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. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 8, 2023

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on October 17, 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.

In August 2023 proposed amendments to Rule 16(b)(3)(B)(iv) and 26(f)(3)(D) dealing with privilege log issues, and a new proposed Rule 16.1 on MDL proceedings, were published for public comment. The first hearing on the proposed amendments and rule was held in Washington, D.C. on Oct. 16, 2023. 24 witnesses signed up to speak at that hearing. Two more hearings are scheduled, both by remote means, on Jan. 16 and Feb. 6, 2024. The public comment period ends on Feb. 16, 2024.

This advisory committee has no action items for this meeting.

Part I of this report 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 has occurred and is continuing. The reports received to date indicate that limiting Rule 41(a) dismissals to dismissals of an entire action can create difficulties. The Subcommittee has not reached consensus, however, on whether an amendment should be proposed, or what one should be if an amendment is pursued.

(b) Discovery Subcommittee ongoing projects: Besides producing the privilege log amendments mentioned above, the Discovery Subcommittee, chaired by Chief Judge Godbey, is working on two ongoing projects and has discussed a third that will be taken up by a newly-appointed subcommittee addressing that project. These projects are:

(i) Service of subpoena – 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-person 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. Initial indications are that clarifying amendments would be helpful.

(ii) Filing under seal – whether rule changes are warranted with regard to court authorization of filing under seal or the procedures used to obtain such authorization. Some procedural specifics that have been proposed might be seen as intruding on local practice in some districts.

(iii) Cross-border discovery – Judge Michael Baylson (E.D. Pa.), and Professor Steven Gensler (Univ. of Oklahoma), both former members of the Advisory Committee, have submitted a proposal that the Civil Rules be amended to provide guidance about appropriate handling of cross-border discovery. This project is likely to take considerable time and work. A new subcommittee, chaired by Judge Manish Shah (N.D. Ill.), has been appointed to undertake this project.

(c) Expanded disclosure requirements regarding interests in corporate parties: A Rule 7.1 Subcommittee, chaired by Justice Jane Bland (Texas Supreme Court), is exploring whether amendments should require expanded disclosure regarding corporate parties to enable judges to determine whether they might need to recuse.

Part II of this report provides information about other ongoing topics:

(a) Random assignment of cases: Forum shopping and random assignment of cases have received considerable attention. Nineteen U.S. Senators wrote Judge Rosenberg expressing concern about random assignment. Another submission suggested that the Civil Rules should be amended to reflect the need – in at least certain cases – to ensure that litigants cannot "choose their judge" by filing in certain courts. It is not clear whether Civil Rule amendments are the most appropriate response to these concerns; the existence of single-judge divisions of district courts may largely be a matter of statute, and presently case assignment practices are handled locally as seemingly contemplated by 28 U.S.C. § 137(a). Circumstances may differ considerably in different districts, particularly in large states that are somewhat sparsely populated.

(b) Demands for jury trial in removed cases: A style change to Rule 81(c) in 2007 changed verb tense in a way that might confuse some about when a jury trial must be demanded within 14 days of removal. This matter was before the Standing Committee at its June 2016 meeting, and prompted two members of the Standing Committee to propose a change to Rule 38 that would have mooted the concern about Rule 81(c). Based in part on FJC research, the Advisory Committee has now dropped that Rule 38 proposal, and it is considering either undoing the 2007 restyling change of verb tense or recommending a more aggressive change to the rule designed to make it clearer.

Part III presents information on topics that remain on the Advisory Committee's agenda but are not presently the subject of ongoing work:

(a) Disclosure of premium for a security bond under Rule 62(b): The Appellate Rules Committee has proposed adoption of a new Appellate Rule 39(b) authorizing a motion for reconsideration of the initial cost award by the court of appeals. That amendment proposal was published for public comment in August 2023. The possible issue under Civil Rule 62(b) is that sometimes litigants in the court of appeals will not know the amount of the premium paid for an appeal bond, although having that information would be important to their decision whether to move for reconsideration of the initial cost award. It is uncertain whether such an amendment is needed, and also whether the amendment of Appellate Rule 39(b) will be adopted.

(b) Attorney fee awards for Social Security appeals: After extended study, the Advisory Committee developed Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g), which went into effect on Dec. 1, 2022. Among the topics discussed during the work leading to the recommendation to adopt Supplemental Rules was the problem of handling attorney fee awards under 42 U.S.C. § 406(b) when the court remands to the Social Security Administration (SSA) for further proceedings. The amount of a fee award is capped, but the cap depends on the results of the further proceedings before the SSA. Rule 54(d)(2)(B), however, provides generally that motions for attorney fees be made promptly, and long before that disposition by SSA is known. The matter is difficult, and the submission received reported on a local rule addressing the issues raised. Because the results of that local rule effort and the functioning of the new Supplemental Rules are presently uncertain, the Advisory Committee is not presently pursuing this subject.

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

(a) Revision of Rule 26(a)(1) based on the results of the Mandatory Initial Discovery Pilot, which the Discovery Subcommittee concluded after study, did not provide a firm basis for proposing changes to the existing rules on initial disclosure.

(b) Possible revision of Rule 60(b)(1) in light of the Supreme Court's decision in Kemp v. U.S., 142 S.Ct. 1856 (2022), that a "mistake" by the court is a ground for relief under Rule 60(b)(1) and therefore subject to the one-year time limit applicable to motions under Rule 60(b)(1).

(c) An amendment to Rule 30(b)(6) closely resembling a proposed amendment to that rule published for comment in 2018 and withdrawn from the amendment package after adverse commentary during the public comment period.

(d) An amendment to Rule 11 stating that district courts must impose sanctions if Congress has mandated imposition of sanctions in actions brought under certain federal statutes.

(e) An amendment to Rule 53 prescribing that masters are held to fiduciary duty standards.

(f) An amendment to Rule 10 requiring that each pleading include a Document of Direction of Claims (DoDoC) to show which parties are asserting claims against which parties.

(g) Proposed amendments to the Civil Rules, Criminal Rules, Appellate Rules, Bankruptcy Rules, and Evidence Rules, as well as statutory amendments, all dealing with the handling of contempt.

I. ONGOING SUBCOMMITTEE PROJECTS

A. Rule 41(a) Subcommittee

The Rule 41 Subcommittee, chaired by Judge Cathy Bissoon (W.D. Pa.), is continuing its work to address several conflicting interpretations of the rule. The Subcommittee was formed after the March 2022 Advisory Committee meeting in response to two submissions (21-CV-O, 22-CV-J) that pointed out a circuit split regarding whether the rule permits unilateral voluntary dismissal of only an entire "action" or something less, such as all claims against a single defendant, or one of several claims against a defendant.[1]

[1] The Second, Sixth, and Seventh Circuits take the view that only an entire action may be dismissed under Rule 41(a); the First, Third, Fifth, Ninth, and Eleventh Circuits take the view that in a multi-defendant case, a plaintiff may dismiss all claims (though not fewer than all claims) against a single defendant under Rule 41. The Eighth and Tenth Circuits have not definitively addressed the issue. The state of play was recently comprehensively summarized in *Interfocus Inc. v., Hibobi Tech. Ltd.*, No. 22-CV-2259, 2023 WL 4137886 (N.D. Ill. June 7, 2023). The Fourth, Tenth, and D.C. Circuits have not explicitly considered the issue, and the district courts within these circuits are split.

At the October 2023 Advisory Committee meeting, members discussed the issues and directed the Subcommittee to continue its work. The Subcommittee subsequently met, via Zoom, on November 15. Although there is not yet a firm consensus among the Subcommittee members about whether to pursue an amendment, it has begun the process of developing various options that would expand the flexibility of the rule. The Reporters will develop these possibilities for consideration at the next Subcommittee meeting.

Currently, Rule 41(a)(1)(A) allows a plaintiff to "dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared." Rule 41(a)(1)(B) provides that such a dismissal is without prejudice unless the plaintiff has "previously dismissed any federal- or state-court action based on or including the same claim," in which case the "notice of dismissal operates as an adjudication on the merits." Rule 41(a)(2) provides that "[e]xcept as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Dismissals under Rule 41(a)(2) are presumptively without prejudice unless the court orders otherwise. Notably, Rule 41(c) states that "[t]his rule applies to dismissal of a counterclaim, crossclaim, or third-party claim," and a claimant may voluntarily dismiss without a court order or consent from other parties before a responsive pleading is served, or, if there is no responsive pleading, before evidence is introduced at a hearing or trial.

As noted above, our inquiry began with the circuit split about the meaning of the word "action" in the rule. Some courts have concluded that a plaintiff may dismiss only an entire action (i.e., all claims against all defendants) under Rule 41(a) whether unilaterally prior to an answer or motion for summary judgment, by stipulation, or by court order. Dismissal of anything less, according to these courts, must be accomplished by amending the complaint under Rule 15. This process, however, can be cumbersome, especially if it occurs later in the pretrial process since an amended complaint requires an amended answer. Moreover, a proliferation of pleadings can create confusion and clog the docket.[2]

Additionally, requiring amendment of the complaint can create downstream problems. Consider a plaintiff who has asserted two claims but loses a motion for summary judgment as to one of them. Absent a finding that Rule 54(b) applies, this judgment cannot be immediately appealed. If Rule 41(a) allows only dismissal of an entire action, in order to create an appealable final judgment, the plaintiff would have to amend her complaint to excise the claim. This, however, may be more easily said than done. For instance, the Eleventh Circuit recently held that such an attempt was unsuccessful because the factual allegations supporting the abandoned

[2] *See Interfocus Inc.v. Hibobi*, No. 22-CV-2259, 2023 WL 4137886, at *2 (N.D. Ill. June 7, 2023) ("Amending a complaint again and again can clog up the docket and create confusion about which complaint is the operative pleading. Imagine a docket with a sixth amended complaint, followed by a seventh amended complaint, followed by an eighth amended complaint, and so on. Heads will start spinning.")

claims remained in the amended complaint. *See GEICO v. Glassco, Inc.*, 54 F.4th 1338, 1344 (11th Cir. 2023).

In sum, the conflict over Rule 41 boils down to whether the rule's text requires a narrow application of the rule, or whether the rule's current text can bear what many courts seem to do with it, which is to narrow the claims and parties throughout the pretrial process.[3] Arguably, facilitating such narrowing, including through settlement, is an efficiency-enhancing device that the rule should encourage. As one committee member put it at the last Advisory Committee meeting, the rule in its present form is "clunky," and perhaps especially so in an era where multiparty, multiclaim litigation is far more prevalent than when the Federal Rules were initially adopted.

