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

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# MEMORANDUM

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

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

**RE:** Report of the Advisory Committee on Civil Rules

**DATE:** May 13, 2022

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*Introduction*

The Civil Rules Advisory Committee met in San Diego, California, on March 29, 2022. Public on-line attendance was provided. Draft Minutes of this meeting are attached.

Part I of this report presents five items for action at this meeting. Amendments to Rules 15(a)(1) and 72(b)(1), and the addition of a new Rule 87, all published for comment in August 2021, are presented for a recommendation to adopt. An amendment of Rule 6(a)(6)(A) is presented for a recommendation to adopt without publication. A proposal to amend Rule 12(a)(4) that was published for comment in August 2020 is presented with a recommendation that it not be advanced for adoption.

Part II provides information about ongoing subcommittee projects. The MDL Subcommittee is continuing to consider possible rule amendments that would include provisions in Rule 16(b) or Rule 26(f), or perhaps a new Rule 16.1, addressing the court's role in appointment and compensation of leadership counsel and management of the MDL pretrial process, including ongoing supervision by the court of the development and resolution of the litigation. The drafts developed for initial discussion would simply focus attention on these issues by the court and the parties without greater direction or detail. The subcommittee received extensive comments from interested bar groups on the approach presented to the Advisory Committee in October and presented to the March meeting along with a revised draft.

The Discovery Subcommittee has begun to study suggestions that amendments should be made to Rule 26(b)(5)(A) on what have come to be called "privilege logs." It will defer further consideration of a proposal to create a new rule to address standards and procedures for sealing matters filed with the court. A sealing project has been launched by the Administrative Office and it seems better to wait to receive the benefits of that project.

The Committee adopted the recommendation of the Rule 9(b) Subcommittee to remove from the agenda a proposal to amend the second sentence of Rule 9(b) to revise the interpretation adopted by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

There is no need for further description of the work of two other subcommittees. A joint subcommittee with the Appellate Rules Committee has explored possible amendments to address the effects of Rule 42 consolidation in determining when a judgment becomes final for purposes of appeal. It will resume work soon, upon formal completion of a second FJC study. Another joint subcommittee continues to consider the time when the last day for electronic filing ends. Further subcommittee deliberations will be supported by the final report on research by the FJC.

Part III describes continuing work on several topics carried forward on the agenda for further study.

The topic that has been longest on the agenda began with a proposal to clarify the jury demand provision in Rule 81(c) for removed cases. Discussion in the Standing Committee prompted a proposal by then-Judge Gorsuch and Judge Graber, Standing Committee Members, that the general jury demand procedures in Rules 38 and 39 be revised to require a jury trial in all cases triable of right by a jury, absent explicit waiver by all parties. This topic will be developed after the FJC completes a study mandated by the Omnibus Budget bill to identify practices and rules that lead to higher rates of jury trials.

Another topic carried forward is the question whether an attempt should be made to establish uniform standards and procedures for deciding requests for permission to proceed in forma pauperis. The need is great, but the prospects for effective solutions in Enabling Act rules do not seem good. Other resources may prove more effective. If the questions are taken so far as to attempt to draft rules solutions, other advisory committees must be involved, perhaps along with other Judicial Conference committees.

Judge Furman suggested that it may be desirable to amend Rule 41(a)(1)(A) to resolve a split in the decisions on the question whether a party can dismiss part of an action by notice without prejudice. This question leads to related questions, some of them implicated in the same words referring to "the plaintiff" and "an action." These questions could become difficult. A subcommittee will be appointed to study them when committee resources can be freed from other tasks.

Rule 4 provisions for serving the summons and complaint were studied by the CARES Act Subcommittee and are involved with the emergency rules provisions in Rule 87 as recommended for adoption. This work renewed interest in several proposals among those regularly received. Here too, a subcommittee will be appointed when extensive work can be fit into the agenda. A particular problem that may demand early attention is presented by entities that have no physical location that can be identified for service.

Rule 5(d)(3)(B) limits on electronic filing by unrepresented parties also are being carried forward. The reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules Committees are working together on these issues, with the help of an extensive study by the FJC.

Initial accounts suggest that practice in many courts deviates from the prescriptions in Rule 55 that the clerk "must" enter a default in defined circumstances, and later "must" enter a default judgment in seemingly narrow circumstances. The FJC is undertaking a study designed in part to measure actual practices and in part to understand the reasons that lead to any routine departures from the rules that may be found.

Cases applying the Rule 63 provision for recalling a witness when a successor judge takes over a hearing or trial will be examined to determine whether the seemingly discretionary text is applied too narrowly.

Work will begin to find means that do not require amending 73(b)(1) to reduce the risk that unfiltered operation of a court's CM/ECF system will notify a judge of a party's consent to assignment of a case to a magistrate judge before all parties have consented.

Part III omits an additional topic carried forward on the agenda but not discussed at this meeting. This topic arises from a potential ambiguity in Rule 4(c)(3) that may affect the procedure for ordering a United States marshal to serve process in an in forma pauperis or seaman case.

Part IV describes several items that have been removed from the agenda.

A thoughtful submission suggested that a rule should be adopted to establish uniform national standards and procedures for filing amicus curiae briefs in the district courts. Discussion of ongoing work on Appellate Rule 29 in the Standing Committee last January expanded to include this proposal. The reasons for removing it from the agenda are described at modest length.

A number of other recent proposals were removed from the agenda after brief discussion. They are summarized with corresponding brevity.

## I. Action Items

### A. For Adoption: New Rule 87: Civil Rules Emergencies

The dedicated hard work to develop emergency rules provisions by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees is well known. Civil Rule 87 was published for comment in August 2021 and is now advanced for a recommendation that it be adopted as published, with minor changes in the Committee Note. This recommendation is elaborated in conjunction with the parallel recommendations of the other advisory committees.

### B. Rule 12(a)(4) Not Recommended for Adoption

In August 2020 an amendment of Rule 12(a)(4) suggested by the Department of Justice was recommended for publication. There were only three public comments, but they stirred vigorous debate in the Committee and in the Standing Committee. The discussion at successive meetings persuaded the Committee to propose that the published amendment not be recommended for adoption.

The published proposal added a clause to Rule 12(a)(4) that provided additional time to respond after a Rule 12 motion is denied or postponed for disposition at trial and the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf:

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

**(a) Time to Serve a Responsive Pleading.**

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

* * * * *

(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or

* * * * *

The Department supported the proposal on several grounds. Over the period from 2017 to 2021 the Department has provided representation in individual-capacity actions in numbers ranging from a low of 1,226 in 2017 to a high of 2,028 in 2021. These actions can be complicated, and much time can be required to prepare an adequate pleading. Special concerns arise, moreover, from the common assertion of official immunity defenses and the collateral-order rule that permits appeal from denial of a motion to dismiss that raises an immunity defense. Careful thought must be devoted to the decision whether to recommend an appeal. The Department must be confident that the pleadings present solid ground for the immunity defense, and that a pleadings-based appeal will not lead to creation of unwise or unnecessary immunity law because of the inadequacy of the pleadings as the record on appeal. Any recommendation to appeal, moreover, must be approved by the Solicitor General, a process that can easily run to the full 60-day period that would be adopted by the amendment. Further support for the 60-day period was found in the amendment of Rule 12(a)(3) that allows 60 days to serve a responsive pleading in these actions and the later amendment of Appellate Rule 4(a)(1)(B)(iv) that sets appeal time at 60 days.

These reasons persuaded the Committee to unanimously recommend publication. Doubts were stirred, however, by two of the public comments. Each of these comments suggested that plaintiffs in these actions face formidable hurdles and should not be subjected to the burden of added delay in getting to the issues after a motion to dismiss is denied. These protests were anchored in concerns about untoward practices by some law enforcement officers and deep concerns about official immunity doctrine. In addition, the comments pointed out that the Department had 60 days to frame the motion to dismiss and has every opportunity to continue to develop the case during the time required to decide the motion. The standard 14 days should be adequate to frame an answer in most cases, and special needs can be addressed by a motion to extend the time.

The Department responded to these comments by observing that it regularly seeks an extension of time to answer beyond 14 days, and regularly wins extensions. Sixty days was suggested to be a common period. The frequent assertion of immunity defenses and the need to determine whether to appeal also was repeated. The need to move for an extension, moreover, is complicated by uncertainty whether the extension will be granted. The Department must work to prepare an answer to be filed in 14 days until it knows whether an extension will be granted, and at times may be forced to participate in the next steps of pretrial procedure, even including discovery, before a ruling on the motion. The hastily prepared and filed answer will not be as useful to the court and plaintiff as a more carefully prepared answer.

Successive committee meetings began by framing the question as a choice between competing presumptions. The rule now presumes that 14 days is an adequate time to prepare an answer, but allows a motion to extend when that is not enough. The published rule presumes that 60 days are needed, but allows a motion to reduce the time when the case should progress faster. The choice between these presumptions was distilled into a series of empirical questions: how often are motions to dismiss made in these cases? How many of the motions include an official

immunity defense? How often are the motions denied? How often are motions made to extend the time to respond, how often are they granted, and how long is the extension when one is granted?

Discussion of these questions generated increasingly serious doubts about the need for more time, and about the length of any extended presumptive period that might be provided. The frequent focus on the complications introduced by collateral-order appeal opportunities led to suggestions that any extended period should be provided only for motions that involve an immunity defense. Motions to shorten the extended presumed period, or to confine any extended period to cases with an immunity defense, garnered substantial support but eventually failed. The desire for better empirical information persisted.

The Department of Justice made valiant efforts to gather better empirical information to address the questions that clouded the proposal. In the end it concluded that the requested information is dispersed too widely within the Department to be available. The same structural problems would make it unlikely that better information could be gathered in a program designed to capture information about experience in these cases for a year or two years in the future.

