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

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

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

RE: Report of the Advisory Committee on Civil Rules

DATE: December 9, 2022

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on Oct. 12, 2022. Members of the public attended in person, and public online attendance was also provided. Draft Minutes of that meeting are attached.

Part I of this report presents one item for action at this meeting. Based on the work of its Discovery Subcommittee, the Advisory Committee presents a preliminary draft of amendments to Rules 26(f) and 16(b) to address concerns about compliance with the "privilege log" directive of Rule 26(b)(5)(A). The Advisory Committee proposes that this preliminary draft be published for public comment in August 2023. It is being presented to the Standing Committee now because the Advisory Committee has concluded that it is ready for publication.

Part I also includes reports on two intercommittee projects that have received substantial attention from the Civil Rules Advisory Committee and other rules committees over the last few years, including considerable research efforts by the Federal Judicial Center Research Division. These efforts addressed the possible need to amend Rule 42 to deal with the timing of appeals in consolidated cases, and a reconsideration of the end-of-the-day e-filing practice. Based on this work, the Advisory Committee has concluded that these projects should be dropped from the agenda, and it is so recommending to the Standing Committee.

Part II provides information regarding ongoing subcommittee projects. The MDL Subcommittee, now headed by Judge R. David Proctor (a former member of the Judicial Panel on Multidistrict Litigation), continues its work on the Rule 16.1 approach that was introduced as an information item during this committee's June meeting. A newly formed Rule 41(a) Subcommittee is addressing concerns (raised by Judge Furman, a former member of this committee, among others) about possible revisions to that rule to resolve seemingly conflicting interpretations in the courts.

Part III describes new or continuing work on a variety of other topics: (A) possible revision of Rule 7.1 regarding disclosure of possible grounds for recusal; (B) possible revision of Rule 45 regarding methods for serving a subpoena; (C) consideration of Rule 55's command that in some circumstances the clerk "must" enter default or a default judgment; (D) possible revision of the rules regarding jury demands; (E) possible rule revisions regarding ifp status; (F) issues raised by an Eleventh Circuit panel opinion regarding "incentive awards" for class representatives; and (G) rule clarifications regarding filing in court under seal.

Part IV identifies matters the Advisory Committee has concluded should be removed from its agenda. One concerns Rule 63's direction that a successor judge "must" sometimes obtain live testimony from witnesses who testified in a trial originally heard before another judge. Another seeks a change in Rule 17(a), seemingly designed to ensure that the proposer is not limited by district judges in Missouri in his efforts to litigate as the real party in interest on behalf of an incompetent plaintiff.

I. Action Items

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

These amendment proposals deal with what is called the "privilege log" problem. These issues were first brought to the Advisory Committee's attention in mid-2020 by the Lawyers for Civil Justice, and supported by attorney Jonathan Redgrave. These original submissions urged that Rule 26(b)(5)(A) be rewritten to endorse identifying materials withheld on grounds of privilege by category rather than one-by-one.

As explained below, the Discovery Subcommittee carefully examined these ideas and also competing arguments for requiring document-by-document logging in all instances, and

eventually concluded that the better course would be to direct that the parties address these questions in their discovery-planning conference under Rule 26(f) and include that feature in their discovery plan for the case.

Before 1993, Rule 26(b)(1) exempted privileged materials from discovery, and Rule 26(b)(3) did the same for work product materials, but no rule required producing parties to declare that they had withheld responsive materials, much less provide any details about those materials or the ground for declining to produce them.

Rule 26(b)(5)(A) addressed that problem and directed that a producing party must expressly state that responsive materials had been withheld on grounds of privilege and describe the materials in a manner that would "enable other parties to assess the claim." The committee note to the amendment said that the method of providing such particulars could vary depending on the circumstances of the given case.

Despite that comment in the committee note, some courts adopted for practice under Rule 26(b)(5)(A) the "privilege log" idea that had originally developed in litigation under the Freedom of Information Act. In many cases, that approach worked reasonably well, but in some it imposed considerable burdens.