Indeed, the Rules now contemplate narrowing claims and defenses asserted in the litigation in various places, such as Rule 16(c)(2)(A) (allowing a court to consider and take appropriate action on "formulating and simplifying the issues, and eliminating frivolous claims or defenses") and Rule 11(b) (authorizing sanctions for "later advocating" a claim that proves to be unwarranted). Notably, Rule 41(c) expressly contemplates dismissal of single counterclaims, crossclaims, and third-party claims, and it is not clear why the plaintiff should not enjoy equal latitude. The Subcommittee's outreach reveals that judges often use Rule 41 during pretrial proceedings to excise claims that are no longer pertinent without requiring parties to amend the pleading. Ultimately, though, if the text is found to not permit that practice, and such a practice is desirable, perhaps the rule should be amended to make it explicit.

Although there are legitimate concerns that amending a longstanding rule, to which the bench and bar have become adjusted, may be unsettling and lead to unanticipated consequences, the Subcommittee's efforts have increasingly led it to the conclusion that this is a problem that likely can only be solved by an amendment. Over the course of the last year, the Subcommittee has engaged in outreach to several attorney groups (i.e., Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association) to determine whether the conflicting interpretations of the rule create a "real-world" problem, and it seems clear that it does, at least when the rule prohibits seamless narrowing of claims and parties. The Subcommittee also sought feedback from federal judges, via a letter to the Federal Judges Association (pg. 207 of the October 2023 agenda book). The request elicited eight responses. These responses were somewhat ambivalent, as some judges had never encountered the issue and others expressed hesitation about upsetting the applecart with an amendment. It is surely the case that not every conflict among the circuits about the meaning of a rule warrants an amendment. Here, though, the starkly different interpretations of the rule among the circuit and district courts, and the practical effect those differing interpretations can have on the progress of a case, indicate that clarification is a worthy goal.

[3] The debate over how to properly interpret the rule is well ventilated in several dueling opinions in a recent *en banc* case in the Fifth Circuit, *Williams v. Seidenbach*, 958 F.3d 341 (5th Cir. 2020).

Should the Committee propose to amend the rule, there are several directions it might take, levers it might adjust, and complications it should avoid. Obviously, an amended rule should clarify how much leeway a plaintiff should have to dismiss something less than an entire action, but whether that leeway should extend to individual claims is an open question. Beyond examining whether "action" should be revised to something less, an amendment might also consider (a) the deadline by which a plaintiff may voluntarily dismiss without a stipulation or a court order; (b) who must sign a stipulation of dismissal, as there is also a conflict over whether such a stipulation must be signed by all parties who have ever appeared in the litigation or only those remaining at the time of the stipulation; and (c) which of these dismissals should be presumptively without prejudice, or vice versa.

As the Subcommittee moves toward considering possible amendments, Standing Committee feedback on which route seems most fruitful would be helpful.

B. Discovery Subcommittee

The Discovery Subcommittee's report to the Advisory Committee during the Oct. 17 meeting included three items that are the subject of ongoing work. One of those will be handled by a new subcommittee going forward, and the Advisory Committee decided not to proceed with another matter considered by the Discovery Subcommittee which is identified in Part IV below. The ongoing projects are:

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

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

At the Subcommittee's request, Rules Law Clerk Chris Pryby prepared a comprehensive memo dated June 1, 2023, on the requirements of the state courts, which might provide insights. A link to that memo is provided below. It does not show that there is any consistent thread of service requirements in state courts that could provide useful guidance for Rule 45.

The Subcommittee concluded that the rule's ambiguity about service of subpoenas has produced sufficient wasteful litigation activity to warrant an effort to clarify the rule. At the same

time, the consensus was also that requiring in-person service in every instance (as some courts have concluded is required under the current rule) would not be a good idea.

Instead, after discussion the Subcommittee gravitated toward recognizing several means of service of initial process authorized under Rule 4 and also recognizing that the court (or perhaps, a local rule) could authorize additional means of service. For purposes of discussion, it offered the following sketch of a possible amendment to Rule 45(b)(1):

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

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

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

One question that has been raised is whether Rule 4(i), dealing with serving the United States, one of its agencies, or a U.S. officer or employee, should be included on the Rule 45(b)(1) list if this amendment approach is adopted. The range of circumstances that emerge for service of a summons and complaint under Rule 4(i) may not work well if transferred to the subpoena setting.

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

More generally, it could be said that the analogy between service of summons and complaint and service of a subpoena is imperfect. A subpoena may be directed to a nonparty and

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

At the same time, it is also worth noting that invoking the entirety of Rule 4 in Rule 45(b)(1) would likely be overbroad. For example, Rules 4(a) and (b) (dealing with the contents of the summons and issuance of the summons by the clerk) do not apply in the subpoena setting, since Rule 45(a) has its own pertinent provisions. Rule 4(g) deals with serving a minor or incompetent person and calls for following state law if that person is located within this country. Rule 4(j) deals with serving a foreign, state, or local government. Rule 4(k) deals with the territorial limits of service of a summons, but Rule 45(c) has its own limits on where a response to a subpoena may be required. Rules 4(l), (m) and (n) also seem inapplicable to the Rule 45.

The invocation of the due process standard "reasonably calculated to give notice" might be unnecessary, for district courts would presumably have that in mind when asked to authorize additional means of service in a given case, and district courts adopting local rules would similarly be expected to have that in mind. The phrase is derived from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which held that Due Process requires notice so calculated to give notice. Presumably the Due Process limits would apply by their own force, without the need for inclusion in the rule, and including such a phrase in the rule might suggest that it is independent of, or in addition to, what Due Process requires. If it were adopted, however, the Committee Note should specify that actual notice is not required, but only the use of substitute means reasonably calculated to give notice.

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

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

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

But it must be remembered that there is no time limit in Rule 45 at present so long as the subpoena does not require production of documents, making the timing requirements of Rule 45 applicable. And since some subpoenas may demand attendance at court hearings or trials on short notice care should be taken if a time feature is built into Rule 45.

The Discovery Subcommittee is continuing its work on the subpoena-service project and expects to present its further thoughts at the Advisory Committee's meeting in April 2024. It invites reactions from the Standing Committee on this work.

Link to Rules Law Clerk June 1, 2023 memo:

https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=148

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

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

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders

* * * * *

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

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

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is directed [or permitted] {authorized} by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified and consistent with the common law and First Amendment rights of public access to court filings.[4]

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

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

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

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

[4] The bracketed addition "or permitted" was suggested during the Advisory Committee's October 2023 meeting, to reflect the possibility that federal law might permit such filing without directing that it occur. It might be better to say "authorized," so that possibility is also included in the above sketch.

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

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

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

Uniform procedures for filing under seal and unsealing

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

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

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

One more moving part should be noted. Two years ago, the Subcommittee paused its work on the sealing issues because the Administrative Office had inaugurated a project on sealing of court records. The pause was to avoid possibly conflicting with or complicating this project's efforts. In early 2023, we were advised that this ongoing project should not cause us to stay our hands. Though the precise contours of the project are not entirely clear, it seems now to be addressing only the manner in which the clerk's office manages materials filed under seal, not the decision whether or not to authorize filing under seal. Whether the dividing line between the decision to seal in the first place and later unsealing is crystal clear might be debated.

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

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

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

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

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

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

In the same vein, the proposal by some that there be "findings" to support an order to seal seems an unnecessary addition. Except for court trials governed by Rule 52, there are few findings requirements in the rules. (Rule 23(b)(3) does seem to have such a requirement because the court may certify a class only if it finds that the predominance and superiority prongs of the rule are satisfied.) Again, once the common law and First Amendment standards are specified as criteria for deciding a motion to seal, adding a findings requirement seems unnecessary. Perhaps it would be useful were frequent appellate review anticipated, but appellate review of discovery-related rulings is rare, and there are no similar findings requirements for such rulings.

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

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

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

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

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

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

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

Alternative 1

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

Alternative 2

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

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

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

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

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

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

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

Such intervention attempts may sometimes raise standing issues. A recent example is *U.S. ex rel. Hernandez v. Team Finance, L.L.C.*, 80 F.4th 571 (5th Cir. 2023), a False Claims Act case in which the district court denied a motion to intervene by a "health care economist." The intervenor sought to unseal information about health care pricing in an action alleging that defendant routinely billed governments for doctor examinations and care services that did not actually occur. The court of appeals concluded that "violations of the public right to access judicial records and proceedings and to gather news are cognizable injuries-in-fact sufficient to establish standing." But the court also remanded for a determination whether the application to intervene was untimely under Rule 24(b).

Because there is an existing body of precedent on intervention for these purposes, providing some parallel right by rule looks dubious. On the one hand, the notion that every "member of the public" can intervene may be too broad. Rule 24(b)(1), which is ordinarily relied

upon for such intervention to unseal, also has other requirements that might not be included in a new rule.

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

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

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

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

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

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

Discussions during the Advisory Committee's October 2023 meeting stressed the reality that many litigations involve highly confidential technical and competitive information; making filing under seal more difficult could prove very troublesome.

But attorney members of the committee stressed the extreme variety of practices in different districts, sometimes making the lawyers' work much more difficult. Some districts have very elaborate local provisions on filing under seal, and others have few or almost no provisions dealing with the topic. But it was also noted that this divergence might in some instances reflect the sorts of cases that are customary in different districts. There was discussion of the tension

between recognizing the need for local latitude in dealing with handling these problems and also recognizing that concerns about perceptions of excessive sealing of court records have continued.

Suggestions during the Advisory Committee meeting included trying to consult with districts that have particular views on these subjects and ensuring that clerk's offices are involved because they are "essential players" in the day-to-day handling of such problems. The Advisory Committee welcomes reactions from the Standing Committee on this project.

Links to some of the submissions received on this topic (often lengthy) are below:

Suggestion 22-CV-A (Sedona Conference): https://www.uscourts.gov/rules-policies/archives/suggestions/sedona-conference-22-cv

Suggestion 21-CV-T (Knight First Amendment Institute at Columbia University): https://www.uscourts.gov/rules-policies/archives/suggestions/sedona-conference-22-cv

Suggestion 21-CV-G (Lawyers for Civil Justice): https://www.uscourts.gov/rules-policies/archives/suggestions/lawyers-civil-justice-21-cv-g

Suggestion 20-CV-T (Prof. Volokh and Reporters Committee for Freedom of the Press): https://www.uscourts.gov/rules-policies/archives/suggestions/eugene-volokh-reporters-committee-freedom-press-and-electronic

(3) Cross-border discovery: Judge Michael Baylson (E.D. Pa.), a former member of the Advisory Committee, submitted 23-CV-G. Since submitting that proposal, he and Professor Gensler (another former member of this Committee) have prepared an article published in *Judicature* entitled "Should the Federal Rules Be Amended to Address Cross-Border Discovery?" A link to the *Judicature* article is provided below. It proposes that the Committee "initiate a project to examine how the Civil Rules might be amended to better guide judges and attorneys through the cross-border discovery maze."