At the March meeting the Department reported that it continues to believe that its original proposal is desirable and should be recommended for adoption as published. The Department also recognizes and honors the committees' desire for better empirical information than it has been able to gather. But it would be a mistake to respond to the lack of more than anecdotal information by voting to adopt a modified version that sets a shorter presumptive extended period or limits an extended period to cases that raise official immunity defenses. That would not be a worthwhile use of the Enabling Act process.

Faced with the lack of empirical information to resolve the remaining questions, the Committee voted to recommend that the published proposal not be approved for adoption.

### C. Recommended for Adoption: Rule 15(a)(1): Mind the Gap

This proposal to amend Rule 15(a)(1) was published in August 2021. The Committee advances it for a recommendation for adoption as published, for the reasons described in the Committee Note. Public comments offer no reason to reconsider. The Committee voted to delete the sentence enclosed by brackets in the Committee Note as an unnecessary elaboration on the meaning of "within."

**(a) Amendments Before Trial.**

**(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course ~~within~~ no later than:

**(A)** 21 days after serving it, or

**(B)** if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21

days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

COMMITTEE NOTE

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

SUMMARY OF COMMENTS

Andrew Straw, Disability Party, CV 2021-0003: "I have no problem with the minor change, but the rule must allow an amendment to the operative complaint when an appeal comes back down under certain conditions." (The balance of the comment complains, among other things, of mistreatment by two federal courts of appeals, dishonest actions by them, inappropriate use of the "frivolous" characterization, and "the 5 law licenses taken away from me with suspension for 54 months.")

Federal Magistrate Judges Association, CV 2021-0007: "Based on the explanation of the amendment, we foresee no unintended consequences from this modest change."

New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: The proposal is "salutary and desirable."

Audrey Lessner, CV-2021-0004: It is not clear what proposed amendment this comment addresses, or whether it is intended as a suggestion for a new amendment of Rule 12(a): "I am strongly encouraging the Federal Courts to have a 90-day limit on time to answer a civil case concerning families."

Federal Bar Association, 21-CV-0013: The proposal is consistent with strengthening the federal judicial system. No objections.

Aaron Ahern, CV-2021-0015: Again, it is not clear which proposed rule amendment this comment addresses: "This must not e[sic]ffect victims of major crime including gross negligent domestic violence. Who haven't collected relief. In good faith."

*Changes Since Publication*

No changes are recommended in the text of Rule 15(a)(1) as published. The Committee Note is recommended for adoption with the change described above, deleting an unnecessary sentence that was published in brackets.

### D. Recommended for Adoption: Rule 72(b)(1): Notice of Magistrate Judge Recommendations

This proposal to amend Rule 72(b)(1) was published for comment in August 2021. Public comments advance no reason for changing or withdrawing the proposal. The Committee voted to delete the sentence in the Committee Note published in brackets. The sentence offered reassurance to guide the comment process, and has served its purpose. The Committee advances the amendment for a recommendation for adoption as published:

**(b) Dispositive Motions and Prisoner Petitions.**

> **(1)** ***Findings and Recommendations.*** * * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must ~~promptly mail~~ immediately serve a copy ~~to~~ on each party as provided in Rule 5(b).

COMMITTEE NOTE

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

SUMMARY OF COMMENTS

Federal Magistrate Judges Association, CV 2021-0007: "We endorse this update, which much more accurately reflects current expectations regarding service, and avoids confusion caused by the outdated mailing requirement."

New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: The proposal is "salutary and desirable."

Shane Jeansonne, 21-CV-0010: This is a bad idea. Prisoners have no access to the CM/ECF system. If they do not have access to mailed copies of the recommendations, they will be unable to adequately object or appeal. (This comment seems to overlook the provision of Rule 5(b)(2)(E) that allows sending notice by filing with the court's electronic-filing system only as to a registered user.)

Federal Bar Association, 21-CV-0013: The proposal is consistent with strengthening the federal judicial system. No objections.

*Changes Since Publication*

No changes are recommended in the text of Rule 72(b)(1) as published. The Committee Note is recommended for adoption with the change described above, deleting an unnecessary sentence that was published in brackets.

### E. Recommended for Adoption Without Publication: Rule 6(a)(6)(A): Juneteenth Holiday

The Committee advances for a recommendation to adopt without publication of an amendment of Rule 6(a)(6)(A) to include Juneteenth National Independence Day in the list of statutory holidays included in the definition of "legal holiday." The amendment reflects the Juneteenth National Independence Day Act, P.L. 117-17 (2021).

Adoption without publication will reduce the hiatus between establishment of this new legal holiday and its recognition in rule text. There is no reason for delay -- indeed Rule 6(a)(6)(B) already recognizes the holiday by including as a legal holiday "any day declared a holiday by the President or Congress." Amending Rule 6(a)(6)(A) serves only to make its enumeration of statutory holidays complete.

As amended, Rule 6(a)(6)(A) would read:

**Rule 6. Computing and Extending Time; Time for Motion Papers**

**(a) Computing Time.** * * *

**(6)** ***"Legal Holiday" Defined.*** "Legal Holiday" means:

(A) the day set aside by statute for observing * * * Memorial Day, Juneteenth National Independence Day, Independence Day, * * *.

COMMITTEE NOTE

Rule 6(a)(6) is amended to add Juneteenth National Independence Day to the days set aside by statute as legal holidays.

## II. Subcommittee Reports

### A. MDL Subcommittee

The MDL Subcommittee has had the benefit of considerable and very helpful input from the bench and bar. In particular, this has included the following events:

Dec. 3, 2021 -- Lawyers for Civil Justice Membership meeting, Nashville, TN (meeting with primarily defense-side lawyers)

Feb. 13, 2022 -- American Association for Justice Convention, Palm Desert, CA (meeting with primarily plaintiff-side lawyers)

March 7-10, 2022 -- Emory Law School Institute for Complex Litigation and Mass Claims Conference, Miami, FL (two-day conference with many experienced MDL transferee judges and current and past members of the Judicial Panel on Multidistrict Litigation and also many experienced plaintiff- and defense-side lawyers)

As reported at the Standing Committee's January 2022 meeting, the focus of the Subcommittee had by then shifted to emphasizing "prompts" to assist and focus transferee judges and lawyers handling cases subject to an MDL transfer order. Since the January meeting, issues about the Subcommittee's focus at the end of 2021 have caused it to consider a different placement of an MDL rule, though the basic issues on which it has focused are the same.

The third of the events mentioned above did not occur until after the agenda materials for the Advisory Committee's March 2022 meeting were due. Below is a presentation of the sketch of a possible rule amendment that was included in the Advisory Committee's agenda book for that meeting earlier this year. Though most of the basic issues raised by that sketch remain on the table, a somewhat different approach to them seems warranted. The Subcommittee is beginning to evaluate that approach.

By way of background, this project began in 2017 with submissions that urged a variety of additions to the Civil Rules. One was an expanded opportunity for appellate review of at least some interlocutory rulings in MDL proceedings. The Subcommittee spent a great deal of time on this possibility, and received a great deal of information about it. Eventually, it concluded that existing routes to interlocutory review seemed sufficient for MDL proceedings as they are for other proceedings.

Another amendment idea was often called "vetting." It emphasized the assertion that in some very large MDLs a significant number of claims were submitted by people who actually did not (a) use the drug or medical device involved, or (b) suffer the sort of adverse medical development alleged in the litigation. Initial proposals (and a bill passed by the House of Representatives in March 2017) required in every covered proceeding that claimants produce evidence up front of use of the product and diagnosis for the pertinent condition at the beginning of litigation. The statutory proceeding (not acted upon by the Senate) even imposed on the court the obligation to review every submission sua sponte to determine its adequacy.

The Subcommittee ultimately concluded that requiring this sort of effort by rule would not be warranted. For one thing, even accepting the assertion that as many as 30% of claims might fail at this point, it was not clear why the remaining 70% should be put on hold for this initial disclosure requirement. It was also possible that resolution of some other issue -- for example, preemption or whether plaintiffs' expert evidence on causation would be admissible -- might make the specifics about each claim largely unnecessary.

In addition, FJC research on actual methods of gathering information of this sort showed that often (particularly in "mega" MDL proceedings involving more than 1,000 plaintiffs) the courts did adopt a requirement that plaintiffs complete a plaintiff's fact sheet (PFS) early in the proceedings. But those PFSs ordinarily were tailored to the issues in the given case, and also took considerable time to draft. A generic "fact sheet" requirement in a rule seemed extremely difficult to devise.

Meanwhile, an alternative and new approach -- called a "census" of claims -- came under consideration. This sort of method of case management could yield valuable information to assist the court in its task of organizing a "mega" MDL, so it went well beyond the "vetting" idea. Yet it could yield information that could be used to filter out unsupportable claims. At least three current "mega" MDLs (one of which -- the Zantac MDL -- is before Judge Robin Rosenberg (S.D. Fla.), Chair of the MDL Subcommittee) have employed this new method to good effect.

So the census idea, though new, seemed to have promise. In rulemaking terms, however, it is likely to require tailoring, as did the PFS practice. To prompt consideration of this possibility, therefore, it seemed that any rule should call for something like consideration that the parties engage in an early exchange of information about their claims and defenses. That idea has been introduced in the recent rule sketches, and appears in the sketch in this agenda book.

The overall orientation reflected in the sketch in this agenda book might be said to have two main features: (a) to direct the parties to meet and discuss critical case management issues at the inception of the MDL proceedings and report to the court about their agreements or disagreements, and (b) to prompt the court to give appropriate early consideration to the important topics that bear on management of the proceedings, often including regular follow-up pretrial conferences.

The original idea for including these prompts in the rules was to add to the list of topics for discussion during the Rule 26(f) conference in order to empower the court at its initial Rule 16 management conference to deal with the issues pertinent to a given proceeding. Accordingly, the Rule 26(f) proposal included in the agenda book for the last Advisory Committee meeting expanded the list of topics for discussion at that event. The idea is that, without focused input from the lawyers, the court would not be adequately informed to take action on critical issues during the Rule 16(b) conference.

