suggestions come from sophisticated pro se litigants and from the academy. The Advisory Committee agrees that serious problems have been identified. Further work is warranted. The continuing study, however, will at the outset focus as much on identifying the appropriate institutions to work for reform as

on developing actual reform proposals. These topics have never been addressed in the Civil Rules, and there are strong reasons to wonder whether they are best confronted within the Rules Enabling Act process. One issue that must be considered at the outset is whether developing standards to implement a specific statute comes too close to the substance of the statutory right.

Professors Zachary Clopton and Andrew Hammond (21-CV-C) have done empirical work that shows wide differences in the standards different judges in the same two courts apply in ruling on petitions for i.f.p. status. The local rules committee of one court, the Northern District of Illinois, has worked with them and with a local bar organization to attempt to bring its judges together on uniform standards. But establishing uniform standards for a single court does not mean that the same standards can be exported to all districts. The most prominent question is whether a uniform nationwide standard is appropriate in the face of substantial differences in the cost of living in different districts, and whether it is feasible to craft a rule that includes an index that effectively responds to this problem. A uniform standard, moreover, would have to confront questions of what resources, responsibilities, and needs should be considered. The Rules Committees have not customarily engaged in the calculations that would be needed to establish initial standards, and then to adjust them at regular intervals.

Standards blend into procedures. Some of the submissions to the Advisory Committee have protested that the information requested by model forms promulgated by the Administrative Office, and by Appellate Rules Form 4, are confusing, seek irrelevant information, and even intrude on constitutionally protected privacy rights of nonparties. But what information can be required depends on what is relevant to administering an appropriate standard. As one example, how far is it appropriate to demand information about a spouse's employment, earnings, assets, and other financial information? How should "spouse" be defined for this purpose? Careful development of these issues will be a massive undertaking that, again, is quite different from the work normally undertaken by the Rules Committees.

Faced with these challenges, the Advisory Committee will continue to focus first on the questions whether it is appropriate to take on this work, and whether it is possible to identify other entities that may be better suited to the work and persuaded to take it up.

B. Rule 12(a)(2), (3): Different Statutory Times

Rule 12(a)(1) establishes the time for serving a responsive pleading in most civil actions at 21 days, or more if a defendant has timely waived service. This paragraph, however, begins with a condition: "Unless another time is specified by * * * a federal statute." Rule 12(a)(2) establishes the time at 60 days if the defendant is the United States, an agency of the United States, or a United States officer or employee sued in an official capacity. Rule 12(a)(3) provides the same 60 days if the defendant is a United States officer or employee sued in an individual capacity for an action or omission occurring in connection with duties performed on the United States' behalf. Unlike paragraph (1), neither paragraph (2) nor paragraph (3) states any recognition of statutes that set a different time. But there are statutes that set a shorter time than 60 days for some actions against the United States; it is not clear whether any statutes set a different time for individual-capacity actions within paragraph (3).

The question is whether different statutory times to respond should be recognized for all of paragraphs (1), (2), and (3), not (1) alone. The rule text can readily be revised to do that. And it is agreed that there is no reason to leave open even the opportunity to argue that Rule 12 supersedes any different statutory time enacted before Rule 12(a)(2) and (3) were adopted. Nor should there be any need to research priority in time when a later-enacted statute supersedes Rule 12. There is a real advantage in having rule text that directly reflects intended meaning.

Two arguments have confronted the impulse to amend. One is that there is no practical need. The Department of Justice knows of the statutes that set shorter response times and either responds in time or seeks an extension. Extensions are sought mostly in cases that include both a claim within a shorter statutory time and a claim subject to the general 60-day time. A detailed survey of Freedom of Information Act cases submitted by a freelance journalist seems to support this position. The second argument is that it is better to avoid adding still more rules to what many see as a constant flow of amendments that must be mastered by bench and bar.

At the October 2020 meeting the Advisory Committee divided evenly on a vote to recommend publication of an amendment to bring Rule 12(a)(2) and (3) into line with conflicting statutory provisions. The question has been carried forward to the October 2021 meeting because there was not sufficient time for further deliberation at the April 2021 meeting, especially in view of the additional information brought to the Advisory Committee's attention shortly before that meeting was held.

C. Rule 9(b): Pleading Conditions of Mind

Dean Spencer, a member of the Advisory Committee, has submitted a suggestion (20-CV-Z), developed at length in a law review article, that the second sentence of Rule 9(b) should be revised to restore the meaning it had before the Supreme Court decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 686-687 (2009). A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by* Iqbal," 41 Cardozo L. Rev. 1015 (2020). The suggestion has been described to the Advisory Committee in some detail, both in the April agenda materials and in the April meeting. In-depth consideration has been deferred to the October meeting, however, because there was not time enough to deliberate in April.

The proposal would amend Rule 9(b) in this way:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~without setting forth the facts or circumstances from which the condition may be inferred.