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

During the Advisory Committee's October 2023 meeting, Judge Baylson made a presentation about the growing importance of these issues. U.S.-style discovery is unknown in the rest of the world, and attitudes about privacy and confidentiality also differ in other countries. The Hague Convention offers methods that for obtaining evidence outside the U.S. that many American lawyers consider unduly difficult. But sometimes it may be considerably more efficient to take a collaborative approach to obtain evidence from abroad.

At the same time, it was clear that this would be a major undertaking. Indeed, it was suggested that it might not be limited to discovery and evidence-gathering; attention might also focus on Rule 44.1, dealing with proof of foreign law, and perhaps also service of process.

During the Advisory Committee meeting, a new subcommittee was appointed to undertake this project. The Chair will be Judge Manish Shah (N.D. Ill.), and includes Magistrate Judge Jennifer Boal (D. Mass.), Professor Zachary Clopton, Joshua Gardner (DOJ), and Bankruptcy Judge Catherine McEwen (liaison to the Bankruptcy Rules Committee). Reactions from the Standing Committee would be welcome.

Some background may be helpful for Committee members:

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

For some time after 1972, many American federal courts were presented with arguments that they would have to use the Convention discovery methods rather than those provided by the Federal Rules to obtain cross-border discovery. There were counter-arguments that the Convention's procedures were cumbersome and slow, so that ordinary American discovery was preferable. In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987), the Supreme Court essentially rejected the requirement of first resort to the Convention procedures and directed that federal courts evaluate a number of factors in deciding whether to use the Convention or ordinary American discovery. Justice Blackmun partially dissented, arguing that comity principles should counsel greater deference to the Convention practices. But over the years many American lawyers have argued that the Convention is costly and slow.

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

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

Campbell, a former Discovery Subcommittee Chair, Advisory Committee Chair, and Standing Committee Chair.

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

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

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

In 1988, an amendment proposal to provide direction for the federal courts' handling of discovery for use in American cases was published for public comment. After the public comment period was completed, the proposal was revised, approved by the Standing Committee and the Judicial Conference and sent to the Supreme Court for its review. While the proposal was before the Court, the Department of State transmitted a set of objections from the United Kingdom to the Court. The Court then returned the proposed amendments to the rulemakers for further review, and no further action occurred at that time.

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

28 U.S.C. § 1782: U.S. discovery for use in proceedings abroad: A companion statute, 28 U.S.C. § 1782, authorizes U.S. discovery to provide evidence for use in "a proceeding in a foreign or international tribunal" if the person from whom discovery is sought "resides or is found" in the district in which discovery is sought. According to Yanbai Andrea Wang, Exporting American

Discovery, 87 U. Chi. L. Rev. 2089 (2020), there has been a very considerable uptick in the use of this statute during the 21st century.

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

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

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

Link to *Judicature* article: https://judicature.duke.edu/articles/should-the-federal-rules-of-civil-procedure-be-amended-to-address-cross-border-discovery/

C. Rule 7.1 Subcommittee

The Rule 7.1 Subcommittee, chaired by Justice Jane N. Bland, was appointed at the March 2023 Advisory Committee meeting to consider a rule amendment that would better inform judges of circumstances that might trigger the statutory duty to recuse. The issue came to the Committee in the form of two suggestions, one from Judge Erickson (8th Cir.) (22-CV-H) and another from Magistrate Judge Barksdale (M.D. Fla.) (22-CV-F). Broadly, both proposals seek to address concerns that current Rule 7.1 inadequately apprises district judges of a potential financial interest in a case that would require recusal. Although a workable revision of the rule will be a challenging task, the Committee has concluded that the "real-world" nature of this problem is cause for the Subcommittee to investigate possible amendments.

Current Rule 7.1(a) reads:

Rule 7.1 Disclosure Statement

(a) Who Must File; Contents.

> **(*1) Nongovernmental Corporations.*** A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene must file a statement that:
>
> > **(A)** identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or
> >
> > **(B)** states that there is no such corporation.

The purpose of Rule 7.1(a), drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, is to provide district judges with the information necessary to comply with the recusal statute, 28 U.S.C. § 455(b)(4). The statute provides that a judge "shall" recuse when:

> He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding[.]

The statute defines "financial interest" as "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party," with exceptions for mutual funds and other investment vehicles not central to our efforts. *Id.* § 455(d)(4). The language of § 455(b)(4) is echoed in the Code of Conduct for United States Judges, Canon 3C(1)(c).

Generally speaking, the concern is that the required Rule 7.1(a) disclosure is insufficient to make judges aware that they may need to recuse, since the rule requires disclosure of only a parent or publicly held corporation that holds 10% or more of stock. As the Committee Note to Rule 7.1 explains, "the information required by Rule 7.1(a) reflects the 'financial interest' standard of Canon 3C(1)(c) [and] will support properly informed disqualification decisions." But the recusal statute and canon provide a different governing standard than the Rule, requiring recusal if the judge has a financial interest "however small" in the "subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). The recusal statute therefore potentially covers significantly more than a financial interest in a parent of a party, or in a 10%+ owner of shares in a party.

The two proposals the Committee received seek to address this gap between what must be disclosed and what would require disclosure in different ways. Judge Erickson's proposal suggests requiring disclosure of "grandparent" corporations in which judges may hold interests. For instance, Berkshire Hathaway owns several companies that may control other corporate parties, but because Berkshire is not the "parent" that relationship is not required to be disclosed, meaning that judges who own shares of Berkshire may find themselves in the dark about whether they must recuse. We have been informally referring to relative opacity of a judge's ownership

interest in a corporation that in turn owns an interest in a subsidiary that, in further turn, owns an interest in a party to a case as the "grandparent problem," though it may also apply to great-grandparents, and so on.

Magistrate Judge Barksdale's proposal takes a different tack by suggesting amendment of Rule 7.1(a) to require parties to check judges' "publicly available financial disclosures and, if a conflict or possible conflict exists, [] file a motion to recuse or a notice of a possible conflict within 14 days of filing the disclosure." At both the March 2023 Committee meeting, the Subcommittee's first meeting, and the October 2023 Committee meeting, there was a general consensus that this proposal may eventually hold promise but that currently the relevant database represents only a snapshot of a judge's holdings at one moment in time, in the prior year, and it may thus be out of date by the time of any particular litigation. Moreover, conflicts-check systems currently in use in the district courts are thought to be reasonably effective at checking Rule 7.1 disclosures against judicial financial disclosures. Ultimately, the Committee concluded that a rule amendment that would broaden the disclosure obligation has more promise at the present time.

Notably, Rule 7.1(a) has never been intended to comprehensively inform judges of *all* instances where recusal is required; the Committee Note explains that the Rule is instead "calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect." Moreover, the Judicial Conference Committee on Codes of Conduct acknowledges as much in its formal advisory opinion (no. 57) interpreting Canon 3C(1)(c), which explains that "when a judge knows that a party is controlled by a corporation in which the judge owns stock, the judge should recuse," and that "the 10% disclosure requirement . . . is a benchmark measure of parental control for recusal purposes." But financial interest in a parent that "controls" a party is a much narrower category than the "any financial interest" standard embodied in the recusal statute.

Although it seems clear that Rule 7.1 could go further, the challenge comes in defining what disclosures may reasonably be required. This is not a new problem. As the current Committee Note explains:

> Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).

Arguably, this challenge has only gotten more difficult in a commercial landscape that includes many large actors that do not fall into the category of "nongovernmental corporations," such as LLCs, limited partnerships, and other business associations. Moreover, the current disclosure requirement is limited to parent corporations and publicly traded corporations owning 10% or more of a party. Of course, there may be entities that hold a substantial interest in a party that are neither. And, as was raised at the last Committee meeting, the increasing prevalence of third-party litigation funding (especially by entities that also engage in other business) may also serve to create interests in the litigation of which a judge is not aware.

Despite the challenges, the Subcommittee has some leads on going forward, including many local-rule variations. Under Rule 83, districts may craft their own local rules on disclosure, so long as they are not inconsistent with Federal Rules. Former Rules Law Clerk Christopher Pryby prepared an excellent and comprehensive memo cataloging all of the local rules (a link to which follows) detailing the local rules in this area. 50 of 94 districts have local rules on this subject, and they take, roughly, three approaches to augmenting the required disclosures: (1) expanding the categories of entities to be disclosed to other possibilities, such as "persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are financially interested in the outcome of the case," as in the Northern District of Texas; (2) requiring disclosure of entities owning a smaller percentage of a party's stock, such as 5%, which is the figure used in the Northern District of Illinois; and (3) requiring disclosure of particular defined financial relationships, such as an insurer, as in the Central District of California, or third-party litigation funder, as in the District of New Jersey.

This is, of course, a non-exclusive list. Both the efficacy of these various local rules, and courts' and parties' experience under them, may be subjects for further investigation. States also have their own creative approaches to this problem, and further research into those may be warranted. Whether these approaches lead to better information and more accurate application of the recusal statute than current Rule 7.1 is an open question, as is whether the gains in information further disclosure requirements would provide justifies the additional burdens placed on parties to comply with them. The Subcommittee intends to engage in further study and outreach in the coming months.

Finally, it is important to note that the Advisory Committee is not acting in a vacuum. The Judicial Conference Codes of Conduct Committee is considering revisions to its guidance. The Advisory Committee has connected with the Codes of Conduct Committee, which has indicated that we should not delay our investigation of potential amendments. There is also Congressional activity in the form of a bill sponsored by Sen. Warren (which in part echoes a bill that failed to gain traction in the prior Congress). The Judicial Ethics and Anti-Corruption Act of 2023 (S. 1908) would bar a justice or judge from owning any interest in any security, trust, commercial real estate, or privately held company, with exceptions for mutual funds and government (or government-managed) securities. The legislation would also require justices and judges to "maintain and submit to the Judicial Conference a list of each association or interest

that would require the justice, judge, or magistrate to be recused" and "any financial interests of the judge, the spouse of the judge, or any minor child of the judge residing in the household of the judge." The bill has been referred to the Judiciary Committee and future action is uncertain, but continued legislative attention is likely.