The recent bench/bar events suggest, however, that this approach may present two challenges not fully addressed in the draft presented to the Advisory Committee:

> (1) Relying on a Rule 26(f) conference in major MDL proceedings is risky. The various actions combined by the Panel may be filed at very different times, so that the date for such a conference in some of them may be long past, while it lies in the future in many others. Although in an "ordinary" civil action that may be a valuable vehicle for discussion by counsel of organizational issues, it likely will not be in many major MDL proceedings. In addition, in later-filed cases the potential transferor court might stay proceedings (including the 26(f) conference) pending a Judicial Panel decision whether to centralize the various actions.
>
> (2) The responsibility of the court to appoint leadership counsel (at least on the plaintiff side) presents the difficult question who is to participate in a conference to address these issues before the court's initial management conference. One idea on this topic was that the court select "coordinating counsel" to perform that function. Otherwise, freelance activities by counsel might significantly complicate the process. But because this initial designation ought not supplant the court's eventual designation of "permanent" leadership counsel, it would be important to guard against that possibility while recognizing also that experienced counsel eligible for the "coordinating counsel" might also be excellent choices for a permanent leadership role.

These two sets of concerns have prompted the Subcommittee to begin consideration of an alternative -- recommending a new Rule 16.1 specifically for MDL proceedings (or perhaps "multiparty proceedings") and including in that rule a prompt to the court that it (a) schedule an early initial management conference, and (b) direct the parties (perhaps through "coordinating counsel") to meet and confer about designated topics and report to the court in advance of that initial management conference.

The basic thrust of the current discussion in terms of topics to be addressed remains much as it was in the most recent draft in the agenda books. But it is possible that the vehicle for addressing these topics will be revised into a new proposed Rule 16.1. Discussions of this possibility remain at a very initial stage, and it is not clear that the Subcommittee will elect to pursue this approach. The specifics of this revised approach would largely track the specifics of the sketch of amendment ideas presented below.

Whether or not the revised approach gains favor, an abiding question is whether adding such a rule would be justified. On the one hand, the number of MDL centralizations is quite small compared to the overall civil docket of the federal courts. But on the other hand the number of individual actions subject to transfer orders from the Judicial Panel on Multidistrict Litigation is very large -- perhaps approaching 40% of the overall federal civil docket. It might seem odd if there were no acknowledgement in the Civil Rules of the distinctive challenges posed by the largest of these proceedings.

There is also reason to believe that guidance in the rules for these important proceedings would be helpful. The Subcommittee has heard from at least some transferee judges who now think they did not fully appreciate the implications of some of the early orders they entered. The Panel, meanwhile, is seeking to enlist new judges as potential transferees. Lawyers might also

benefit from some guidance in the rules about how these proceedings are handled; the lawyers the Subcommittee has heard from are largely the most accomplished in the field. Though it is less likely that lawyers in MDL proceedings are as unfamiliar with how they work as some lawyers who file class actions appear to be, those who do not have an inside track in MDL might benefit from having some general direction in the rules about how those proceedings are to be handled.

The Subcommittee welcomes reactions from Standing Committee members.

Revised Approach presented to Advisory Committee

The following is a Reporter's Sketch that takes a more aggressive approach than prior sketches to the Rule 26(f) topics, largely to provide the court with needed information about management of the MDL proceedings from the outset. Possible issues are addressed in footnotes.

**Rule 26. Duty to Disclose; General Provisions Governing Discovery**

* * * * *

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

* * * * *

**(3)** ***Discovery [and Case Management] Plan***.[1] A discovery [and case management] plan must state the parties' views and proposals on:

* * * * *

**(F)** In actions transferred for coordinated pretrial proceedings under 28 U.S.C. § 1407 [a case management plan, including]:

**(i)** whether the parties should be directed to exchange information about their claims and defenses at an early point in the proceedings;

**(ii)** whether [leadership] {lead}[2] counsel for plaintiffs should be appointed [and whether liaison defense counsel should be

[1] The title "case management" might be added here, but that may be overloading the great majority of cases in which Rule 26(f) requires only a discovery plan. On the other hand, it does seem that scheduling orders under Rule 16(b) go beyond purely discovery issues, including the time to join additional parties, amending pleadings, and hearing summary judgment motions. Rule 16(b)(3)(A) requires the court to limit the time for these activities, and in that sense is about scheduling, but these topics go beyond discovery. At least for MDL proceedings, hearing from the parties about additional topics seems useful.

[2] There has been some discussion of whether a new term -- leadership counsel -- should be used in place of the familiar term lead counsel. One reason for a new term is that in the MDL setting it is often desirable for the court to adopt a specialized method of selecting counsel, appoint many lawyers to various positions,

appointed],[3] the process for such appointments, and the responsibilities of such appointed counsel, [and whether common benefit funds should be created to support the work of such appointed counsel];[4]

**(iii)** whether the court should adopt a schedule for sequencing discovery, deciding disputed legal issues, or any other order under Rule 16(c)(2)(A), (E), (F), (I), or (L);[5]

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and (perhaps) enter a rather detailed order prescribing the responsibilities of designated counsel. In addition, it may be that "term limits" are sometimes a desirable feature of such orders. It is not clear that other lead counsel appointments involve comparable provisions.

[3] There has been only limited discussion of the role of the court in appointing liaison counsel in multi-defendant MDL proceedings. Because such appointments may be important in some such proceedings, they could be noted here. If that might be in order, it would seem that the court could profit from hearing the parties' views on whether and how to make such appointments, and what authority/limitations might be included in an appointment order.

[4] In *In re Roundup Products Liability Litigation*, 544 F.Supp.3d 950 (N.D. Cal. 2021), Judge Chhabria raised some significant questions about the scope of authority for an MDL transferee judge to order the creation of a common benefit fund. The Subcommittee has initially discussed some of these points, but not in detail, and it has not focused on the corresponding possibility that the court might enter an order enabling reimbursement for expenses incurred by liaison counsel for the defendants. There is authority supporting such an order when liaison counsel are appointed for defendants. See *In re San Juan Dupont Plaza Hotel Fire Litigation*, 93 F.3d 1 (1st Cir. 1996), described in a footnote to the notes of the Nov. 2 meeting.

[5] This is a first effort to call for discussion during the 26(f) meeting of a constellation of issues that the court might address early in MDL proceedings. It seemed useful to tie the description of possible issues to specific provisions of Rule 16(c)(2). If of use, the Rule 16(c)(2) provisions mentioned above are:

> **(A)** formulating and simplifying the issues, and eliminating frivolous claims or defenses;
>
> **(E)** determining the appropriateness and timing of summary adjudication under Rule 56;
>
> **(F)** controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;
>
> **(I)** settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;
>
> **(L)** adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.

It bears noting that one could consider (A) above somewhat related to the "vetting" idea that continues to be emphasized by some who favor rule amendments. In addition, it bears noting that reference

**(iv)** a schedule for pretrial conferences to enable the court to manage the proceedings [including possible resolution of some or all claims]; and[6] [7]

**(~~F~~G)** any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

A Committee Note could elaborate on the many topics that it is valuable for the parties to call to the judge's attention. It may be that the sketch above includes unnecessary detail. Ideally, lawyers involved in MDL proceedings would be conversant enough with their management to make detailed direction unnecessary. On the other hand, to the extent there are "new entrants" into the field it may be useful to provide more detail.

**Rule 16. Pretrial Conferences; Scheduling; Management**

* * * * *

**(b) Scheduling and Case Management.**

* * * * *

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

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**(B)** *Permitted Contents.*

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(vii) include an order under Rule 16(b)(5); and

(viii) include other appropriate matters.

* * * * *

**(5)** ***Multidistrict Litigation***. In addition to complying with Rules 16(b)(1) and 16(b)(3), a court managing actions transferred for coordinated pretrial

to (I) may be premature at the 26(f) stage, but might also prompt useful attention to including provisions in an order appointing leadership counsel that provide some potential for court oversight.

[6] This final prompt may be unnecessary, but since it is likely often for the court to establish a schedule for pretrial conferences it may also be useful for the parties to offer their views on how those should be handled.

[7] The bracketed language introduces the possibility of judicial oversight, or at least reporting to the judge, about potential settlements. It may be premature to raise this possibility so early in the proceedings.

proceedings pursuant to 28 U.S.C. § 1407 should consider [appointing interim plaintiffs' [leadership] {lead} counsel prior to the Rule 26(f) conference and][8] entering an order about the following at an early pretrial conference [after receiving the parties' Rule 26(f) case management plan][9]:

**(A)** directing the parties to exchange information about their claims and defenses at an early point in the proceedings;

**(B)** appointing plaintiffs' [leadership] {lead} counsel with appropriate specifics including:[10]

**(i)** the responsibilities and structure of [leadership] {lead} counsel;

[**(ii)** the duration of the appointment];[11]

[**(iii)** any limitations on the activities of other plaintiff counsel];[12]

**(iv)** methods for compensating plaintiffs' [leadership] {lead} counsel;

**(v)** directing plaintiffs' [leadership] {lead] counsel to make regular reports to the court -- in case management

[8] There has been some discussion of "freelancing" efforts among plaintiff counsel in advance of meeting with defense counsel and before the initial appearance before the court. That presents something of a chicken/egg problem -- who represents the plaintiffs at the initial Rule 26(f) event? The idea of interim leadership counsel here is different from interim class counsel under Rule 23(g), and the sole or main role here is to manage the expanded Rule 26(f) responsibilities for the plaintiff side. Presumably (as with interim class counsel appointments) the lawyers can find a way to approach the court about this issue. Judicial involvement may be preferable to a free-for-all effort by competing counsel.

[9] It would seem to go without saying that the court ought first receive the Rule 26(f) plan before entering the orders described below.