The opinion in the *Iqbal* case interpreted "generally" to mean that while allegations of a condition of mind need not be stated with particularity, they must be pleaded under the restated tests for pleading a claim under Rule 8(a)(2).

Dean Spencer challenges the Court's interpretation on multiple grounds. In his view, it is inconsistent with the structure and meaning of several of the pleading rules taken together. It also departs from the meaning intended when Rule 9(b) was adopted as part of the original Civil Rules. The 1937 committee note explains this part of Rule 9(b) by advising that readers see the English Rules Under the Judicature Act. Dean Spencer's proposed new language tracks the English rule, and he shows that it was consistently interpreted to allow an allegation of knowledge, for example, by pleading "knew" without more. More importantly, the lower court decisions that have followed the *Iqbal* decision across such matters as discrimination claims and allegations of actual malice in defamation actions show that the rule has become unfair. It is used to require pleaders to allege facts that they cannot know without access to discovery, and it invites decisions based on the life experiences that limit any individual judge's impression of what is "plausible."

For about a decade, the Advisory Committee studied the pleading standards restated by the decisions in *Iqbal* and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). That work focused on Rule 8(a)(2) standards, not Rule 9(b). Consideration of Rule 9(b) is not preempted by the decision to forgo any present consideration of Rule 8(a)(2). But any decision to take on Rule 9(b) will require deep and detailed work to explore its actual operation in current practices across a range of cases that account for a substantial share of the federal civil docket. Any eventual proposal to undo this part of the *Iqbal* decision must be supported by a strong showing of untoward dismissals.

IV. P**roposals Removed from Docket**

Five public proposals that were removed from the docket may be described briefly.

One submission (20-CV-FF) asked about the relationship between Rule 4(f)(1), which allows service abroad "by any internationally agreed means * * * such as those authorized by the Hague Convention * * *," and Rule 4(f)(2), which authorizes service abroad "if there is no internationally agreed means, or if an international agreement allows but does not specify other means * * *." The proposal asked how to fit in the parts of the Hague Convention that both authorize and specify various methods of service. The answer seems to be that these means of service come within (f)(1) as means authorized by the Convention. There is no apparent gap in the rule text to fill.

A second submission (21-CV-A) simply asked a question: Why does Rule 65(e)(2) say that these rules "do not modify * * * 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader * * *." Section 2361 includes provisions for a permanent injunction. Rule 65(e)(2) has referred only to preliminary injunctions since its inception in the original Civil Rules. Providing the full protections of Rule 65 to permanent injunctions in interpleader actions seems desirable. It is more difficult to speculate about the reasons for ensuring that the rules do not "modify" the statutory provisions for interlocutory injunctions. Such help as can be found speculates that the court must be able to act immediately to prevent destruction or preemption of the subject of the interpleader action. The submission does not speak to this prospect, nor does it point to any problems in practice. If there were any question to address, it would be whether Rule 65(e)(2) should be abandoned. Absent any indication of

problems in practice, and given the value that has been ascribed to it, the Advisory Committee voted to drop this subject from the agenda.

The third submission (21-CV-B), by a pro se litigant, advanced two unrelated proposals. One would expand Rule 6(d) to add three days to any time to act measured from entry of judgment when the clerk serves notice by mail or the other means described in Rule 6(d). This suggestion implicates a carefully integrated set of rules. Rules 50, 52, 59, and 60(c)(1) set times for post-judgment motions. Rule 77(d)(1) directs the clerk to serve notice of the entry of judgment, while Rule 77(d)(2) provides that lack of notice of entry does not affect the time for appeal, except as allowed by Appellate Rule 4(a). Appellate Rule 4(a) includes various provisions for extending appeal time. The relationships among these rules have been carefully worked out. It is better to leave them as they are.

The other proposal in the third submission would add to Rule 60(c)(1) a cross-reference to the provision in Appellate Rule 4(a)(4)(A)(vi) that measures the effect of a Rule 60 motion on appeal time. This proposal was rejected because cross-references are disfavored.

Two proposals (20-CV-GG and 21-CV-D) were removed from the agenda on recommendation of the Discovery Subcommittee. One suggested clarification of Rule 37(e) to include express authorization of an award of attorney fees incurred in discovery efforts to restore or replace electronically stored information that should have been preserved. Research found that although the rule text is uncertain, courts generally have found fee awards an appropriate remedy. It does not seem wise to reopen Rule 37(e) for this reason. The other proposal suggested adding a provision to Rule 27(c) to authorize an action for pre-suit information preservation or, apparently, an action for a declaration that information need not be preserved. An order to preserve need not include discovery, but this proposal would encounter many of the problems that have deterred adoption of pre-suit discovery rules, and likely would compound the problems. The Advisory Committee has been reluctant to go beyond Rule 37(e) to address the duty to preserve information in anticipation of litigation, and concluded that this proposal does not warrant further development.