These burdens escalated as digital communications supplanted other means of communication. The volume of material potentially subject to discovery escalated, and the cost of preparing a privilege log for all of them also escalated. Nevertheless, there were also regular objections that these very expensive and voluminous lists did not really provide the needed information.

As noted above, the initial 2020 amendment proposals urged that the rule should provide that it was sufficient for the producing party simply to identify "categories" of materials withheld on grounds of privilege. The burdens of current privilege log practice were emphasized.

A new Discovery Subcommittee (chaired by Chief Judge David Godbey, N.D. Tex., and including Magistrate Judge Jennifer Boal, Ariana Tadler, Helen Witt, Joseph Sellers, David Burman, and Clerk of Court Representative Carmelita Shinn) was formed and it began intense work on this project.

After several online meetings, the Discovery Subcommittee concluded that it should informally solicit comments on the issues raised. Accordingly, in June 2020, it issued an informal invitation for comment on the general problem of compliance with Rule 26(b)(5)(A) and also on three possible rule-amendment approaches to these issues:

- Revising Rule 26(b)(5)(A) to indicate that document-by-document listing is not routinely required, and also to refer in the rule to the possibility of describing categories of documents that need not be identified;

- A revision to Rule 26(f)(3)(D) directing the parties to discuss the method of complying with Rule 26(b)(5)(A) when preparing their discovery plan, and a revision to Rule 16 inviting the court to include provisions about that method in the scheduling order;
- A revision of Rule 26(b)(5)(A) to specify that it only requires parties to identify "categories" of documents, or alternatively to list in the rule "categories" of documents that need not be identified.

In response to this invitation, the Subcommittee received more than 100 written comments. The comments took a variety of positions and raised a variety of issues, which were described in summaries included in the agenda book for the following Advisory Committee meeting. A number supported the concerns identified in the original submissions to the Advisory Committee. Others (including one from a state bar association) urged that Rule 26(b)(5)(A) be amended to require document-by-document listing in every case.

In addition, the Subcommittee received presentations from members of the National Employment Lawyers' Association, the American Association for Justice, and the Lawyers for Civil Justice about experience under current Rule 26(b)(5)(A). Retired Magistrate Judge John Facciola (D.D.C.) and Jonathan Redgrave also organized a two-day Symposium on the Modern Privilege Log that was attended (virtually) by members of the Subcommittee.

This extensive input made a number of things clear. One was that there seemed to be a rather pervasive divide between what might be called the "requesting" and "producing" parties. The former frequently argued that detailed logs were critical to permit effective monitoring of withholding on grounds of privilege and leveled charges of frequent over-withholding. Attorneys who routinely made production demands urged that without the detail provided by document-by-document logs they could not evaluate privilege claims, and also reported that producing parties often abandoned claims of privilege when those were challenged, and that judges often rejected the claims even when they were not abandoned.

Attorneys who are usually on the producing side emphasized the great cost and difficulty of creating logs, even when the other side thereafter pronounced them inadequate. From their perspective, too often requesting attorneys used the privilege log expectation as a club, either to obtain a desired concession in regard to other discovery or to impose added costs on the producing parties. They also emphasized that it was often possible to devise categories of materials that could be exempted from any listing requirement in light of the issues involved in a given case, thereby reducing the burden of logging.

As noted above, another point was that there was great variety in the cases governed by Rule 26(b)(5)(A). The original proposals for amendment came from those mainly involved in commercial litigation and often focused mainly on the attorney-client privilege and work product protection. But the comments submitted in response to the invitation for public comment showed that the rule was important in very different sorts of cases. One example raised in several comments was the excessive force suit against the police. Such cases might involve very different privileges from those that matter in commercial litigation, meaning that the information pertinent to privilege claims would perforce be different. Another category brought to the Subcommittee's attention due

to the public comment already received was medical malpractice — again involving a very different set of privilege criteria.

Yet another point that emerged from this study was the recurrent reality that delivery of a privilege log shortly before the close of discovery could be a recipe for chaos. Resolving any privilege disputes that emerged only at that point could disrupt trial preparation or require that discovery be redone. It would be far better to unearth these issues early on, permitting the parties to work them out or, at least, get them resolved by the court in a timely manner.