[10] There has been considerable discussion of the desirability of relatively comprehensive and specific orders appointing lead or leadership counsel. The term "appropriate specifics" is designed to encourage courts to develop such orders up front.

[11] This bracketed phrase highlights the possibility of appointment for a fixed term rather than an open-ended appointment.

[12] It remains unclear whether this provision is useful.

conferences or otherwise -- about the progress and prospects for resolution[13] of the litigation;

**[(C)** appointing liaison counsel for defendants, if appropriate, and addressing methods for compensating liaison counsel for expenses incurred in that role;][14]

**(D)** adopting a case management order addressing:

**(i)** sequencing of discovery;

**(ii)** a schedule for deciding disputed legal issues; and

**(iii)** any other order under Rule 16(c)(2), including Rule 16(c)(2)(A), (E), (F), (I), or (L).[15]

Because this approach may not be favored going forward, no attempt has been made to draft Committee Notes that might accompany it.

### B. Discovery Subcommittee

The primary focus of the Discovery Subcommittee has been on submissions about burdens and difficulties with Rule 26(b)(5)(A), which was adopted in 1993 and directed parties withholding items on grounds of privilege or work product to identify those materials and describe the nature of the materials in a manner that would "enable other parties to assess the claim [of privilege]."

The Subcommittee has reached relative consensus on an approach to amending the rule, but did not propose that this draft amendment be submitted to the Standing Committee this year for publication and public comment. In part, that was because the MDL Subcommittee was considering proposing additional changes to Rules 26(f) and 16(b), which are the rules also under consideration by the Discovery Subcommittee. There was concern that propounding different changes to the same rules in succeeding years could cause confusion. As noted in the MDL Subcommittee portion of this report, it may be that the MDL Subcommittee will ultimately suggest adding a new Rule 16.1 rather than proposing amendments to Rules 16(b) and 26(f), but is not

[13] Is this reference to "resolution" sufficient to include the concept of reports about settlement possibilities? Note that Rule 16(c)(2)(I) refers to "settling the case."

[14] It remains unclear whether it is useful to raise this issue in the rule. One reason might be to provide authority also for the creation of a common fund for defense outlays.

[15] This provision largely reproduces the proposed addition to Rule 26(f). Given the prod in that rule, it may well be unnecessary to include a parallel provision here. On the other hand, for judges new to the MDL assignment it may be useful to replicate the 26(f) direction here. It should be clear that calling attention to these provisions in Rule 16(c) in no way limits the court's authority to enter orders addressing other matters discussed in Rule 16(c)(2).

certain whether that will occur. Since the current rule has been in effect for nearly 30 years, it seemed prudent to wait another year to permit the MDL Subcommittee to complete its work, or at least to determine whether it intends to go forward with proposing changes to Rule 16(b) and 26(f).

Another topic that the Discovery Subcommittee has on its agenda is addressing filing under seal in the Civil Rules. Suggestions have been made that a national rule be adopted to provide a procedure for requesting leave to file under seal and, perhaps, for challenges to such requests for filing under seal. While Discovery Subcommittee consideration was going forward, the Administrative Office inaugurated what appears to be a study of filing under seal addressing a broader set of cases, not just civil cases in the district courts. In light of that broader study, the Discovery Subcommittee has not proceeded further with possible changes to the Civil Rules.[1]

This report provides background on the issues presented and also the working draft the Subcommittee expects to consider going forward. The Subcommittee invites input from the Standing Committee on its current orientation.

## Advent and Implementation of Rule 26(b)(5)(A)

Before 1993, the rules did not say anything about disclosure by a producing party that it withheld requested materials from production. That year, Rule 26(b)(5)(A) was added. As restyled in 2007, it provides:

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

As quoted in the draft Committee Note for a possible Rule 26(f) amendment below, the 1993 Committee Note emphasized that the exact method of complying with this new requirement should be keyed to the circumstances of given cases. But according to submissions to the Committee some requesting parties demanded, or some courts insisted upon, document-by-document listing even in cases involving large numbers of documents. Preparation of those lists reportedly sometimes involved great expense on top of the expense of reviewing responsive materials to identify privileged materials.

[1] It is worth noting that the 21st Century Courts Act of 2022, introduced in both the Senate and the House in April 2022, contains provisions addressing sealed court filings. See S. 4010 § 6; H.R. 7426 § 6. It is not clear what action will be taken on this bill, which contains many other provisions.

The digital revolution since 1993 has had a major impact on these concerns. The volume of material potentially subject to production, and therefore needing privilege review, has multiplied. And lawyer-client communications that formerly might have been handled in person or by telephone have increasingly been done instead by email, text, or other electronic means that could be the target of a Rule 34 request. (It appears that the principal area of concern is Rule 34 production, not deposition or interrogatory discovery.)

Burden is not the only difficulty reportedly encountered. For a variety of reasons, even laboriously developed listings of materials may prove delphic to the requesting party though the rule says that description should "enable other parties to assess the claim." To some extent, this difficulty may have resulted in "large document" cases from the use of identical "generic" descriptions for numerous withheld materials. To some extent, problems may have resulted from overly aggressive flagging of materials to be withheld. That tendency has been noted in reported court opinions, and attributed to junior lawyers' fears about overlooking a privileged item, and perhaps also their ignorance of the legal criteria for privilege claims. (An example proffered was an email about meeting for lunch at Legal Seafoods that was withheld because the word "legal" appeared.)

It might be hoped that technology, having partly contributed to current problems, might also contribute to their solution. The Subcommittee has inquired about whether a "push the button" privilege log can now be done or will soon be possible. Despite some vendor claims that this should now or soon be possible, many lawyers told the Subcommittee that experience with such efforts in actual cases was at best mixed; sometimes initial efforts to use such methods must later be abandoned and a more "traditional" method substituted.

A final background note: it does not appear that the adoption of Rule 26(b)(5)(A) caused most of the current problems. The Subcommittee is not aware of a reason to believe that before the rule was adopted in 1993 producing parties were always punctilious in their claims of privilege protection; indeed, the fact the rule was adopted suggests the reverse. And the adoption of the rule had nothing to do with the explosion of digital materials that has occurred since 1993 and complicated contemporary efforts to comply with the rule.

## The Approach Presently Under Consideration

The Subcommittee has concluded the rule-amendment approach presented below offers the greatest promise. One option might be to do nothing and remove this topic from the agenda, but the reported current problems make that seem inadvisable. Instead, the promising route appears to be requiring the parties to address the best way to deal with these issues and report about that to the court in their discovery plan, leaving it to the judge to address compliance with Rule 26(b)(5)(A) in the Rule 16(b) order.

The following includes an initial Reporter's sketch of a possible Committee Note. The Subcommittee has not yet had an opportunity to discuss it thoroughly, but invites input from this Committee on the rule amendment ideas and on the Committee Note sketch.

**Rule 26. Duty to Disclose; General Provisions Governing Discovery**

* * * * *

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

* * * * *

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

* * * * *

**(D)** any issues about claims of privilege or of protection as trial-preparation materials, including the [timing for and][2] method to be used to comply with Rule 26(b)(5)(A) and -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

DRAFT COMMITTEE NOTE

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. The Committee has been informed that compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log." Frequently, however, those privilege logs do not actually provide the information needed to enable other parties or the court to assess the justification for withholding the materials. And on occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold materials [clearly] not entitled to protection from discovery.

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

Requiring this discussion at the outset of litigation is important to avoid problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period. [The rule therefore directs the parties to discuss and report to the court on the timing for compliance with the rule's requirements.]

[2] The bracketed language has not been discussed with the Subcommittee, but the Subcommittee has discussed the problems that can arise from belated service of a privilege log. Committee Note language below addresses the same point.

This amendment also seeks to grant the parties maximum flexibility in designing an appropriate method for identifying the grounds for withheld materials, and to prompt creativity in designing methods that will work in a particular case. One matter that may often be valuable in that regard is candid discussion of what information the receiving party needs to evaluate the claim. Depending on the nature of the litigation, the nature of the materials sought through discovery, and the nature of the privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

From the beginning, Rule 26(b)(5)(A) was intended to recognize the need for flexibility. The 1993 Committee Note explained:

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

Despite this explanation, the Committee has been informed that in some cases the rule has not been applied in a flexible manner, sometimes imposing undue burdens. And the growing importance and volume of digital material sought through discovery have compounded these difficulties.

But the Committee is also persuaded that the most effective way to solve these problems is for the parties to develop and report to the court on a practical method for complying with Rule 26(b)(5)(A). Cases vary from one another, in the volume of material involved, the sorts of materials sought, and the range of pertinent privileges.

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

As suggested in the 1993 Committee Note, in some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many withheld documents. Suggestions have been made about various such approaches. For example, it may be that communications between a party and outside litigation counsel could be excluded from the listing, and in some cases a date range might be a suitable method of excluding some materials from the listing requirement. Depending on the particulars of a given action, many such methods may enable creative counsel to reduce the burden and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the specifics of the action.

In some cases, technology may facilitate both privilege review and preparation of the listing needed to comply with Rule 26(b)(5)(A), perhaps by preparation of what is sometimes called a "metadata log." One technique that the parties might discuss in this regard is whether a some sort of listing of the identities of people who sent or received materials withheld should be supplied, to enable the recipient to appreciate how that bears on a claim of privilege.

Requiring that this topic be taken up at the outset of litigation and that the court be advised of the parties' plans in this regard is a key purpose of this amendment. Belated production of a privilege log until near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an accompanying listing of withheld items. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution. That resolution, then, can guide the parties in further discovery in the action.