In the meantime, the Subcommittee intends to proceed forward in its research and develop possible amendment language, and it would be eager to hear any feedback from the Standing Committee.

Link to Rules Law Clerk August 27, 2023 memo:
https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=220

II. Other topics under consideration

A. Random assignment of cases

The Advisory Committee has received several suggestions to consider rulemaking regarding civil case assignment in the district courts. Attention to this issue has increased in recent years due to concerns that in high-profile cases, especially cases seeking nationwide injunctions against executive action, plaintiffs are engaged in a more precise form of forum shopping that facilitates selecting a potentially favorable individual judge.

Forum shopping is, of course, a perennial concern and, to some degree, an inevitability. But in most cases choosing a favorable forum does not guarantee a particular judge. Some case-assignment methods, however, facilitate more precise "judge-shopping," particularly in "single-judge divisions" of a district court. In some districts, if a case is properly filed in a division of a district court with a single sitting judge, then a plaintiff may be virtually guaranteed that her case will be assigned to that judge, at least in the first instance. Professor Amanda Shanor, of the Wharton School at the University of Pennsylvania, and the Brennan Center For Justice at NYU School of Law, have suggested a new rule such that "[i]n cases where a plaintiff seeks injunctive or declaratory relief that may extend beyond the district in which the case is filed, districts shall use a random or blind assignment procedure to assign the cases among the judges in that district." (23-CV-U, linked below)

Beyond this suggestion, there is significant interest in this issue from multiple quarters. On July 10, 2023, nineteen U.S. Senators wrote Judge Rosenberg a letter, linked below, expressing concerns that in some districts "plaintiffs can effectively choose the judge who will hear their cases due to local court rules governing how matters are assigned." Moreover, in August 2023, the American Bar Association adopted its Resolution 521, linked below, which "urges federal courts to eliminate mechanisms that predictably assign cases to a single United States District Judge . . . when such cases seek to enjoin or mandate the enforcement of a state or federal law or regulation." In such instances, the ABA proposes that these cases be "made randomly and on a district-wide rather than a division-wide basis." And both the House and

Senate Judiciary Committees have held hearings on the issues related to nationwide injunctions and forum shopping. In sum, these matters are of significant current public concern.

At its October meeting, the Advisory Committee preliminarily considered these questions and defined some areas for additional study.

An initial question is whether the Rules Enabling Act provides authority to address assignment of judicial business. Currently, case assignment is a matter delegated by statute to the districts. 28 U.S.C. § 137 states that "[t]he business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court." Other statutory provisions contain considerable detail about the divisions of district court, which may sometimes be a reason why a plaintiff can be confident in a given division that the case will be assigned to a particular judge. See 28 U.S.C. §§ 81-131. Since the focus of recent concerns seems to be on divisions rather than entire districts, the detail of these statutory provisions raises issues about whether a national rule can require a reallocation of business among divisions of a district court, and whether Congress has demonstrated that it considers such questions beyond scope of rulemaking.

This is not to say that the rules process is clearly unable to address these concerns. Although § 137 has long provided that the districts divide their business among judges themselves, a rule might properly supersede the statute by virtue of the Enabling Act's supersession clause, so long as it is a "general rule[] of practice and procedure" and does not "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072. There is likely a good argument that a rule about allocation of judicial business is a matter of procedure amenable to rulemaking, and, if so, a rule would supersede § 137. That said, that authority was largely intended to counter arguments in the 1930s and 1940s that the multitude of then-existing statutory provisions dealing with topics addressed in the new rules could hamstring the new rules in their infancy. At the October meeting, the Committee assigned the reporters to research the history and past precedent involving case assignment and the supersession clause. This research is ongoing.

Assuming authority to engage in rulemaking, the subsequent question would be whether case assignments are best handled by Civil Rule. Both the agenda book and discussion at the October meeting suggested some reasons for caution.

For instance, the flexibility that § 137 provides enables districts to tailor their assignment policies to their particular needs, and intrusion in this area might be problematic. Preliminary research reveals that districts have adopted a wide variety of methods for assigning cases according to their needs. Several committee members expressed concerns about imposing a uniform rule on districts that vary significantly in size and culture. While in some districts, particularly those that are geographically smaller, local rules embrace random assignment to judges across several divisions, in other districts, particularly geographically larger ones with many divisions, cases are assigned to the judge or judges sitting in the divisions where cases are

filed. One advantage of this approach that is especially salient in expansive districts (such as large states with a single district court) is that it increases both the likelihood that the forum is convenient, ensuring access to justice in rural areas, and that the judge and jury pool are connected to the community from which the controversy arose.

A different example is the Northern District of California, which uses district-wide random assignment for patent, trademark, and copyright cases, and securities class actions. One reason for this arrangement might be that judges in the San Jose Division (next to Silicon Valley) might bear a very disproportionate portion of the district's workload were all cases brought by or against Silicon Valley companies assigned to that division. Beyond these examples, the districts have myriad approaches to related-case assignments, magistrate-judge assignments, and assignments of specific types of cases.

Should work progress toward drafting rule language, the Committee will have to pay significant attention to the scope of the rule and potential downstream effects. The Shanor/Brennan Center proposal suggests application of a rule to cases seeking "injunctive or declaratory relief that may extend beyond the district where the case is filed," while the ABA Resolution proposes random assignment when "cases seek to enjoin or mandate the enforcement of a state or federal law or regulation." These proposals illustrate only two of the directions a rule could take and the challenge of designing a rule that defines exactly what kind of forum shopping should be prohibited, and on what grounds. Both proposals are animated by the problem of nationwide injunctions, but the first may be much broader (in that it captures cases that fall outside of that category) while the second may be narrower (in that it may not capture other kinds of cases that implicate the same problem beyond those challenging federal or state law, such as judge-shopping in patent cases). Ultimately, in crafting a rule, the task will be to match up the rule's application to the problem it seeks to solve, and then to examine whether the predicted effects will be positive. As a matter of order of operations, this inquiry would follow a determination that there is a solid case for rulemaking authority.

Aside from the impact of reducing the current flexibility afforded the district courts, the committee noted other areas for further investigation, such as appropriately defining the cases affected by a rule, whether the rule would unduly interfere with statutes governing venue, and whether such a rule ought to apply to magistrate judges. Further study of the many approaches in the districts, including the degree to which some districts are addressing the question of divisions with only one or a few judges, will inform additional investigation of these matters.

Given the importance of this issue, the Committee concluded that it should remain high on its agenda, with initial focus on the question of rulemaking authority. Input from the Standing Committee would be especially welcome on this question, or any other aspects of this issue.

Suggestion 23-CV-U (Prof. Shanor and Brennan Center for Justice):
https://www.uscourts.gov/rules-policies/archives/suggestions/prof-amanda-shanor-and-brennan-center-justice-23-cv-u

Link to July 10, 2023 letter to Judge Rosenberg:
https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=313

Link to ABA Resolution 521: https://www.uscourts.gov/sites/default/files/2023-10_civil_rules_committee_meeting_agenda_book_11-6_final_0.pdf#page=318

B. Rule 81(c) – Demands for jury trial in removed cases

Submission 15-CV-A from Nevada attorney Mike Wray, received in 2015, focused on a change of verb tense made by the 2007 Style Project. When this submission was initially presented to the Standing Committee at its June 2016 meeting, two members of that Committee (then-Judge Gorsuch and Judge Graber) proposed that problems of loss of the right to jury trial due to failure to make a timely demand for jury trial might be solved by amending Rule 38 to provide that there is always a right to jury trial unless all parties and the judge agree to a court trial. Considerable FJC research indicated that the requirements of Rule 38 did not often impede access to jury trial. And the Rule 38 suggestion was removed from the Advisory Committee's agenda.

That left the question of whether the original submission provided a basis for amending Rule 81(c). The Style Project change that prompted the Rule 81(c) submission is presented below:

RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS

(c) Removed Actions.

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

* * *

(3) Demand for a Jury Trial.

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

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

(i) it files a notice of removal; or

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

Neither the records of the Style Project nor the recollections of the Reporters suggest that this change in verb tense was meant to affect the application of the rule; the Committee Note to the style changes makes no mention of the change in verb tense.

But one might nevertheless regard the rule change as altering the meaning of the rule. Before the change (using "does") the rule seemed pretty clearly to say that the jury demand must be made within 14 days unless the state court system from which the case was removed *never* required a jury demand, perhaps the case if the state court had a jury demand setup like the Gorsuch/Graber amendment proposal.

That was how the Ninth Circuit viewed the rule in 1983. In *Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983), the court applied Rule 81(c) as then written to require a demand for jury trial within the time specified in Rule 38(b)(1) (*id.* at 556):

> Lewis did not request a jury trial before his case was removed from California state court. Under California law, a litigant waives trial by jury by, *inter alia*, failing to "announce that one is required" when the trial is set. Cal. Civ. Proc. Code §§ 631, 631.01. (West 1982 Supp.). We understand that to mean that an "express demand" is required. Therefore, F.R. Civ. P. 38(d), made applicable by Rule 81(c), required Lewis to file a demand "not later than 10 days after the service of the last pleading directed to such issue [to be tried]." Failure to file within the time provided constituted a waiver of the right to trial by jury. Rule 38(d).

If the change to "did" means that a demand within 14 days of removal is required only when the time to demand a jury trial has already arrived in the state court proceeding, that could mean that Rule 81(c) would not require a jury demand very often. Usually removal must occur very early in the case, so the jury trial demand would not have been triggered in a system like the one in California. According to Mr. Wray, the district courts in California nevertheless continued to apply the rule as interpreted in the 1983 case. A number of Advisory Committee members thought this change could prompt failure to make a timely jury demand.

Accordingly, one solution would be to amend the rule so that it again reads as it did before 2007. Alternatively, it might be clarified along the following lines:

RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS

(c) Removed Actions.

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

* * *

(3) Demand for a Jury Trial.

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

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

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

The Advisory Committee expects to return to this issue at its April 2024 meeting. Reactions or guidance from the Standing Committee would be welcome.

Suggestion 15-CV-A (Mark Wray): https://www.uscourts.gov/rules-policies/archives/suggestions/mark-wray-15-cv

III. Other topics that remain on agenda but are not focus of current work

A. Rule 62(b) – notice of premium for security bond

This matter came to the Civil Rules Committee on referral from the Appellate Rules Committee, which has prepared a set of proposed amendments to Appellate Rule 39 that are now out for public comment through February 2024.