Perhaps the most pertinent point was that one size would not fit all cases. Some cases involved only a limited number of withheld documents; for those cases a "traditional" document-by-document privilege log might work fine. Depending on the nature of the privileges likely to be asserted, the specifics necessary in one case might have little to do with the specifics important in another case. Often the type of materials involved and the manner of storage of those materials could bear on the information needed to evaluate a privilege claim.

Taking account of these aspects of the information it obtained through its outreach, the Subcommittee concluded that trying to amend Rule 26(b)(5)(A) and prescribe an all-purpose solution to the variegated problems of claiming privileges with regard to variegated materials would not work. Instead, a consensus emerged that the most beneficial rule amendment would be one that would make the parties focus on the best method for compliance for their case carefully at the outset of litigation and also that they apprise the court of their proposed timing and method for complying with the rule. None of this interaction will solve all problems that claims of privilege present, but the Subcommittee became convinced that these small additions to Rules 26(f) and 16(b) promise to significantly reduce difficulties that have occurred due to the requirements of Rule 26(b)(5)(A).

At its October 2022 meeting, the Advisory Committee unanimously recommended publication for public comment of the preliminary draft of the rule amendments set out below (with a slight revision proposed by the Style Consultants).

Rule 26. Duty to Disclose; General Provisions Regarding Discovery

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(f) Conference of the Parties; Planning for Discovery

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

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(D) any issues about claims of privilege or of protection as trial-preparation materials, including <u>the timing and method for complying with Rule 26(b)(5)(A) and</u> — if the parties agree on a procedure to assert these

claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

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DRAFT COMMITTEE NOTE

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log." Those logs sometimes may not provide the information needed to enable other parties or the court to assess the justification for withholding the materials, or be more detailed and voluminous than necessary to allow the receiving party to evaluate the justification. And on occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold materials 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.

This amendment also seeks to grant the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials, and to prompt creativity in designing methods that will work in a particular case. One matter that may often be valuable 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 rule has not been consistently 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 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, these or other methods may enable counsel to reduce the burden and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the specifics of the action.

In some cases, technology may facilitate both privilege review and preparation of the listing needed to comply with Rule 26(b)(5)(A). One technique that the parties might discuss in this regard is whether some sort of listing of the identities and job descriptions 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. Current or evolving technology may offer other solutions.

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. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an 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. In addition, that early listing might identify methods to facilitate future productions.

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

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling and Management.

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

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(B) *Permitted Contents.* The scheduling order may:

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

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DRAFT COMMITTEE NOTE

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

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

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

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case — 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.

B. Rule 42 Consolidation and Appeal Status — Recommendation to Dissolve Joint Subcommittee

Rule 42(a) came onto the Advisory Committee's agenda after the Supreme Court decided in *Hall v. Hall*, 138 S.Ct. 1118 (2018), that when separate actions are consolidated under that rule, the time to appeal begins to run in any of the consolidated actions when a final judgment is entered in that action, without regard to the fact other consolidated actions remain pending in the district court. The Court had earlier made a similar ruling regarding MDL proceedings, holding that a final judgment in any action centralized in an MDL would be immediately appealable even though the MDL proceedings continued for the other actions transferred by the Panel on Multidistrict Litigation. *Gelboim v. Bank of America Corp.*, 574 U.S. 405 (2015).

Before the *Hall v. Hall* decision, the courts of appeals had taken varying approaches to the timing of appeals in consolidated actions when one reached final judgment but others did not. Some adopted the interpretation later embraced by the Supreme Court — that separate actions are separate for purposes of timing of appeal whether or not they have been consolidated. Others took different approaches.

The Supreme Court recognized that a rule amendment could change its *Hall v. Hall* interpretation of the current rule, and premised its interpretation on what it found to have been practice in the federal courts regarding consolidated cases for more than 200 years. Thus, it was not a decision that articulated a principle that would stand in the way of a rule amendment to change the practice going forward. The Appellate Rules Committee also considered the question, noting concern about the risk of a trap for the unwary should the time to appeal elapse before a litigant knew the time was ripe.