The Committee has also been informed that in some cases there appears to have been over-designation of materials as privileged. Though it is sometimes difficult to determine whether certain materials are properly withheld, the Committee has been informed that in some instances privilege claims are made without significant foundation. One problem may be overbroad designation by risk-averse reviewers. In addition, it may sometimes be that attorneys are routinely copied to bolster inappropriate claims of privilege. It is important to note that Rule 26(g)(1) applies to privilege claims. It is hoped that carefully designed methods of complying with Rule 26(b)(5)(A) can avoid disputes about unjustified claims of privilege.

**Rule 16. Pretrial Conferences; Scheduling; Management**

* * * * *

**(b) Scheduling <u>and Management</u>.**

* * * * *

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

* * * * *

**(B)** *Permitted Contents.*

* * * * *

**(iv)** include <u>the [timing for and] method to be used to comply with Rule 26(b)(5)(A) and</u> any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

* * * * *

DRAFT COMMITTEE NOTE

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D), which directs the parties to discuss the method to be used to comply with Rule 26(b)(5)(A) in the action, and to report to the court about that issue. In addition, two words -- "and management" -- are added to

the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A) regarding providing information about materials withheld from production on grounds of the withheld items are privileged or subject to trial-preparation protection. [It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid problems that can arise if issues about compliance emerge only at the end of the discovery period.]

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

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case -- type of materials being produced, volume of materials being produced, type of privilege or protection being invoked, and other specifics pertinent to a given case -- there is no overarching standard for all cases. For some cases involving a limited number of withheld items, a simple document-by-document listing may be the best choice. In some instances, it may be that certain categories of materials may be deemed exempt from the listing requirement, or listed by category. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) permit the court to provide constructive involvement early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement.

### C. Rule 9(b) Subcommittee

The Advisory Committee received a proposal by Committee member Dean and Professor A. Benjamin Spencer to amend the second sentence of Rule 9(b) in light of the interpretation of that rule in the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 686-687 (2009). The proposal was supported by Dean Spencer's article, A. Benjamin Spencer, Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by *Iqbal*, 41 Cardozo L. Rev. 1015 (2020). The article stressed pre-1938 English authority under a rule that was a model of the rule included in the Civil Rules in 1938. The proposal focused on the second sentence of the rule, and urged that the rule be amended in order to guarantee an opportunity to plead intent, knowledge and state of mind generally in all cases, not just fraud cases. Specifically, the proposal was to amend the second sentence of Rule 9(b) as follows:

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

In October, 2021, a Rule 9(b) Subcommittee was appointed, chaired by Judge Sara Lioi, and including Judge Cathy Bissoon, Justice Thomas Lee, Joseph Sellers and Helen Witt. Meanwhile the Rules Law Clerk did research on the application of the second sentence of Rule 9(b) before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which announced what has come to be called the "plausibility" standard for the sufficiency of pleadings. The research revealed that the second sentence of the rule had almost never played a role in decisions on motions to dismiss outside the fraud context (the focus of the first sentence of Rule 9(b)) before the 2007 decision in *Twombly*.

On Dec. 15, 2021, the Rule 9(b) Subcommittee met via Teams and thoroughly discussed the issues raised by Dean Spencer's article and addressed by the Rules Law Clerk's research. At the end of this discussion, the subcommittee voted unanimously to recommend that this proposal be removed from the agenda. The matter was fully discussed during the Advisory Committee's March 29 meeting and the proposal was dropped from the agenda without dissent.

The following memorandum provides considerable background in an effort to put the current proposal into the larger context of pleadings issues presented under the Civil Rules.

## Past Committee Consideration of Pleading Requirements

In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court announced that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 45-46. In 1998, Professor Hazard noted that "Conley v. Gibson turned Rule 8 on its head by holding that a claim is insufficient only if the insufficiency appears from the pleading itself." Hazard, From Whom No Secrets Are Hid, 76 Texas L. Rev. 1665, 1685 (1998).

Whatever one's attitude toward *Conley v. Gibson*, it is apparent that the second sentence of Rule 9(b) did not loom large in decisions under that precedent. Indeed, lower courts frequently insisted on factual allegations to support "conclusory" allegations of knowledge or intent. Even in the fraud context, the Second Circuit held in 1979 that despite the second sentence plaintiffs pleading securities fraud had to "specifically plead those events which they assert give rise to a strong inference that the defendants had knowledge of the facts contained in * * * the complaint or recklessly disregarded their existence."[1] In the Private Securities Litigation Reform Act, adopted in 1995, Congress picked up this Second Circuit language and put it into the statute as a pleading standard for securities fraud claims.

[1] *Ross v. A.H. Robins Co., Inc.*, 607 F.2d 545, 558 (2d Cir. 1979).

In 1993, the Supreme Court made it clear that though the first sentence of Rule 9(b) applies to fraud cases, it does not apply to all cases. In *Leatherman v. Tarrant County Narcotics and Coordination Unit*, 507 U.S. 163 (1993), it rejected a Fifth Circuit "heightened pleading" standard in a suit against local officials, noting: "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Id. at 168.

The Court's reference in *Leatherman* to amending the rules prompted considerable Advisory Committee study but ultimately no amendment was proposed. Meanwhile, at least some academics urged that Rule 9(b) be abrogated. See Christopher M. Fairman, An Invitation to the Rulemakers -- Strike Rule 9(b), 38 UC Davis L. Rev. 281 (2004); William M. Richman, Donald E. Lively & Patricia Mell, The Pleading of Fraud: Rhymes Without Reason, 60 So. Cal. L. Rev. 959, 994 (1987) (Rule 9(b) "should be abandoned as a relic whose time is past"); Jeff Sovern, Reconsidering Federal Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?, 104 F.R.D. 143 (1985) (urging that Rule 9(b) "be eliminated from the federal civil rules").

In *Twombly*, the Court "retired" the "no set of facts" standard from *Conley v. Gibson*. 550 U.S. at 562-63. In *Iqbal*, it held that plaintiff's complaint had to be dismissed under the pleading standard articulated in *Twombly*, because that standard applied to all cases governed by Rule 8(a)(2), something commentators had questioned after 2007. As a consequence, plaintiff's allegation that the Attorney General and the Director of the FBI adopted an aggressive law-enforcement posture after the September 11, 2001, attacks to discriminate on grounds of religion or national origin was found insufficient. Plaintiff urged that the second sentence of Rule 9(b) excused him from alleging specifics to support his claim of discriminatory intent. Writing for the Court, Justice Kennedy rejected this argument on the ground that plaintiff's allegation was "conclusory" (556 U.S. at 686-87):

> It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, knowledge, and other conditions of mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid -- though still operative -- strictures of Rule 8.

See also A. Benjamin Spencer, Plausibility Pleading, 49 Bos. Col. L. Rev. 431, 473 (2008) (describing the second sentence of Rule 9(b) as "a reference to the pleading standard of Rule 8(a)(2)").

Until this argument was advanced by plaintiff in *Iqbal*, the second sentence of Rule 9(b) had not received much attention in the courts. In *Leatherman*, the Supreme Court ruled that at least the first sentence of the rule did not apply to non-fraud claims. As quoted above, the Second Circuit read Rule 9(b), even in a fraud case, to permit demanding pleading requirements of knowledge of the falsity of representations, which Congress later adopted as the pleading standard in the PSLRA.

And in non-fraud cases, including discrimination cases, pleading requirements for factual allegations supporting conclusory allegations of motive had been upheld.[2]

The Supreme Court's decisions in *Twombly* and *Iqbal* prompted a very large amount of academic writing, most of it unfavorable to the Court's decisions. Even though the Court did not (as it had in its *Leatherman* decision in 1993) invite rulemaking, the decisions also prompted much Advisory Committee activity. Various possible revisions of Rule 8 appeared in a number of agenda books. The Rules Law Clerk at the time compiled a massive study of post *Iqbal* decisions in the lower courts (eventually some 700 pages long).

Meanwhile, the Federal Judicial Center did a thorough study that compared decisions before 2007 (when *Twombly* was decided) and after 2009 (when *Iqbal* was decided), and concluded that there was no statistically significant increase in the granting of motions to dismiss. See J. Cecil, G. Cort, M. Williams & J. Batillon, Motions to Dismiss for Failure to State A Claim After *Iqbal*, Report to the Judicial Conference Advisory Committee on Civil Rules (2011). This report was challenged as being too cautious in applying standards of statistical significance. See Hoffman, *Twombly* and *Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss, 6 Fed. Cts. L. Rev. 1 (2011); see also Dodson, A New Look at Dismissal Rates of Federal Civil Claims, 96 Judicature 127 (2012) (finding a statistically significant increase in the rate of dismissals after *Iqbal* compared to the rate before *Twombly*, but also that dismissal was quite common before *Twombly*).

The current proposal

As noted above, in *Iqbal* the Court interpreted the second sentence of Rule 9(b) as a qualification of the first sentence, so the entire subdivision is important:

> **(b) Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

[2] See *Albany Welfare Rights Organization Day Care Center v. Scherck*, 463 F.2d 620, 623 (2d Cir. 1972) the court upheld dismissal of a complaint alleging retaliation on the ground that the complaint "presents no facts to support the allegation that the refusal to refer children [to plaintiff's childcare facility] was in retaliation for [the executive director's] organizing activities." Other courts made similar decisions. See Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 447-50 (1986) (describing demanding pleading requirements in securities fraud, civil rights, and conspiracy cases); Marcus, The Puzzling Persistence of Pleading Practice, 76 Texas L. Rev. 1749 (1998) (finding that courts continued to require specifics to support certain clams into the late 1990s).

The proposed amendment would revise the second sentence:

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

The overall approach underlying the proposed amendment reflects deep dissatisfaction with the general "plausibility" pleading standard that has evolved since 2007, but does not propose a frontal attack on *Twombly* and *Iqbal*. Nonetheless, it clearly seeks to countermand the interpretation the Court gave to the second sentence in *Iqbal*. It also introduces the possibility that the second sentence of Rule 9(b) would begin to apply to claims having nothing to do with fraud, contrary to many decisions requiring factual allegations to support "conclusory" allegations before *Twombly* was decided. And it would do that without any invitation (as could be found in the Court's 1993 decision in *Leatherman*) for the Advisory Committee to amend the rule.