These proposed amendments to the Appellate Rules clarify Rule 39 and some of its terminology, such as replacing the word "taxed" with the word "allocated." As amended, Rule 39(a) contains the same basic provisions as current Rule 39(a).

But the amendments introduce in a new Appellate Rule 39(b) motion for reconsideration of costs:

(b) Reconsideration. Once the allocation of costs is established by the entry of judgment, a party may seek reconsideration of that allocation by filing a motion in the court of appeals within 14 days after the entry of judgment. But issuance of the mandate under Rule 41 must not be delayed awaiting a determination of the motion.

> The court of appeals retains jurisdiction to decide the motion after the mandate issues.

As under current Appellate Rule 39(e)(3), costs taxable in the district court include "premiums paid for a bond or other security to preserve rights pending appeal."

The Rule 62 issue was explained in the Appellate Rules Committee's report to the Standing Committee for the June 2023 Standing Committee meeting (agenda book at 76):

> The Advisory Committee was unable to come up with a good way to make sure that the judgment winner in the district court is aware of the cost of the supersedeas bond early enough to ask the court of appeals to reallocate the costs. Allowing a party to move for reallocation in the court of appeals after the bill of costs is filed in the district court would mean that both courts are dealing with the same costs issue at the same time. Creating a long period to seek reallocation in the court of appeals would mean that the case would be less fresh in the judges' minds and begin to look like a wholly separate appeal. Requiring disclosure in the bill of costs filed in the court of appeals would be odd because those costs are not sought in the court of appeals. Plus, a party might forego the relatively minor costs taxable in the court of appeals and care only about costs taxable in the district court. It would be possible to have the court of appeals tax the costs itself, but that would be a major departure from the principle, endorsed by the Supreme Court in [*City of San Antonio v.*] *Hotels.com*, that the court closest to the cost should tax it.
>
> For this reason, the Appellate Rules Committee believes that the easiest and most obvious time for disclosure is when the bond is before the district court for approval. It has requested the Civil Rules Committee to consider amending Civil Rule 62 to require that disclosure.

In *City of San Antonio v. Hotels.com, L.P.*, 141 S.Ct. 1628 (2021), the Court unanimously held that under Appellate Rule 39 the district court has no authority to decline to tax the entire cost of a bond on the party that won in the district court but lost in the court of appeals.

Ordinarily this is probably not a major concern, but in the *Hotels.com* case it was a major concern because the costs taxed in the district court totalled more than $2.3 million. The underlying lawsuit was a class action brought by San Antonio on behalf of a class of 173 Texas municipalities against a number of online travel companies (OTCs) that plaintiffs alleged had been systematically underpaying hotel occupancy taxes by using wholesale rather than retail rates for hotel rooms. After a jury trial, the district court entered judgment for $55 million in favor of plaintiffs. That led to a negotiation about supersedeas bonds (*id.* at 1632):

> The OTCs quickly sought to secure supersedeas bonds to stay the judgment. They negotiated with San Antonio over the terms of the bonds, and the city ultimately supported the OTCs' efforts to stay the judgment with supersedeas bonds totaling

> almost $69 million, an amount that was calculated to cover the judgment plus 18 months of interest and further taxes. The District Court approved the bonds, which were subsequently increased at San Antonio's urging to cover what grew to be an $84 million judgment after years of post-trial motions.

The court of appeals reversed, and defendants then filed a bill of costs in the court of appeals totaling $905.60 to cover the appellate docket fee and the cost of printing filings in the court of appeals. There was no objection to these costs.

In the district court, however, the OTCs filed a bill of costs for more than $2.3 million, mainly to cover the premium on the supersedeas bond. San Antonio urged the district court to decline to award these costs on the ground that "the OTCs should have pursued alternatives to a supersedeas bond and that it was unfair for San Antonio to bear the costs for the entire class rather than just its proportional share of the judgment." *Id.* at 1633. The district court declined San Antonio's invitation on the ground it had no discretion to reallocate costs, and the court of appeals affirmed.

The Supreme Court affirmed, reading Appellate Rule 39(a)(3) to refer to the court of appeals in directing that "if a judgment is reversed, costs are taxed against the appellee" unless "the court orders otherwise." [Under the pending amendment proposal, new Rule 39(b) would presumably expressly provide a vehicle for such a request to the court of appeals.] San Antonio argued that the district court should have discretion to determine an equitable allocation of the costs, but the Supreme Court held that "Rule 39 gives discretion over the allocation of appellate costs to the courts of appeals." *Id.* at 1634. As a consequence, "district courts cannot alter that allocation." *Id.* at 1636.

The published preliminary draft of proposed amendments to Appellate Rule 39 responds to this Supreme Court decision. The Committee Note begins: "The [*Hotels.com*] Court also observed that 'the current Rules and the relevant statutes could specify more clearly the procedure that such a party [as San Antonio] should follow to bring their arguments to the court of appeals.' . . . The amendment does so."

But as noted above, the proposed Appellate Rule does not ensure that the party that lost on appeal after winning below is aware of the premium for the supersedeas bond at the time it must file its motion for reconsideration under new Appellate Rule 39(b). Under Rule 62(a), there is an automatic 30-day stay of execution, but unless a further stay is obtained under Rule 62(b) the judgment may be enforced thereafter.

As suggested by the Appellate Rules Committee, a small change to Rule 62(b) could plug that gap:

> **(b) Stay by Bond or Other Security.** At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. <u>The party seeking the stay must disclose the premium [to be] paid for the bond or other security.</u> The stay takes

> effect when the court approves the bond or other security and remain in effect for the time specified in the bond or other security.

This amendment does not specify who is to receive this disclosure, but suggests that the court might consider the prospective premium in deciding whether to approve the security. As a general matter, assuming "gold plated" providers of security tend to charge higher premiums than "fly by night" providers of security, it might be odd for the judgment winner to try to persuade the district court to reject the high-priced security. But introducing the amount of the premium might occasionally produce tricky issues for district courts making Rule 62(b) decisions in some cases.

One question is whether such an amendment is really needed. As the Supreme Court noted in *Hotels.com* (*id.* at 1636-37):

> Most appellate costs are readily estimable, rarely disputed, and frankly not large enough to engender contentious litigation in the great majority of cases. We recognize that supersedeas bond premiums are a bit of an outlier in that they can grow quite large. . . . But the underlying supersedeas bonds will often have been negotiated by the parties, as happened here. They will in any event have been approved by the district court, see Fed. Rule Civ. Proc. 62(b), and their premiums will have been paid by one of the parties to the appeal. There is no reason to think that litigants and courts will be forced to operate without any sense of the magnitude of the costs at issue. Indeed, San Antonio admits that it was largely aware of the costs of the bonds in this case when they were approved.

So it may be that the predicament in which San Antonio found itself was a result of its expectation that it could pitch its arguments to the district court after the appellate reversal. Given the Supreme Court's ruling that the district court has no such discretion in the face of Appellate Rule 39, that problem should not recur. The fact this was a class action, and it seems that San Antonio alone faced taxation for the premium presumably keyed to hotel taxes not paid to many other class members is another complicating factor in that case.

But the Supreme Court recognized a solution: the losing party can ask the court of appeals to delegate the authority to allocate costs to the district court (*id.* at 1637):

> In all events, if a court of appeals thinks that a district court is better suited to allocate the appellate costs listed in Rule 39(e), the court of appeals may delegate that responsibility to the district court, as several Courts of Appeals have done in the pat. And nothing we say here should be read to cast doubt on that.

It would seem that a motion under proposed Appellate Rule 39(b) could invite the court of appeals to do this rather than make its own allocation decision.

Going forward, then, there may be no need for an amendment to Rule 62(b) because this is not likely to be a real problem, though amending the rule seems unlikely to produce a real problem, and it would respond to the suggestion of the Appellate Rules Committee.

At its October 2023 meeting, the Advisory Committee discussed this possible amendment, and decided that it should remain on the Committee's agenda but not the subject of immediate action. One significant matter is whether the amendment adding new Appellate Rule 39(b) goes into effect. If it does not, there may be no need for amending Rule 62(b). And in addition, it remains unclear how often appellees are unaware of the amount of the bond premium.

Link to *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021): https://www.supremecourt.gov/opinions/20pdf/20-334_5h26.pdf

B. Rule 54(d)(2)(B) – Attorney fee awards for Social Security Appeals

Magistrate Judge Patricia Barksdale (M.D. Fla.) submitted 23-CV-L, which proposes that the Advisory Committee consider a rule amendment to deal with a timing problem in handling fee awards under 42 U.S.C. § 406(b). She calls attention to local rule changes being considered in the M.D. Fla. that might be a model for an amendment to Rule 54(d)(2)(B)(i), which requires generally that a motion for attorney's fees must be made "no later than 14 days after the entry of judgment." A link to the submission is provided below.

Here is the local rule proposal:

(e) ATTORNEY'S FEE IN A SOCIAL SECURITY CASE AFTER REMAND. No later than fourteen days after receipt of a "close out" letter, a lawyer requesting an attorney's fee, payable from withheld benefits, must move for the fee and include in the motion:

(1) the agency letter specifying the withheld benefits;

(2) any contingency fee agreement; and

(3) proof that the proposed fee is reasonable.

The basic problem arises in connection with judicial review of decisions by the Social Security Administration (SSA) denying benefits. The fee award for in-court work by the attorney ordinarily depends on the outcome of further proceedings before the SSA because the normal relief in court for a successful plaintiff under 42 U.S. § 405(g) is remand to the SSA for further proceedings, and the attorney fee award under § 406(b) must be "reasonable" but is limited to "25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." When the court orders a remand, that depends on the eventual outcome of those proceedings after remand.

As spelled out in the Committee Note to Rule 54(b)(2), the 14-day deadline assures that the opposing party knows of the attorney fee claim before the time to appeal expires, but that does not seem to be important frequently in court remands of SSA denials of benefits. Another goal was to provide "an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind." That objective might be served by the deadline, but since the

statutory limit on the fee award can't be known until further proceedings before the SSA it hardly seems dispositive.

Review of SSA benefits decisions occupied much Advisory Committee time and energy recently, so some background on that effort seems in order. In 2017, the Administrative Conference of the U.S. made a proposal that explicit rules be developed for civil actions under 42 U.S.C. § 405(g) to review denial of individual disability claims under the Social Security Act.