An intercommittee Rule 42 Subcommittee (sometimes called the *Hall v. Hall* Subcommittee) was formed, chaired by Judge Rosenberg. It determined that it would be important to determine how frequently the *Hall v. Hall* type problem — final judgment entered in one consolidated action before other actions within the consolidation reached final judgment — and in particular whether it seemed that the rule announced in *Hall v. Hall* had or might have trapped some unwary litigants.

FJC Research undertook what turned out to be a very challenging empirical project to identify district court cases in which Rule 42(a) consolidation had occurred and then attempt to determine whether there was any indication that, before *Hall v. Hall*, the diverging interpretations of the timing rule had defeated appellate review where sought. The challenging problem was to

identify consolidated cases, which the federal courts do not track as a category. That meant that hundreds of thousands of cases had to be reviewed during the first phase of the research. Eventually it emerged that some 2.5% of civil case filings seemed to involve a Rule 42(a) order, and that around 2% of those consolidated matters involved final judgments in some but not all consolidated cases. But in none of those cases was there a timeliness of appeal problem.

A second phase research effort was undertaken to examine post-*Hall* cases. This time, the focus was only on cases that were appealed, a much smaller number. It revealed that 3.5% of those cases involved Rule 42(a) consolidation. Among those consolidated cases, about 6% involved a final judgment in one but not all of the consolidated cases. Thus the number of cases that might present the *Hall v. Hall* problem was extremely small. But there was no instance in which appeal rights were lost under the *Hall v. Hall* rule.

The Subcommittee met via Zoom and concluded unanimously that there is no reason to proceed with an amendment to Rule 42(a). No problems with operation of the rule as interpreted by *Hall v. Hall* were found. Amending the rule to confirm what *Hall v. Hall* already said seemed not to be useful. Indeed, it might even introduce uncertainty because it might require specifying which district court actions that qualify as "consolidation" (e.g., "consolidation for all purposes," "consolidation only for pretrial purposes," "consolidation only for discovery," "consolidation only for trial") trigger a change in the timing of appeal. Accordingly, the unanimous Subcommittee decision was to recommend that the topic be dropped from the Advisory Committee agenda.

At the October 2022 Advisory Committee, there was some discussion of whether Rule 54(b) could be employed in a way that would address problems emerging from Rule 42 consolidation, but the many factors that may bear on invocation of Rule 54(b) make special treatment for consolidated actions a dubious proposition for rule amendment; existing Rule 54(b) could be employed in a single case or consolidated cases. And it might be needed only when consolidation is "for all purposes," something that may occur formally only rarely. While rule text might be devised to integrate the two, the FJC's finding that the basic problem does not actually arise in practice makes that effort seem unwarranted.

The Advisory Committee concluded without dissent to recommend to the Standing Committee that the joint subcommittee be dissolved without further work.

C. End of E-Filing Day — Recommendation That This Proposal be Dropped From the Agenda Unless Another Advisory Committee Suggests That the Deadline Should be Revised

The Time Project of 2009 amended Rule 6(a)(4)(A) to define the end of the last day for electronic court filings as "midnight in the court's time zone." The same definition was adopted in the Appellate, Bankruptcy, and Criminal Rules.

In response to concerns first emanating from the Appellate Rules Committee, an intercommittee effort was organized to consider whether to direct that filing be completed by some hour before midnight in the court's time zone on the last day when filings were due. One concern

was that permitting electronic filing until midnight interfered with family life. Surveys of lawyers (including DOJ lawyers) indicated a variety of opinions on this subject. There was considerable sentiment that permitting electronic filing until midnight might sometimes be conducive to a full family life, as the lawyer could eat dinner with family and, after dinner, complete and file the document.