The *Iqbal* opinion elucidated the now-familiar general Rule 8(a)(2) standards for pleading "a short and plain statement of the claim showing that the pleader is entitled to relief." The details of the *Iqbal* complaint deserve a brief summary to pave the way for the Rule 9(b) ruling. The plaintiff, "a citizen of Pakistan and a Muslim," was arrested on fraud charges, pleaded guilty, served a term of imprisonment, and was removed to Pakistan. He did not challenge the arrest or the confinement as such. But he did claim that he was designated a "person of high interest" in connection with the terrorist attacks of September 11, 2001, and placed in administrative maximum confinement, "on account of his race, religion, or national origin." The Court accepted the prospect that he had pleaded claims against some of the many defendants. The case came to it on qualified immunity appeals by two of the defendants — John Ashcroft, the former Attorney General, and Robert Mueller, the Director of the FBI. He alleged that Ashcroft was the principal architect of the unconstitutional policy, and that Mueller was instrumental in its adoption. He further alleged that they "knew of, condoned, and willfully and maliciously agreed to subject" him to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."

The Court found these allegations failed to push the claim beyond mere possibility into plausibility. It applied a legal standard that "purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' * * * It instead involves a decisionmaker's undertaking a course of action "because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.'" Knowledge of, and acquiescence in, discriminatory acts by their subordinates would not suffice to hold the Attorney General and the Director of the FBI liable. The allegations of these defendants' purpose "are conclusory, and not entitled to be assumed true." "It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." The allegations were "consistent with" an unlawful discriminatory purpose, but did not plausibly establish this purpose "given more likely explanations." Lower-ranking government officials may have designated the plaintiff a person of high interest and subjected him to unlawful conditions of confinement for unlawful reasons, but nothing more could be inferred against these two defendants than seeking "to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."

The Court addressed Rule 9(b) after setting the general pleading requirements. It characterized the plaintiff's argument to be that by allowing discriminatory intent to be pleaded "generally," Rule 9(b) permits a conclusory allegation without more. This argument was rejected on the face of the rule text. "Generally" is used to distinguish allegations of malice, intent, knowledge, or other conditions of a person's mind from the particularity standard established for fraud or mistake. "Generally" "does not give [a party] license to evade the less rigid — although still operative — strictures of Rule 8. * * * And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."

Pursuing an amendment for publication would require significant work of the sort that was undertaken after the *Leatherman* decision in 1993 and again after the *Iqbal* decision in 2009. A starting point would be that it is puzzling to insert a qualification of Rule 8(a)(2) as a second sentence in Rule 9(b), without even a cross-reference to Rule 8. Instead, the second sentence is no more than an amelioration of the particular pleading requirement in the first sentence, allowing the condition-of-mind elements of a claim of fraud or mistake to be pleaded generally. On this view, Rule 8(a)(2) has all along governed allegations of malice, intent, knowledge, and other conditions of a person's mind outside the realm of fraud and mistake. Variations in the general Rule 8(a)(2) standard over time apply to such allegations as intent to discriminate or actual malice in defaming a public figure, but that is a direct consequence of Rule 8(a)(2), not a departure from the existing law concerning the second sentence of Rule 9(b).

It bears emphasis that the range of substantive claims (beyond fraud) that might be affected by such an amendment is significant. For example, *Twombly* involved a claim of "conspiracy" under § 1 of the Sherman Act, a concept often translated as "agreement" but without any coherent concept to identify the line between "conscious parallelism" and some more closely convergent states of competitors' minds. The basis for decision commonly is a detailed set of facts of behavior in the marketplace, not any direct evidence of collusion. Time and again, "agreement" is no more than an inference from such facts. But it is an inference that looks to the state of mind of two or more actors, as inferred from the facts. The *Twombly* complaint included detailed statements of facts, and explicit allegations of conspiracy, but the Court did not find plausible support for the required inference. Unless the antitrust question is answered by ruling that "agreement" requires explicit offer and acceptance, however, how is an allegation of intent — for example, an intent to exclude competition by rivals for incumbent carriers — not an allegation of a condition of mind? How should a new rule for pleading conditions of mind be framed to avoid overruling *Twombly*?

One approach to the general proposal might be to examine multiple areas of the law where a claim depends on proving malice, intent, knowledge, or other conditions of a person's mind, seeking to develop an appropriate pleading standard for each. But if that task seems as unmanageable as a parallel task seemed from 1993 to 2007, which general rule would be better? Whatever practices emerge from adapting the general and highly variable standards of Rule 8(a)(2) as mandated by the Supreme Court? Or a return to a practice that treats as a sufficient allegation of fact a direct averment of "malice," "intent," "knowledge," or some other condition of a person's mind as required by the substantive claim asserted in the pleading?

These are difficult questions. Any potential revision of the second sentence of Rule 9(b) would inevitably be highly contentious and involve a great deal of work, as illustrated by the efforts made after the 1993 decision in *Leatherman* and after the *Twombly* and *Iqbal* decisions came down.

The Subcommittee's deliberation

Against this background, the Rule 9(b) Subcommittee carefully considered the suggested amendment. One consideration was whether the Advisory Committee would be well advised to pursue, in effect, a change in a recent Supreme Court holding without some indication from the Court that it was receptive to such rulemaking. On occasion, the Court invites rulemaking to change a result it has reached. A recent example is *Hall v. Hall*, 138 S.Ct. 1118 (2018), holding that under Rule 42, as presently written, a final judgment in one of two consolidated cases is immediately appealable. That Rule 42 issue remains on the Advisory Committee's agenda.

Though the Court did seem to invite consideration of rulemaking in its 1993 *Leatherman* decision, there does not seem to be any such invitation in its *Twombly* or *Iqbal* decisions. The Advisory Committee does not await invitations from the Court to pursue rule amendments, though it is worth noting that the Court is the body that prescribes the rules and amends them, not the Judicial Conference or its committees. A key point would often be whether there seems to be a real problem in practice under the current rule. But the Subcommittee concluded that there does not seem to be such a problem.

The subcommittee also noted that it seems that the greatest unhappiness about the pleading rules since 2009 has come from the academic community. Certainly, some on the plaintiff side regard the Court's pleading decisions as harmful. Within the subcommittee, there was some sympathy for an effort to clarify what "generally" means in the second sentence. Among judges, however, the "plausibility" standard has turned out to be useful as a case management tool. One view during the Subcommittee meeting was: "Folks have grown accustomed to the new pleading regime." From that perspective, making a change might produce mischief instead of desirable results; any change introduces a new argument to litigate.[3]

[3] On that score, it seems worth noting something from the minutes of the Bankruptcy Rules Advisory Committee meeting on September 14, 2021, regarding a report from Judge McEwen (liaison to the Civil Rules Committee from the Bankruptcy Rules Committee) about this Rule 9(b) submission. Judge McEwen explained to the Bankruptcy Rules Advisory Committee that the goal of the Rule 9(b) amendment proposal was to "undo the portion of the Supreme Court's *Iqbal* decision holding that although mental state need not be alleged 'with particularity,' the allegation must still satisfy Rule 8(a) -- meaning some facts must be pleaded." Here is the concern of the Bankruptcy Rules Committee, as expressed in its minutes:

> This is of serious interest to the Bankruptcy Advisory Committee. Rule 9(b) comes up often in bankruptcy (adopted by reference in Fed. R. Bankr. P. 7009) because some of the section 523(a) exceptions to discharge and some of the objections to discharge under § 727 have state of mind elements. The Bankruptcy Advisory Committee will want to watch this proposed amendment closely and consider weighing in when the time comes.

Though the submission cites examples of recent rulings one might question, the subcommittee discussion suggested that judges know that "people are not mind readers," and a lawyer noted that in state courts governed by a "fact pleading" standard the judges are realistic about allegations of motive or intent even under that standard.

After a thorough discussion of the issues, the subcommittee voted unanimously to recommend that the Advisory Committee remove this item from its agenda, and the Advisory Committee accepted this recommendation without dissent.

## III. Matters Carried Forward

### A. Jury Trial: Rules 38, 39, and 81(c)

The procedures for demanding a jury trial have been long on the agenda. They began with a protest by a disappointed litigant that a word change in Rule 81(c) by the 2007 Style Project changed the requirements for demanding a jury trial in an action removed from state court. Rule 81(c) gives effect to a demand made in the state court before removal. If a demand was not made before removal, the rule went on: "if the state law ~~does~~ did not require an express demand for jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." "Does not" excused the demand requirement only if state law does not require a demand at any point. The proponent of an amendment argued unsuccessfully in his case that the change to "did not" meant that a demand need not be made after removal, even though state law requires a demand, if the time set by state law for making the demand had not been reached at the time of removal. That argument is undercut by the standard language in the 2007 Committee Note: "These changes are intended to be stylistic only." The proposed amendment would clearly express the rejected interpretation of the 2007 amendment.

Consideration of the proposal led the Committee to begin to study the possibility of simplifying Rule 81(c) by honoring a jury demand made in state court before removal, but requiring a demand under Rule 38 within a specified time after removal in all other cases. This project was reported to the Standing Committee at the June 2016 meeting. Immediately after the meeting, then-Judge Gorsuch and Judge Graber, Standing Committee members, proposed that Rule 38 should be amended, with corresponding changes in Rules 39 and 81, to eliminate the demand requirement. Jury trials would be provided in every case in which there is a constitutional or statutory right to jury trial unless all parties stipulate to a bench trial.

Several arguments were advanced to support the proposal. Elimination of the demand requirement would encourage jury trials. "Simplicity is a virtue." The demand procedure can be a trap for the unwary. Eliminating it would produce greater certainty, and "honors the Seventh Amendment more fully." And there is no indication of negative experiences in the many states that do not require a specific demand.