The ACUS recommendation was based in large part on a 180-page study by Professors Jonah Gelbach and David Marcus entitled A Study of Social Security Disability Litigation in the Federal Courts. That study was very thorough and raised questions about many aspects of the SSA's internal processes in reviewing such claims. But it also suggested that the ordinary Civil Rules did not work well for what were essentially appellate proceedings, though conducted in the district court.

The Standing Committee decided that the Civil Rules Committee should address the ACUS proposal. On the day before the Advisory Committee's November 2017 meeting, an informal subcommittee met with representatives of SSA and of claimant organizations. At that meeting, SSA representatives strongly urged the adoption of uniform national rules, in part because SSA attorneys have to handle cases in a number of courts or regions and the procedures may differ significantly from one court to the next. For details, see Minutes of the Nov. 7, 2017, Advisory Committee meeting at 7-12.

A major difficulty in SSA benefits decisions was the amount of time the SSA takes to resolve claims. It was recognized during the informal meeting a national rule for in-court handling of appeals would not address those problems, which had been detailed in the Gelbach/Marcus report. So in-court procedural difficulties did not seem to be a big part of the overall SSA claims-processing activity.

But it was also clear that because there are so many such proceedings – about 18,000 per year – and that SSA review usually differs in kind from other administrative review matters before the district courts, which are also much less numerous. Furthermore, these in-court proceedings very frequently end with a remand to the SSA for further proceedings, presenting the timing difficulty raised by this submission. Considerable grounds for specialized treatment appeared to exist.

Moreover, one potential up side of a national rule for SSA appeals was that it could simplify service of the complaint on the SSA. Some districts were experimenting with that. But it was also noted that designing rules for only one type of case runs against the grain of the transsubstantive federal rules. There are exceptions, however, including the rules for § 2255 proceedings and the provisions of Supplemental Rule G for forfeiture proceedings.

A formal Subcommittee was formed, with Judge Sara Lioi as Chair. The SSA continued to press for broad and detailed national rules. In particular, it urged the following as a model for a rule on attorney fee awards:

(c) PETITIONS FOR ATTORNEY'S FEES UNDER 42 U.S.C. § 406(b).

(1) Timing of petition. Plaintiff's counsel may file a petition for attorney's fees under 42 U.S.C. § 406(b) no later than 60 days after the date of the final notice of award sent to Plaintiff's counsel of record at the conclusion of Defendant's past due benefit calculation stating the amount withheld for attorney's fees. The court will assume counsel representing Plaintiff in federal court received any notice of award as of the same date that Plaintiff received the notice, unless counsel establishes otherwise.

(2) Service of Petition. Plaintiff's counsel must serve a petition for fees on Defendant and must attest that counsel has informed Plaintiff of the request.

(3) Contents of petition. The petition for fees must include:

(A) a copy of the final notice of award showing the amount of retroactive benefits payable to Plaintiff (and to any auxiliaries, if applicable), including the amount withheld for attorney's fees, and, if the date that counsel received the notice is different from the date provided on the notice, evidence of the date counsel received the notice;

(B) an itemization of the time expended by counsel representing Plaintiff in federal court, including a statement as to the effective hourly rate (as calculated by dividing the total amount requested by number of hours expended);

(C) a copy of any fee agreement between Plaintiff and counsel;

(D) statements as to whether counsel:

(i) has sought, or intends to seek, fees under 42 U.S.C. § 406(a) for work performed on behalf of Plaintiff at the administrative level;

(ii) the award to any other representative who has sought, or who may intend to seek, fees under 42 U.S.C. § 406(a);

(iii) was awarded attorney's fees under 42 U.S.C. § 2412, the Equal Access to Justice Act, in connection with the case and, if so, the amount of such fees; and

(iv) will return the lesser of the § 2412 and § 406(b) awards to Plaintiff upon receipt of the § 406(b) award.

(E) any other information the court would reasonably need to assess the petition.

(4) Response. Defendant may file a response within 30 days of service of the petition, but such response is not required.

In the agenda book for the November 2018 Advisory Committee meeting, the following report appears on p. 223:

> SSA reports that the general Civil Rules provisions work well for awarding fees under the Equal Access to Justice Act. But there are serious difficulties with the procedure for awarding fees under § 406(b). These fees, which come out of the award of benefits, are for attorney services in the court. The award is made by the court, not SSA. The substantive calculation can be difficult, including integration with fees awarded by the Commissioner for work in the administrative proceedings under §406(a) and fees awarded by the court under the Equal Access to Justice Act. Rule text addressing those substantive issues does not seem appropriate, even if the substantive rules are clearly established.
>
> It may be possible, however, to address the problem of timing a motion for an award by the court under § 406(b). In a great many cases the result of the court's judgment is a remand to SSA for further proceedings. The Civil Rule 54(d)(2) timing requirements geared to judgment do not fit well with a motion that cannot become ripe until conclusion of the administrative proceedings. There are serious problems.
>
> To recognize that there are serious problems, however, is not to agree that they can be resolved by a new court rule. There is a mess, but it originates primarily outside the Civil Rules. Attempts to clean it up would be difficult and might make matters worse.
>
> Despite the sentiment that these problems may be too varied and too complicated to address by rule, the Subcommittee concluded that the topic should be carried forward for further consideration.

The SSA Subcommittee spent two years developing its proposal for Supplemental Rules. Those eight Supplemental Rules in relatively brief compass set out a specialized sequence of actions for "an action under 42 U.S.C. § 405(g) for review on the record of a final decision of the Commissioner of Social Security that presents only an individual claim." Supp. Rule 1(a). Supplemental Rule 1(b) then provides that the Civil Rules apply to proceedings under § 405(g) "except to the extent that they are inconsistent with these rules."

Subsequent rules prescribe the contents of the complaint (Rule 2), service in a simplified manner (Rule 3), the answer and any motions (Rule 4), the method of presenting the action for decision (Rule 5), the plaintiff's brief (Rule 6), the Commissioner's Brief (Rule 7) and a reply brief by the plaintiff (Rule 8). There is no mention of attorney fee awards.

The Supplemental Rules went into effect on Dec. 1, 2022.

One contrast between Judge Barksdale's submission and the SSA submission is that the SSA focused only on § 406(b), while the judge's proposal applies to any application for an award of attorney fees in § 504(g) proceedings. Either way, it might be odd to add a provision to Rule 54(d)(2) if it is only about § 405(g) proceedings, or perhaps only some of them. There may well be other situations in which the same sort of timing disjunctions could be urged as a basis for an exception to the timing requirements of Rule 54(d)(2)(B). If we are to proceed down this line, it might be better to consider an amendment to the Supplemental Rules, perhaps a new rule solely about attorney fee awards under section 406(b). But given that the new Supplemental Rules went into effect less than a year ago, it might seem premature to change them now.

It also seems worth noting that there are somewhat complex statutory provisions about attorney fees in § 405(g) proceedings. This seems to be a specialized practice with a specialized bar, and less familiar to others. And as one might imagine, the stakes can be considerable for the cognoscenti. But some introductory points can be made.

Representation before SSA: 42 U.S.C. § 406(a) contains extensive provisions about fees for representation before the SSA. It permits non-attorneys to provide such representation, but the Commissioner may refuse to recognize a proposed representative or disqualify the representative. § 406(a)(1). In general, the Commissioner can by rule or regulation prescribe the maximum fees for such services.

§ 406(a)(2) further limits such fees to 25% of the total payment of past-due benefits, and limits that to $4,000 total, though the Commissioner may increase that dollar amount if that increase is keyed to "the rate of increase in primary insurance amounts under section 415(i) of this title." "[T]he term 'past-due benefits' excludes any benefits with respect to which payment has been continued pursuant to [provisions of another section] of the title." See § 406(a)(2)(B).

There are also fairly elaborate provisions in § 406(a)(3) - (5) regarding the SSA determination whether a fee claimed under this provision exceeds the maximum amount allowed under the statute.

But it appears that § 406(a) is entirely or mainly about fees claimed without regard to an action in court governed by the new Supplemental Rules. If that is correct, there seems no need to address such determinations in the Civil Rules.

§ 406(b) addresses attorney fee awards for proceedings in court. But it is not the only statute that addresses that. The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, also can apply to

a proceeding in court. Indeed, a 1985 amendment to the EAJA provided that "where the claimant's attorney receives fees for the same work under both [§ 406(b) and the EAJA] the attorney [must] refun[d] to the claimant the amount of the smaller fee." *See Astrue v. Ratliff*, 130 S.Ct. 2521 (2010) (holding that the EAJA award belongs to the client, not the lawyer). In that case, the Court pointed out that the award to the attorney under § 406(b) went directly to the attorney, but the EAJA award went to the claimant, so the Government could offset the Claimant's other obligations to the Government against the amount of the fee award.

Though SSA reported that the Civil Rules work well for EAJA applications in § 405(g) actions, EAJA decisions in such cases provide reasons for caution. This topic almost certainly is of great importance to both sides, and questions of timing (central to the current submission) have proved very challenging under the EAJA. It is likely that substantial education will be needed to gain a full grasp of these issues.

Perhaps a good illustration is provided by *Shalala v. Schaefer*, 113 S.Ct. 2625 (1993), which Justice Scalia, speaking for the Court, introduced as presenting the question of "the proper timing of an application for attorney's fees under the [EAJA] in a Social Security case."

Plaintiff Schaefer was denied disability benefits and sought judicial review under § 405(g). The district court found that SSA had committed three errors and remanded to SSA. As we shall see, the Court regarded it as important that the original court decision was under sentence four of § 405(g): "The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the case for a rehearing."

After remand, Schaefer's application was granted. He then applied for an attorneys fee award under EAJA. Under the EAJA, such an application must be made "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). SSA argued that the trigger for applying the 30-day requirement would be the end of the 60-day period from the entry of the court's remand order. The district court, however, found that the remand order was not a final judgment if "the district court retain[s] jurisdiction . . . and plan[s] to enter dispositive sentence four judgmen[t]" after the administrative proceedings were complete, and made a fee award. The court of appeals affirmed.

The Supreme Court emphasized that the EAJA requires the application for attorneys fees to be made within 30 days of "final judgment." Schaefer argued, however, that in a sentence four ruling the court need not enter judgment at the time of remand, but could postpone entry and judgment and retain jurisdiction pending completion of the administrative proceedings on remand. Justice Scalia rejected this argument as "inconsistent with the plain language of sentence four, which authorizes a district court to enter a judgment 'with or without' a remand order, not a remand order 'with or without' a judgment." *Id.* at 297.