Another aspect of this study has been to recognize that the operations of various courts may have particular local features that are not uniform across the federal court system but could affect filing practices. The system includes courts in a range of time zones, meaning that filing by midnight in some might be well after midnight in other districts (e.g., filing in Hawaii from D.C.). In addition, the ability to file after hours by non-electronic means can vary, as are the hours during which the clerk's office is open in various localities.

The Federal Judicial Center completed an extensive study included in the Advisory Committee's agenda book (supported by some 2,000 pages of appendices not included in the Advisory Committee's agenda book) of filing practices of lawyers and of various courts which does not suggest serious problems with the current arrangement. The FJC study does not take account of the impact of the COVID pandemic on the operations described in the study.

During the October 2022 meeting of the Civil Rules Committee, the Department of Justice representative confirmed that the Department prefers to leave the rule as it is. But it was noted that other rules committees might have different views; in particular, the Bankruptcy Rules Committee may have distinctive concerns.

At the same time, another view was that, due to the pandemic (which arose after this initiative began), attitudes on these matters have shifted. "Flexibility in the times that work best for each lawyer is important."

The Civil Rules Committee agreed without dissent that this proposal should be dropped from the agenda unless a problem of disuniformity arises due to a desire by another advisory committee to redefine the filing deadline.

II. Subcommittee Reports

A. MDL Subcommittee

The MDL Subcommittee was originally appointed in 2018 in response to submissions that emphasized how important MDL proceedings have recently become in the federal court system, and asserted that, particularly with regard to very large "mega" MDLs explicit provisions in the rules for those proceedings would be an important improvement.

In particular, the original proposals were that in "large" "personal injury" MDLs there should be fairly intense early "vetting" of claims to screen out "unsupportable" claims. It was also urged that opportunities for interlocutory review should be expanded at least for some highly consequential rulings in such cases. A.O. data were cited indicating that as many as one third or perhaps one half of all civil actions in the federal court system were the subject of a transfer order

by the Judicial Panel on Multidistrict Litigation, and that many of these individual actions seemed to remain pending for a considerably longer time than most other civil actions. In addition, it was asserted, defendants in "mega" proceedings found it impossible to obtain timely appellate review of critical "cross-cutting" decisions on matters such as preemption and admissibility of expert causation evidence. This inability, it was further asserted, actually impeded meaningful settlement discussions because defendants were resistant to making substantial settlement offers based on the decision of a single district judge.

Many of these assertions were vigorously rebutted, and the Subcommittee received numerous very thoughtful submissions on both sides of these issues, particularly interlocutory review. The Rules Law Clerk also did research on experience with interlocutory review pursuant to 28 U.S.C. § 1292(b) in MDL proceedings. Besides interlocutory review, many questions were raised about the most aggressive "vetting" proposals. Some of them resembled features of H.R. 985, passed by the House of Representatives in March 2017, which included uniform and very demanding requirements that claimants in "personal injury" MDLs present evidence of use of the product involved and also of the injury supposedly caused by the product early in the proceedings and that the court, without a defense motion, be required to evaluate those showings very promptly and dismiss all claims found wanting. FJC research indicated that it was very common to use a "plaintiff fact sheet" (PFS) in large MDL proceedings, but also that PFS requirements were tailored to the individual MDL and took considerable time to draft.

The original Chair of the MDL Subcommittee was Judge Robert Dow, and much of the time he chaired the Subcommittee it dealt with these initial issues. They were examined very carefully, including a number of conferences mainly focused on these topics. Some research suggested that the interlocutory review concern ought to be addressed through use of 28 U.S.C. § 1292(b). Eventually, the Subcommittee concluded that a special rule for interlocutory review in MDL proceedings would not be a positive addition to the Civil Rules.

In addition, it seemed difficult to define a subcategory of MDL proceedings that should be eligible for expanded interlocutory review. For example, trying to tie that treatment to the number of proceedings in a given MDL might be confounded if (as some have found) the number of actions in an MDL grew over time. In addition, the possibility that some putative actions might be on a "registry" could further complicate an effort to "count cases" in order to determine which proceedings should be subject to the special rules.