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Agenda Book, Standing Committee meeting, Jan. 4, 2022, at 170.

The Committee concluded at its November 2016 meeting that the proposal to eliminate the demand procedure raises complex questions, both procedural and empirical. The Rules Committee Support Office undertook to organize the first stage of the research, to include "case law, anecdotal reports, academic analysis, and available empirical evidence." The agenda materials for the April 2017 Committee meeting included elaborate drafts of revised Rules 38 and 39 that illustrated different approaches that could be adopted to relax or abandon the demand requirement, with the note that Rule 79(a)(3) -- entry of "jury" on the docket -- might also be reconsidered.

There the matter rests. It was restored for active consideration at the Committee's March meeting. A further pause, however, has come to seem desirable. The Omnibus Budget bill includes directions that the FJC identify jurisdictions that have a high number of jury trials and analyze whether litigation practices, local court rules, or other factors contribute to a higher incidence of jury trials. The project is on a short timeline. The Committee concluded that it is better to defer further consideration of these sensitive questions in order to begin with the lessons to be learned in the FJC study.

### B. In forma Pauperis Standards and Procedures

The standards and procedures applied in ruling on motions for leave to proceed in forma pauperis have been on the Committee's agenda for a while. It has been clear from the beginning that existing practices are the antithesis of uniform standards or procedures. There are manifest opportunities for improvement. The challenge is to decide who is in the best position to meet the challenge. Rules Enabling Act rules, and the procedure for developing them, would encounter severe challenges if they were to become the vehicle of choice. The immediate goal is to survey the field of possible alternative groups that might take up the task.

28 U.S.C. § 1915(a)(1) provides that a court may authorize litigation without prepayment of fees or security for fees by "a person who submits an affidavit that includes a statement of all assets such prisoner [sic] possesses that the person is unable to pay such fees or give security therefor." The statute provides no additional guide for determining whether a litigant is "unable to pay such fees." The standards applied vary widely from court to court, and often from judge to judge within a single court. The prospect that a uniform national standard might be devised dims on recognizing that a particular level of assets may leave a litigant unable to pay fees that could be paid by a litigant facing quite different living costs in a different section of the country. The sufficiency of any particular level of assets, moreover, can be calculated only after determining the level of competing demands on those assets and the worthiness of those demands. Complex formulas might be devised, but are likely to require frequent adjustment. The capacity of Rules Enabling Act processes to meet these basic challenges is open to doubt.

Beyond determining what level of assets is sufficient, it is essential to determine what assets count as assets that a litigant "possesses." The information that may be required in undertaking this task is illustrated by Form 4 appended to the Rules of Appellate Procedure, a form that the Appellate Rules Committee is studying for possible revision. In its present state, Form 4 calls for information about such matters as a spouse's income from gifts, alimony, child support, and disability payments, and a spouse's employment history. This form implies substantive

judgments that all of these resources count as assets that a litigant possesses. Those judgments are more secure if they can be anchored in unequivocal interpretations of § 1915(a)(1), but a dissatisfied litigant might well challenge any of them. Consider, for example, "child support" received by a spouse, an income stream that may relieve the applicant of an expenditure that might otherwise count in determining what net assets the litigant possesses, but does not seem to count directly as the litigant's possession. However that may be, difficult judgments are implied by each of these items and many others. Here again, it is far from clear that Enabling Act rules can provide sound answers.

These challenges might better be considered by some other group that commands different sources of information, better resources for evaluating the myriad choices that are implied in formulating uniform guidance without yet attempting to create specific formulas, and procedures that enable adjustments faster than can be made under § 2072. The Administrative Office has formed a working group to study some of these issues. Other Judicial Conference committees, perhaps the Committee on Court Administration and Case Management, might take an interest. Before deciding whether it is feasible to even begin its own project, the Committee will seek to identify potential alternative entities that might take up the task.

### C. Rule 41(a)(1): Partial Dismissals

Judge Furman suggested that the Committee should study the division of opinions on the scope of Rule 41(a)(1)(A). This rule provides:

> **(1)** ***By the Plaintiff.***
>
> **(A)** ***Without a Court Order.*** Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without 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 the dismissal is without prejudice unless the notice or stipulation states otherwise.

Judge Furman encountered, but was able to avoid answering in the case before him, a question that has produced divided opinions. Does the right to dismiss "an action" permit dismissal of only part of the action, or can it be invoked only to dismiss all claims among all parties?

A lengthy research memorandum by Burton DeWitt, the Rules Law Clerk, shows that although courts are divided, there are clear majority answers to three related questions that can be identified by simple examples.

The question encountered by Judge Furman arises when one plaintiff advances two claims against one defendant. The plaintiff seeks to dismiss one of the claims without prejudice, while continuing the action on the other. Most courts say this cannot be done. The opinions seem to rely on defining what is "an action," without exploring the competing policy considerations that might bear on the answer. The "action" comprises both claims.

A closely related question arises when one plaintiff advances identical claims against two defendants in a single action. The plaintiff then seeks to dismiss all claims against one defendant without prejudice, while continuing the action against the other. Here most courts accept this tactic. There is little indication of efforts to explain why dismissal as to one of two defendants is any more dismissal of "an action" than dismissal of one of two claims against a single defendant. Competing policy concerns might well be resolved to support the distinction, but are not apparent on the face of the word. The research memorandum describes a related question, describing cases found, without looking for them, that allow a plaintiff to dismiss without prejudice against a defendant that has not answered or moved for summary judgment, even though another defendant has done one or the other.

Few courts seem to have faced the third question. Two plaintiffs join in an action to assert identical claims against a single defendant. One plaintiff seeks to dismiss without prejudice all claims against the defendant. The research memorandum reports that when courts face this question, they "have been unanimous in applying the same law to plaintiffs and claimants as they do to voluntary dismissal of a defendant." Here too, competing policy concerns may be identified.

The meaning of Rule 41 may be set against the background of Rules 15(a) and 21. Decisions interpreting Rule 41 frequently observe that a plaintiff can achieve dismissal of a claim or a defendant by amending the complaint, a tactic that is available once as a matter of course during the period recognized by Rule 15(a)(1). The preclusion consequences of this tactic may be difficult to predict. Similarly, it is observed that under Rule 21 the court may drop or add a party "on just terms." The terms may direct that dropping a party is with or without prejudice.

A Rule 41(a) project might be extended to include other questions that appear on the face of the rule. Rule 41(a)(1)(A)(i) cuts off the right to dismiss unilaterally and without prejudice when the defendant files an answer or a motion for summary judgment. Why not treat a motion to dismiss in the same way? May there be other litigating events that also should cut off unilateral dismissal without prejudice because the defendant or the court have made substantial investments in the action? This possibility as illustrated by *Harvey Aluminum, Inc. v. American Cyanamid Co.,* 203 F.2d 105, 108 (2d Cir. 1953), which ruled that the right to dismiss was defeated by an extensive hearing leading to denial of a preliminary injunction. The court reasoned that literal application of the rule "would not be in accord with its essential purpose of preventing arbitrary dismissals after an advanced stage of a suit has been reached." Other courts have proved reluctant to follow this lead, stymied by the rule text, but it deserves consideration in a thorough reexamination of the rule.

Similar questions might be asked of Rule 41(c), which applies "this rule" to "dismissal of any counterclaim, crossclaim, or third-party claim." To qualify for unilateral dismissal without prejudice under Rule 41(a)(1)(A)(i), the motion must be made before a responsive pleading is filed or, if there is no responsive pleading, before evidence is introduced at a hearing or trial. They should be kept in mind if a comprehensive review of Rule 41(a)(1) is undertaken.

The Committee has concluded that, in the words of one member, "a rule that means different things to different people should be fixed." A subcommittee will be appointed when the competing demands for subcommittee work permit. Alternative approaches will be considered. The simplest task would be to write rule text that incorporates the answers given by a majority of the cases by suitable elaboration of "an action." A more difficult task would be to explore the open-ended and indeterminate policies that push in opposite directions. On one side lies a plaintiff's interest in a second opportunity to pursue claims or defendants that come to seem a poor fit in a first action. On the other side lies a defendant's interest in avoiding the burdens of remaining subject to a second action, perhaps in a less convenient court with a more unfavorable array of parties after evidence becomes more difficult to muster. No attempt has been made to work through these concerns or to predict how they might be resolved.

### D. Rule 4

While it deliberated the drafts that developed into the Emergency Rules 4(e), (h)(1), (i), and (j)(2) provided by proposed Rule 87(c)(1), the CARES Act Subcommittee considered the alternative prospect of revising the corresponding general provisions to enable the court to authorize service of process by alternative methods reasonably calculated to give notice. In the end, it concluded that this possibility should be deferred until the Committee might undertake a broader review of Rule 4.

Rule 4 has been the subject of regular suggestions for amendment. Perhaps the most modest has been to allow a request to waive service to be made by electronic communication, a fitting complement to the purpose of the waiver procedure to reduce costs. A more ambitious proposal has been to reduce the Rule 4(i) requirements for serving multiple persons or agencies in actions involving the federal government or its agencies or employees. It might, for example, be effective to recognize service on the United States Attorney without requiring the plaintiff also to send notice to the Attorney General.

Expanded service by electronic means will have to be considered at some time. A modest beginning is made in the Supplemental Rules for Social Security review actions that the Supreme Court sent to Congress in April, substituting a notice of electronic filing from the court for Rule 4 service. A similar approach might be taken to service under Rule 4(i) by substituting for service a court notice of electronic filing sent to appropriate electronic addresses established by the Department of Justice.

A particular need for service by electronic methods was noted. Plaintiffs increasingly encounter prospective defendants that have no physical presence or address, that exist only in the

electronic ether. If such an entity could be located "at a place not within any judicial district of the United States," Rule 4(f)(3) can be, and has been, invoked by court order for electronic service. A similar order may be entered outside Rule 4(f)(3), but this practice is subject to reasonable challenges.