Indeed: "Immediate entry of judgment (as opposed to entry of judgment after post-remand agency proceedings have been completed and their results filed with the court) is in fact the

principal feature that distinguishes a sentence-four remand from a sentence-six remand." *Id.* Sentence six provided as follows:

> The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

Schaefer relied on *Sullivan v. Hudson*, 490 U.S. 877 (1989), holding that under the EAJA the fee award may include fees in connection with further proceedings before SSA. In that case, the district court said it was retaining jurisdiction for such a potential award. But in *Sullivan v. Finkelstein*, 496 U.S.617 (1990), the Court "made clear . . . that the retention of jurisdiction . . . was error . . . and a sentence-four remand order '*terminate[s]* the civil action' seeking judicial review of the Secretary's final decision." 509 U.S. at 299. "We therefore do not consider the holding of *Hudson* binding as to sentence-four remands that are ordered (as they should be) without retention of jurisdiction." *Id.* It added in a footnote that "*Hudson* remains good law as applied to remands ordered pursuant to sentence six." *Id.* n.4.

Nonetheless, the Court also held that the appeal in Schaeffer's case was timely because the district court had not entered a judgment as a separate document as required by Rule 58, meaning that the remand judgment remained appealable at the time Schaefer applied for an EAJA fee award, making the application timely under the EAJA. So the award of fees was upheld.

Justice Stevens (joined by Justice Blackmun) concurred in the judgment upholding the award of fees, but rejected the majority's reasoning because the EAJA permits an award only to a "prevailing party," so "it makes little sense to start the 30-day EAJA clock running before a claimant even knows whether he or she will be a 'prevailing party' under EAJA by securing benefits on remand." *Id.* at 304. He also rejected the "major premise" underlying the Court's decision "that there is a sharp distinction, for purposes of the EAJA, between remands ordered pursuant to sentence four and sentence six of 42 U.S.C. § 405(g)." *Id.* at 305.

Though *Schaefer* has been cited in more than 7,000 decisions since it was decided, it does not appear that the Supreme Court has addressed these issues again. Under the circumstances, caution is indicated before adopting a timing rule applicable to fee awards under § 406(b)(1)(A), which provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and

> allow as part of its judgment a reasonable fee for such representation a reasonable fee for such representation, not in excess of 25 percent of the total past due benefits to which the claimant is entitled by reason of such judgment . . . .

As with the EAJA, it would seem difficult for the court to determine the "past due benefits to which the claimant is entitled by reason of such judgment" until the further proceedings before the SSA are completed. But under *Schaeffer*, it appears that (at least for EAJA purposes) a sentence-four remand order is a judgment. And *Finkelstein* seemingly means that the court cannot retain jurisdiction to address fees after remanding under sentence four.

Nevertheless, if it seems worthwhile, it may be possible to obviate the timing impact of Rule 54(d)(2)(B) as an additional Supplemental Rule 9:

> **Rule 9. Attorney fee award under § 406(b)**
>
> In its judgment remanding to the Commissioner, the court may[, without regard to Rule 62(d)(2)(B),] {notwithstanding Rule 62(d)(2)(B),} retain jurisdiction to permit plaintiff to [move] {apply} for an attorney fee award under 42 U.S.C. § 406(b) within __ days of the [final decision of the Commissioner] {final notice of the award sent to plaintiffs' counsel} after the remand.

The foregoing is a very tentative draft. Whether retention of jurisdiction is really valid with regard to a sentence-four remand remains uncertain. Recommending that district courts disregard Rule 58 when they want to do so seems to invite a violation of the Civil Rules. The draft is focused only on changing the time limits for a motion for an attorney fee award. Rule 54(d)(2)(B) refers to a motion, not an application. Rule 7(b)(1) says requests to the court for an order must be made by motion.

The draft speaks of the "final decision" of the Commissioner because that is the term used in the Supplemental Rules. See Supplemental Rule 2(b)(1)(B), requiring that the complaint "identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision." As noted in braces, the original proposal by SSA used "final notice of the award sent to plaintiff's counsel."

The SSA proposal and the draft local rule cited in Judge Barksdale's submission both contain specifics about what the moving party ought to provide in support of the motion. It is not clear why the procedures of Rule 54(d)(2) need elaboration, and Rule 54(d)(2)(D) authorizes local rules for resolving fee-related issues. It is not clear why more is needed in a national rule, and could be that some parties might regard some features to afford them an advantage. The problem to be solved is a timing problem, not a content problem.

At the Advisory Committee's October 2023 meeting, it was noted that the question of handling of attorney fee awards was consciously not included in the Supplemental Rule package despite SSA urging that it be included. A concern raised was that proceeding down this line would

raise issues of unintentional shifting of advantage between the SSA and claimants. But because this very large category of actions (around 18,000 per year) involves a specialized practice, it would likely be true that addressing it would require a relatively intense education process similar to the one that led to the adoption of the Supplemental Rules.

At the same time, it was also noted that revising Rule 54(b)(2)(B), which deals with all kinds of actions, seems a dubious idea given that this concern appears limited to the matters covered by the Supplemental Rules, and that carving out one kind of action within Rule 54(d)(2)(D) seems unwarranted.

The Advisory Committee's conclusion was to await developments before dealing further with this issue. For one thing, if the proposed local rule reported by Magistrate Judge Barksdale goes into effect experience under that rule could inform a national rule-amendment effort. For another, it seems worthwhile to let the new Supplemental Rules have some time to operate to see if other issues emerge. If this task is undertaken, it will probably be important for the Advisory Committee to become better educated about the details § 405(g) actions and in particular of § 406(b) fee awards.

Suggestion 23-CV-L (Hon. Patricia Barksdale): https://www.uscourts.gov/rules-policies/archives/suggestions/hon-patricia-barksdale-23-cv-l

IV. Items to be removed from the Advisory Committee's agenda

A. Revision of Rule 26(a)(1) based on Mandatory Initial Discovery Pilot

With the approval of the Standing Committee, a multi-year Mandatory Initial Discovery Pilot (MIDP) was undertaken in the District of Arizona and the Northern District of Illinois. The FJC did a thorough analysis of data from this project, producing a report available via a link below. The Discovery Subcommittee undertook to review the report to determine whether it identified specific possible amendments to the initial disclosure regime of Rule 26(a)(1)(A) that warranted further study.

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

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

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

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

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

One important take away is that the project had a statistically significant effect on case duration – "the pilot shortened disposition times for cases subject to the MIDP." But it is not possible to say that the study of these two volunteer districts provides a firm foundation to support national rulemaking at this time.

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

At its October 2023 meeting the Advisory Committee accepted the Discovery Subcommittee recommendation that the topic be removed from the Committee's agenda.

Link to Mandatory Initial Discovery Pilot (MIDP) Final Report: https://www.fjc.gov/sites/default/files/materials/23/MIDP%20Final%20Report%20advisory%20committee.pdf

B. Revision of Rule 60(b)(1) in response to Kemp v. U.S., 142 S.Ct. 1856 (2022).

At the Standing Committee's January 2023 meeting of the Standing Committee, Judge Pratter made the following suggestion:

> At the January 2023 Standing Committee meeting, Judge Pratter suggested that the Civil Rules Committee consider whether there is a need to address the recent Supreme Court decision *Kemp v. United States* (2022). In that opinion, the Court held that a "mistake" under Civil Rules 60(b)(1) includes a judge's error of law.

Kemp v. United States, 142 S.Ct. 1856 (2022), involved a Rule 60(b) motion to reopen Kemp's motion under § 2255 to vacate his 2011 sentence of 420 months after conviction for a variety of crimes. Kemp appealed his conviction, as did his co-defendants, and the Eleventh Circuit consolidated the appeals and affirmed the convictions in November 2013. Ordinarily such a judgment would become final when the 90 days to seek certiorari or rehearing expired, in February 2014. Though Kemp did not seek rehearing of this affirmance or certiorari, two of his co-defendants did seek rehearing, which the Eleventh Circuit denied in May 2014.

In April 2015, Kemp filed the § 2255 motion. The Government moved to dismiss on the ground that the motion was too late because the statute requires that the motion must be filed within one year from "the date on which the judgment of conviction becomes final." The district court granted the Government's motion, concluding that the judgment on Kemp's appeal became final in February 2014, 90 days after the panel ruling. Though his § 2255 motion was filed within one year of the Eleventh Circuit denial of his co-defendants' motion for a rehearing, Kemp did not appeal the dismissal.

Two years after the dismissal of the § 2255 motion, Kemp sought to reopen that action, relying on Rule 60(b)(6). He argued that even though he did not move for rehearing from the original affirmance of his conviction some of his co-defendants did, meaning that the final judgment was entered only when the rehearing petitions of those co-defendants were denied in May 2014, so that his April 2015 motion actually was timely. Kemp relied on the Supreme Court's Rule 13.3, which prescribes that the 90-day clock to seek certiorari does not begin to run until *all* parties' petitions for rehearing are denied.

The district court rejected Kemp's argument on the timeliness of his original § 2255 motion, but also held that in any event his Rule 60(b) motion was untimely under the one-year

limit in Rule 60(c)(1): "A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order."

Kemp argued before the Eleventh Circuit that his motion was actually under Rule 60(b)(6) – "any other reason that justifies relief" – because it was premised about the district court's legal error in determining whether his original § 2255 motion was timely. The Eleventh Circuit agreed that Kemp's original § 2255 motion appeared to have been timely due to the petitions for rehearing filed by his co-defendants, but held that he was nevertheless barred by the one-year limit in Rule 60(c)(1) since his motion was based on a "mistake."

Noting that there was a division among the circuits about whether Rule 60(b)(1) was available for relief due to an argument that the court erred as a matter of law, the Supreme Court granted cert. See 142 S.Ct. at 1861 n.1, saying that the Eighth and First Circuits had ruled that Rule 60(b)(1) does not apply in such circumstances, while the Seventh, Second, Sixth and Eleventh had ruled that it includes the court's errors of law.

By an 8-1 vote, the Court held that, in light of the "text, structure, and history of Rule 60(b)," a judge's errors of law are "mistakes" within the rule. It rejected Kemp's reliance on Rule 60(b)(6) because that is available only when Rules 60(b)(1) through 60(b)(5) are inapplicable, and 60(b)(1) was applicable.

Justice Sotomayor concurred in the Court's opinion, but stressed her understanding that Rule 60(b)(6) might be available in "extraordinary circumstances, including a change in controlling law." The Court recognized that "we do not decide whether a judicial decision rendered erroneous by subsequent legal or factual changes also qualifies as a 'mistake' under Rule 60(b)(1)." See *id.* at 1862 n.2.