The "personal injury" dividing line also posed problems. One large MDL that seemed not to fit into that category was the *In re: Volkswagen "Clean Diesel"* MDL before Judge Breyer. Another recent example that might confound such a rule standard is *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, MDL no. 3047, which the Panel assigned to Judge Gonzalez-Rogers (N.D. Cal.) on Oct. 6, 2022. These actions charge that various online platforms including Facebook, Instagram, and Google cause addiction and self-destructive behavior in adolescents, seemingly within the "personal injury" category. Whatever the merit of those allegations, it does not seem that the sort of evidentiary showing that might be useful in pharmaceutical or medical products MDL proceedings (e.g., evidence of use of the product involved and development of the specific adverse condition allegedly caused by the product)

would also be appropriate in this sort of MDL. So a uniform requirement of an evidentiary showing sought in pharmaceutical and medical device litigation would not seem readily to fit this MDL.

In short, though there certainly are a variety of MDL proceedings it does not seem that there is a "one size fits all" method of designing a rule-based evidence exchange regime that would be suited to all, or perhaps even most MDLs. Gradually, thinking shifted toward developing a rule provision that focused the court and the parties on the management issues that can effectively move MDL proceedings forward from an early point. One thing that did seem true was a variation of the old notion that "as the twig is bent, so grows the tree" — it can be essential for the court to take an active and informed role in early orientation of an MDL proceeding, and often it is important to focus on a number of issues in MDL proceedings that need not be addressed at the outset of most other actions.[1]

But the specifics of that management effort might vary considerably depending on the specifics of the given MDL proceeding. So the Subcommittee's thinking shifted from the initial focus on "vetting" and interlocutory review toward Rules 26(f) and 16(b), which set the scene for the court's judicial management role in civil litigation, and it produced a sketch of possible amendments to those rules to assist courts in managing MDL proceedings. At the Advisory Committee's March 2022 meeting, therefore, the amendment ideas presented in the agenda book had evolved from its starting point in 2018, focusing on possible changes to Rules 26(f) and 16(b)).

But further discussions and conferences raised doubts about whether the Rule 26(f)/16(b) route held promise. At least two serious problems emerged:

(1) Rule 26(f) conferences probably do not occur as part of MDL proceedings in the same manner the rule says they should occur in individual actions. If they have already occurred in some transferred actions, the rule does not call for them to occur again, but probably the scheduling order for that individual action no longer applies. And after transfer it would be chaotic to expect them to occur in individual actions in which they have not occurred (including later-filed and "tagalong" actions) on the schedule set out in the rule for individual actions.

(2) It would also be desirable to provide a role for the court to consider designating "coordinating counsel" to meet and confer about the topics on which the court needs

[1] The Subcommittee is aware than some multi-party actions not created by an MDL transfer order may also benefit from similar early organization, and expects to include a comment to that effect in a committee note should rulemaking move forward for MDL proceedings. There has been some discussion whether the rule ought to focus on "complex" cases rather than MDL proceedings. But defining "complex" in a rule sounds very challenging. Even the Manual for Complex Litigation does not really attempt a definition of complex litigation. See Manual for Complex Litigation (4th) § 10.11 (advising that "courts should have a method of advising the assigned judge immediately that a case is likely to be complex," but not offering specific criteria for making that identification). And the Introduction to this edition of the Manual acknowledges that the term "complex litigation" is not "susceptible to any bright-line definition." *Id.* at 1.

information prior to the initial case management conference. Otherwise, there may be unsupervised and possibly counterproductive jockeying among counsel.

Prompted by those concerns, the Reporters prepared a sketch of an alternative approach — a possible new freestanding Rule 16.1, directed only to MDL proceedings. The goal of this sketch is to prompt the convening of a meet-and-confer session among counsel before the initial post-transfer case management conference with the court. Such a conference can produce a report providing the court with the parties' views on issues the court may need to address in early case management orders. That sketch was reviewed by the Subcommittee during an online meeting and included in the Standing Committee's agenda book for its June 2022 meeting as an information item. That sketch (again presented below) offered two alternatives to the key provision regarding the required topics for discussion of counsel before the management conference with the court to organize the proceeding.