The Committee concluded that important questions surround Rule 4. They will be explored, but at a time when competing demands on Committee resources permit a commitment of the substantial efforts of a new subcommittee. The most urgent question may be the problem of intangible entities without location or address, but for the moment it may suffice to rely on creative development under, or somehow alongside, current Rule 4.

### E. Rule 5(d)(3)(B): Expanded pro se e-filing

Civil Rule 5(d) was amended as part of an all-committees process in 2018 to "recognize[] increased reliance on electronic filing." The Committee Note went on to explain the provisions of Rule 5(d)(3)(B)(i), which permit a person not represented by an attorney to file electronically "only if allowed by court order or by local rule." The Note observed that "[i]t is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing." This conclusion was reached with some regret after reflecting on the advantages that electronic filing provides for the filer, all other parties, and the court.

Experience during the Covid-19 pandemic led some courts to expand opportunities for electronic filing by unrepresented parties. Distinctions often were drawn between case-initiating filings and later filings. It was rather common to accept electronic filing only by means other than direct access to the court's ECF system. Email filings were a frequent choice, relying on the clerk's office to utilize a method of entering the filings into the ECF system that reduces concerns about contaminating the system with malign computer intrusions.

The FJC has undertaken a comprehensive survey of current practices. The reporters for all the advisory committees met in March to learn and discuss the preliminary results. They will meet soon again to consider the final report and to open the question whether the time has come to modify the present rules. It seems likely that the focus will be on the possibility of expanding opportunities for electronic filing by unrepresented parties, without reconsidering the provisions in all the rules that, like Civil Rule 5(d)(3)(B)(ii), require an unrepresented person to file electronically "only by court order, or by a local rule that includes reasonable exceptions."

### F. Rule 55: The Clerk "Must"

Questions about the duties Rule 55 imposes on court clerks to enter defaults and default judgments came to the Committee informally by questions from judges in courts that have shifted some of these duties to the court.

Rule 55(a) directs that when a party "has failed to appear or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." "Must" was inserted into the rule text by the 2007 Style Project as one of many decisions on how to substitute

a different word of command for the ubiquitous but now forbidden "shall." It appears that at least on occasion some courts require that the default be entered by the court. This practice may reflect concerns that determining whether a named party has in fact been served, or has failed to "otherwise defend," may involve more than simple ministerial tasks.

Rule 55(b) similarly directs that the clerk "must" enter a default judgment against a defendant who has been defaulted for not appearing at the request of a plaintiff whose claim is for a sum certain or a sum that can be made certain by computation, if the request is supported by an affidavit showing the amount. Some courts, perhaps many, require that only a judge may enter a default judgment. There may be powerful reasons to shift this responsibility to the court. Determination of what is a sum certain, either or on its face or as made certain by computation, may involve uncertain questions of law, or an affidavit that seems to omit facts the law requires for the computation. It may be desirable as well to protect the clerk against well-established practices that intersect the rule text. If one of two defendants is defaulted for failure to appear, for example, but another defendant remains to litigate common questions on the merits, a default judgment may not be entered.

The FJC has agreed to undertake a study of default practices. One goal will be to map the actual division of authority between clerk and court across many districts. A more ambitious goal will be to explore the reasons for such departures of practice from rule text as may be found. The experience and concerns that underlie the departures will provide an important foundation for the next step in considering possible amendments.

### G. Rule 63: Recalling Witnesses for Successor Judge

Rule 63 allows another judge to proceed when a judge conducting a hearing or trial is unable to proceed. The second sentence reads:

> In a hearing or nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden.

This sentence was brought to the Committee by a suggestion that the rule text be amended to reflect the proposition that the availability of a video transcript of the witness's testimony may dispel any need to recall the witness.

Discussion of this proposal at the October 2021 Committee meeting recognized that Rule 63 includes many opportunities to turn the discretionary decision whether to recall a witness on a pragmatic assessment of the circumstances of a particular hearing or trial. Many issues presented by the multifarious events that qualify as "hearings," for example, are likely to be quite different from the issues presented by a "trial" on the merits. At the same time, some committee members expressed concern that the rule text may be applied more narrowly than should be. Further research was requested.

Research into the cases that apply Rule 63 was not completed in time for consideration in March. The topic will return to the agenda next October.

### H. Rule 73(b)(1): Protecting Against Disclosure of Consent to Proceed Before a Magistrate Judge

Rule 73(b)(1) directs that a district judge or magistrate judge may be informed of a party's response to the clerk's notice of the opportunity to proceed before a magistrate judge only if all parties consent to the referral. This rule implements 28 U.S.C. § 636(c)(2), which directs that rules of court for referring civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent. The proposal observes that in some courts the CM/ECF system automatically sends notice of each party's consent as it is filed, automatically violating Rule 73(b)(1).

This is not a new problem. It was carried forward from the April 2019 Committee meeting "pending examination of the opportunities to adjust operation of the CM/ECF system." Some number of districts have developed local practices that prevent premature disclosure to a judge of individual consents to proceed before a magistrate judge. An effective approach has been to refuse to accept a consent for filing unless it is signed by all parties. The process may be expedited by issuing the consent form to the plaintiff, who can solicit consents from other parties if the plaintiff chooses to consent.

The difficulty does not seem to lie in Rule 73, but rather in failure to attend to what may or may not be the inexorable operation of the CM/ECF system, current or "next gen." The Committee will undertake further inquiry, inviting committee members to explore practices in their own districts and asking the Federal Magistrate Judges Association for further information.

## IV. Matters Removed from Agenda

All of the following items were discussed and removed from the agenda without dissent.

21-CV-F: Briefs Amicus Curiae. This proposal would adopt a new Civil Rule to establish standards and procedures for filing amicus curiae submissions in the district courts. It was briefly discussed at this Committee's October meeting and was extensively discussed in the Standing Committee last January, in conjunction with issues arising under Appellate Rule 29. It was extensively discussed again at the March meeting, building on the discussion last January.

The proposal suggests that amicus curiae briefs are filed far less frequently in district courts than in the courts of appeals. The result is that many districts have no clear procedures or standards to guide those who wish to file an amicus brief. The proposal was submitted by lawyers at a large firm who regularly file amicus briefs all around the country and who would benefit from the guidance provided by a uniform national rule. The proposal includes a draft drawn from a local rule in the District for the District of Columbia and Appellate Rule 29.

It was recognized that amicus briefs may provide perspectives and analysis different from the presentations made by the parties. The brief may prove to be a true friend of the court and support a better-informed decision. A district court decision, although not formally precedent in a

hierarchical concept of precedent, may influence other courts, and in some circumstances -- such as the now hotly debated "nationwide injunction" -- may have an impact on nonparties far greater than the precedential impact of many appellate decisions. Amicus practice can provide valuable assistance in a district court and to the law, just as in an appellate court.

The analogy to Appellate Rule 29, however, may prove uncertain. The risk that an amicus filing may lead to recusal of the only judge assigned to the case in a district court seems real. Beyond that, the parties have roles in the district court that are quite different from their roles on appeal. They frame the issues of claim and defense, often choosing among potential theories for maximum adversary advantage. They investigate the facts, independently and through discovery, tailoring the inquiry to the needs of the case as they wish to present it. The different perspectives offered by an amicus may disrupt the litigation as it would be conducted by the parties, interjecting new issues. At times, indeed, an amicus may attempt to advance facts not supported by the record made by the parties. One ploy, noted in the Standing Committee discussion, may be to suggest that the court take judicial notice of facts not in the record. There is a risk that the court's decision will provide an unsatisfactory resolution of the parties' dispute by shifting the focus of litigation to tangential issues.

20-CV-G: Court Review of all Actions for Claim Stated. This proposal was to adopt a new Rule 11(e) that would apply to all civil actions the procedure provided by 28 U.S.C. § 1915(e)(2)(B)(ii) that calls on the court to dismiss an action seeking i.f.p. status if the action "fails to state a claim on which relief may be granted." Variations that would confine the rule to some nature of suit categories are included. The same proposal included a new Appellate Rule 25.1, a suggestion that has been rejected by the Appellate Rules Committee.

20-CV-CC: Rule 7.1: "Two copies." Rule 7.1 now requires that a party file two copies of a disclosure statement. This suggestion that electronic case filing systems obviate the need for two copies anticipated the deletion of the two copies requirement in the amended version of Rule 7.1 transmitted by the Supreme Court to Congress this April.

21-CV-K, Rule 4: Actual Knowledge, not Service: This proposal urges that since the purpose of service of process is to give a defendant notice that an action has been filed, service need not be made on a party that has actual knowledge of the action and either possesses a copy of the complaint or has PACER access to it. Several difficulties appear. Determining whether a defendant had actual knowledge will often be difficult. And there are technical problems, involving such matters as integration with the time-to-serve provisions in Rule 4(m) and the event that triggers the time for removal from a state court.

21-CV-M: Set Time to Decide: This proposal urged that both Civil and Appellate Rules be adopted to require that all potentially dispositive motions be decided within a set period after final submissions are due. The proposal suggests that a period of 30 days, or 60 days, or even 90 days might be suitable. Time limits of this sort have an unavoidable and inflexible impact on managing suitable docket priorities for matters that compete for the court's attention. They have long been resisted. The Appellate Rules Committee has already rejected this proposal.

21-CV-X: Expanded Initial Disclosures: This proposal, drawing from dissatisfaction with practice under the initial disclosure provisions of Rule 26(a)(1)(A)(i), suggests that required initial disclosures be expanded to include a summary of the facts and lay opinions that each "witness" will provide. It would be difficult to integrate the time for such "initial" disclosures to the progress of an action. The FJC study of the initial mandatory discovery pilot projects, nearing completion, will provide a more secure foundation for reconsidering mandatory initial disclosure practice.