Justice Gorsuch dissented on the ground that the Court should not have taken the case, and that the issue should instead have been addressed through the rules process because it "presents a policy question about the proper balance between finality and error correction." He also stressed that the rule interpretation "matters only under rare circumstances": "By petitioner's own (uncontested) count, his is the first petition *ever* to present today's question for this Court's review." *Id.* at 1865.

The majority did not accept Justice Gorsuch's urging that the matter be addressed by rulemaking, so the question going forward is whether this decision provides a ground for considering a change to Rule 60(b). As matters now stand, it seems that the Court has held that the interpretation of Rule 60(b)(1) previously employed by the Eighth and First Circuits was wrong, and that the interpretation of four other circuits was right.

The main impact of the Court's interpretation of Rule 60(b)(1) is to subject motions seeking relief from an order or judgment to the one-year time limitation in Rule 60(c)(1), which would not apply to a motion under Rule 60(b)(6). One concern might be that including legal errors among those within "mistake" under Rule 60(b)(1) would permit losing parties to sidestep the time limits

on appealing by filing 60(b)(1) motions within a year. The Court addressed this issue in *Kemp* (142 S.Ct. at 1864):

> In any event, the alleged specter of litigation gamesmanship and strategic delay is overstated. Rule 60(b)(1) motions, like all Rule 60(b) motions, must be made "within a reasonable time." Fed. Rule Civ. Proc. 60(c)(1). And while we have no cause to define the "reasonable time" standard here, we note that Courts of Appeals have used it to forestall abusive litigation by denying Rule 60(b)(1) motions alleging errors that should have been raised sooner (*e.g.*, in a timely appeal). See, *e.g.*, *Mendez v. Republic Bank*, 725 F.3d 651, 660 (CA 7 2013).

The Seventh Circuit's *Mendez* decision (cited by the Court) held that, after a timely notice of appeal was filed in that case, the district court could entertain a Rule 60(b)(1) motion premised on an error that would lead to reversal unless corrected by the district court. It quoted Judge Henry Friendly: "no good purpose is served by requiring the parties to appeal to a higher court, often requiring remand for further trial proceedings, when the trial court is equally able to correct its decision in the light of new authority on application made within the time permitted for appeal." *Id.* at 660, quoting *Schildhaus v. Moe*, 335 F.2d 529, 531 (2d Cir. 1964). It added (*id.*):

> To be clear, this conclusion does not undermine our effort to prevent Rule 60(b) from being used to evade the deadline to file a timely appeal. This concern may be adequately addressed through careful enforcement of the requirement that Rule 60(b) relief be sought within a "reasonable time." * * * [A] Rule 60(b) motion filed after the time to appeal has run that seeks to remedy errors that are correctable on appeal will typically not be filed within a reasonable time.

The Seventh Circuit's *Mendez* decision also stressed that "district courts are given broad discretion to deny motions for relief from judgment. Accordingly, we review the grant or denial of relief from judgment only for abuse of discretion." *Id.* at 657-58.

During the Advisory Committee's October 2023 meeting, the view expressed was that it does not appear likely that the Supreme Court's *Kemp* decision (adopting what seems to have been the majority view of the courts of appeals) will cause significant problems. If later developments show that the decision has caused problems, attention could return to the rule. But for the present, the Advisory Committee's consensus was to drop the matter from its agenda.

Suggestion 23-CV-D (Hon. Gene E.K. Pratter): https://www.uscourts.gov/rules-policies/archives/suggestions/hon-gene-ek-pratter-23-cv-d

Link to *Kemp v. United States*, 142 S.Ct. 1856 (2022): https://www.supremecourt.gov/opinions/21pdf/21-5726_5iel.pdf

C. Rule 30(b)(6) – Requiring disclosure of entity representative prior to deposition

Submission 23-CV-I, from William D. Sanders, proposes amending Rule 30(b)(6) to require that an entity subject to a deposition identify the representative it will offer for deposition in advance of the deposition. Such a requirement might be useful in some cases. But after very extensive study and a public comment period with many witnesses testifying and more than 1700 written comments submitted, the Advisory Committee decided not to include such a requirement in the amendments to Rule 30(b)(6) that went into effect in 2020.

The 2020 amendment to Rule 30(b)(6) was developed by a Rule 30(b)(6) Subcommittee chaired by Judge Joan Ericksen (D. Minn.) that engaged in an extended effort to gather reactions to a variety of possible revisions to the rule and ultimately recommended publishing for public comment an amendment that would require the parties to discuss the list of matters for examination and the identity of the representative to be designated to provide answers during the deposition. The proposed requirement to discuss the identity of the representative produced very vigorous opposition on a variety of grounds, including that the organization has unfettered discretion to choose its representative and that it can happen that last-minute developments require the entity to present a different representative.

Given the vigorous resistance to the requirement that the organization discuss with the noticing party the identity of the representative, the Advisory Committee had a very thorough discussion of the issues raised during its Spring 2019 meeting. Several current members of the Advisory Committee were involved in that discussion. The eventual conclusion was to remove the requirement to discuss the identity of the witness from the amendment, and the amended rule that went into effect in 2020 did not include that requirement.

At the Advisory Committee's October 2023 meeting, it was recognized that the current proposal in essence replicates the feature removed from the 2020 amendment to the rule. The consensus was that taking up the same proposal so soon after it was withdrawn is unwarranted, so that this proposal should be withdrawn from the agenda.

Suggestion 23-CV-I (William Sanders): https://www.uscourts.gov/rules-policies/archives/suggestions/william-sanders-23-cv-i

D. Rule 11 – requiring imposition of sanctions in actions brought under federal statutes commanding imposition of sanctions

23-CV-N proposes that Rule 11 be amended to require district courts to impose sanctions on finding a violation of Rule 11(b) if Congress has "mandated" that sanctions be imposed for such violations when claims are made under certain federal statutes.

The question whether Rule 11 should require district courts to impose sanctions whenever there is a violation of the certification requirements of Rule 11(b) was a tendentious issue after the rule was extensively amended in 1983. In 1991, due to concerns about the amended rule, the Advisory Committee issued an unprecedented "call" for comments on whether the rule should be

amended. After much discussion, the rule was amended to say that the court "may" impose sanctions, not that it "must" do so in 1993.

The use of "may" produced some controversy. There was a Supreme Court dissent from the Court's adoption of the 1993 amendment to Rule 11. In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA), which contains certain requirements about judicial enforcement of the Rule 11(b) certification requirement. From time to time since then, bills have been introduced in Congress to mandate sanctions whenever the rule is violated. See, e.g., Lawsuit Abuse Reduction Act of 2017 (passed by the House in March 2017 but not acted upon by the Senate).

As discussed during the Advisory Committee's October 2023 meeting, this proposed amendment would not be needed for actions under the PSLRA, since its provisions apply in such actions. And even if it were adopted, the question of what sanctions should be employed would remain open. Rule 11(c) does not compel courts that apply sanctions to impose specific sanctions. Under the circumstances, the Advisory Committee consensus was to drop this proposal from the agenda.

Suggestion 23-CV-N (Joseph Leckenby): https://www.uscourts.gov/rules-policies/archives/suggestions/joseph-leckenby-23-cv-n

E. Rule 53 – direct that masters are held to "fiduciary duty" standards

Submission 23-CV-O proposes that Rule 53 be amended to "reign in" masters by providing that "masters are held to a fiduciary standard type of relationship." This rule was very extensively amended by a Rule 53 Subcommittee chaired by Judge Shira Sheindlin (S.D.N.Y.) in 2003 to adapt it to contemporary use of masters. The amended rule therefore requires that an order appointing a master specify the master's duties, the circumstances (if any) in which the master may engage in ex parte communications, and the records the master must retain and file as a record of the activities undertaken pursuant to the order.

In other settings, such as with regard to investment advisors, the introduction of a "fiduciary duty" standard has produced concerns. Whether such a standard would be governed by state law or created afresh by a Civil Rule could be litigated. The Advisory Committee decided during its October 2023 meeting that this proposal should be dropped from the agenda.

Suggestion 23-CV-O (Anthony Buonopane): https://www.uscourts.gov/rules-policies/archives/suggestions/anthony-buonopane-23-cv-o

F. Rule 10 – Requiring that each pleading include a Document of Direction of Claims (DoDoC)

Submission 23-CV-Q urges that Rule 10 be amended to require that all pleadings include a "Document of Direction of Claims" (DoDoC). Examples are attached to the submission, The

evident goal is to assist the court and the parties in visualizing the claims asserted in multiparty actions.

Though such a diagram might often be useful to the court or to parties in some cases, the Advisory Committee decided during its October 2023 meeting that this matter should be dropped from the agenda. Policing this requirement as a feature of pleading practice could invite cost and delay without providing significant benefit. The ideal of motion practice to determine the sufficiency of a party's DoDoC, and requiring a new one each time a pleading is amended, are not inviting.

Suggestion 23-CV-Q (Richie Muniak): https://www.uscourts.gov/rules-policies/archives/suggestions/richie-muniak-23-cv-q

G. Rule and Statutory Amendments Concerning Contempt

Submission 23-CV-K proposes adoption of a new Rule 42 and also new Appellate, Bankruptcy, Criminal and Evidence rules (as well as some statutory changes). It is supported by the submitter's recent law review article on problems with use of contempt in some circumstances.

There certainly can be problems with use of contempt. For example, in his dissent in *U.S. v. United Mine Workers*, 330 U.S. 258, 364 (1947), Justice Rutledge described contempt as a "criminal-civil hodgepodge." For a review from a half century ago, see Dan Dobbs, Contempt of Court: A Survey, 56 Cornell L.Q. 183 (1971).

This article reflects an incredible amount of research on both the history of contempt and the history of rulemaking. But except for the provision in Rule 37(b)(2)(A)(vii) permitting the court to use contempt to deal with certain failures to comply with discovery orders, there is no comprehensive treatment of contempt (often regarded as an element of the court's inherent authority) in the Civil Rules.

At the October 2023 meeting, the Advisory Committee concluded this matter should be dropped from the agenda unless some other advisory committee (the proposal is directed to all five) decides to proceed with consideration of a rule amendment. If that does occur, there may be reason to consider amending the Civil Rules as well.

Suggestion 23-CV-K (Joshua Carback): https://www.uscourts.gov/rules-policies/archives/suggestions/joshua-carback-23-cv-k