After the June 2022 Standing Committee meeting, the Subcommittee began to receive reactions to the Rule 16.1 sketch. In particular, on July 11, 2022, members of the American Association for Justice (AAJ) met via Zoom with the Subcommittee to discuss this new approach, and on August 1, 2022, members of the Lawyers for Civil Justice met with the Subcommittee to discuss the same topic. As presented below, both groups offered constructive reactions to the Rule 16.1 approach, though those approaches diverged in some ways.

In addition, further comments have been submitted. Professors Alan Morrison and Roger Trangsrud of George Washington University Law School submitted 22-CV-K, urging that important decisions not be made until permanent leadership counsel are selected, and John Rabiej (formerly head of the A.O. rules office) submitted 22-CV-N, urging that provisions in the rule sketch take account of provisions frequently encountered in management orders in large MDLs.

To introduce the issues, then, this report is in two parts. The first contains the sketch included in the Standing Committee agenda book for the June 2022 meeting. The second part, then, attempts to integrate the AAJ and LCJ reactions during the conferences that occurred before the Advisory Committee's October 2022 meeting, and to identify areas of agreement and disagreement in the presentations of those organizations. It bears emphasis that this attempt at integration reflects the Reporter's assessment and was not vetted with either AAJ or LCJ. As will be seen, the more detailed Alternative 1 in the sketch provided to the Standing Committee did not receive support from either AAJ or LCJ members, but both proposed revisions of Alternative 2.

As noted above, a very considerable proportion of civil actions now pending in the federal court system — perhaps more than half — are subject to a transfer order from the Judicial Panel on Multidistrict Litigation. To some extent, the huge numbers result from one or two enormous litigations; the 3M Earplug MDL pending before Judge Rodgers (N.D. Fla.) is the largest, but the Zantac MDL before Judge Rosenberg, now the Chair of the Advisory Committee, also involves thousands of claims, particularly when the "registry" of putative claims is included. Some have pointed out that there is no reference at all in the Civil Rules to these very important proceedings. Some critics even assert that MDL proceedings are a "rules free" zone.

Another key point is that it appears substantial progress has been made even if disagreements remain. Of course, neither the Subcommittee nor the full Advisory Committee is in any sense obligated to accept comments offered on its work, but a primary goal is to develop a rule, if one is to be adopted, that will work for the people who will need to make it work — experienced lawyers and judges handling MDL proceedings in the future. Unless that seems likely, it may be that rulemaking is not warranted. But as that question is addressed, it is useful to keep in mind Judge Chhabria's comments in *In re: Roundup Products Liability Litigation*, 544 F.Supp.3d 950 (N.D. Cal. 2021), urging this Committee to give serious consideration to providing rules for guidance of transferee judges and of counsel.[2]

During the Advisory Committee's October 2022 meeting, there was discussion about whether a rule is really needed, and concern about adopting a "one size fits all" rule ill-suited to many MDL proceedings, particularly those with a limited number of cases. One illustration is the idea of early designation of "coordinating counsel" to organize the required meeting of counsel before the first management conference with the court, and to submit a report to the court on the various topics to be addressed during the meet-and-confer session. One concern could be described as a "chicken/egg" tension — how can the court meaningfully choose among attorneys so early in the proceedings, but how effectively can designated coordinating counsel develop a useful report for the court if not ultimately appointed to the leadership position? One response to this concern was that the very process of organizing the cases may provide the court with important insights about the strengths of various potential candidates for leadership positions. But a competing concern is that such early designation could become de facto appointment of leadership counsel without the process that might be important in making that selection.

Discussion during the Advisory Committee meeting also addressed the choice between Alternative 1 and Alternative 2 in terms of whether rules should provide a "checklist," perhaps providing a basis for preferring a more general rule provision like Alternative 2. A competing consideration was that Alternative 1 can usefully focus the court on the various topics that regularly need early attention. A further potential advantage of having a rule is that it would provide guidance to judges and attorneys new to MDL practice. Another topic of discussion was the court's role in regard to settlement; unlike class actions, the court is not in a position to "approve" or

[2] Judge Chhabria was particularly focused on the common benefit orders often entered in MDL proceedings. As noted below, input the Subcommittee has received suggests trepidation among some in the bar about a rule dealing with such orders, or at least one that prompts early entry of such an order. Here is what Judge Chhabria said (*id.* at 953):

> The fact that counsel is even requesting such a far-reaching order — a request that has some support from past MDL practice — suggests that courts and attorneys need clearer guidance regarding attorney compensation in mass litigation, at least outside the class action context. The Civil Rules Advisory Committee should consider crafting a rule that brings some semblance of order and predictability to an MDL attorney compensation system that seems to have gotten totally out of control.

"disapprove" a settlement in MDL proceedings, but because settlement looms large in those proceedings it would be desirable to attend to it in Rule 16.1, if that is adopted.

After the October 2022 Advisory Committee meeting, representatives of the Subcommittee attended and made a presentation about the Rule 16.1 idea during the Judicial Panel's Conference for Transferee Judges at the end of October, including a special session devoted entirely to the Rule 16.1 sketch. These events provided extensive reactions to the Rule 16.1 sketch, and suggested that experienced transferee judges supported further consideration of an MDL rule and might prefer a model more like Alternative 1 (with its detail) than Alternative 2.

Further conferences are anticipated with the Lawyers for Civil Justice and American Association for Justice during upcoming meetings of those groups. Representatives of the Subcommittee expect to attend these events.

Meanwhile, the Subcommittee continues to refine its approach to the Rule 16.1 idea, including consideration of the views of the various groups that have offered reactions. The presentation below reflects what was before the Advisory Committee in October. The Subcommittee invites reactions from members of the Standing Committee. The questions whether it is advisable to propose a new Civil Rule, and if so what the rule should say, both remain open. But it may be possible to provide the Standing Committee with a preliminary draft of a Rule 16.1 amendment proposal at its June 2023 meeting.

1. Rule 16.1 Sketch Included in Standing Committee Agenda Book in June 2022

Rule 16.1. Multidistrict Litigation Judicial Management

(a) MDL MANAGEMENT CONFERENCES. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions to a designated transferee judge, that judge may [must] {should} schedule [an early management conference] {one or more management conferences} to develop a management plan for orderly pretrial activity in the centralized actions.

(b) DESIGNATION OF COORDINATING COUNSEL FOR PRE-CONFERENCE MEET AND CONFER. The court may [must] {should} designate coordinating counsel to act on behalf of plaintiffs [and defendants in multi-defendant proceedings] during the pre-conference meet and confer session under Rule 16.1(c). [Designation of coordinating counsel does not imply any determination about the appointment of permanent leadership counsel.] {Such appointments are without prejudice to later selection of other permanent leadership or liaison counsel.}

Alternative 1

(c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should} direct the parties to meet and confer through their attorneys or through coordinating counsel designated under Rule 16.1(b) before the initial conference under Rule 16.1(a). [The parties must discuss

and prepare a report to the court on the following:] {Unless excused by the court, the parties must discuss and prepare a report for the court on any matter addressed in Rule 16(a) or (b), and in addition on the following}:

(1) Appointment of leadership counsel, including lead or liaison attorneys, the appropriate structure of leadership counsel, and whether such appointments should be for a specified term;

(2) Responsibilities and authority of leadership counsel in conducting pretrial activity in the proceedings and addressing possible resolution, including methods for providing information to non-leadership counsel concerning progress in pretrial proceedings;

(3) Requirements for leadership counsel to report to the court on a regular basis [on progress in pretrial proceedings];

(4) Any limits on activity by non-leadership counsel;

(5) Whether to establish a means for compensating leadership counsel [including a common benefit fund];

(6) Identification of the primary elements of the parties' claims and defenses and the principal factual and legal issues likely to be presented in the proceedings;

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

(8) Whether a master [administrative] complaint or master answer should be prepared;

(9) Whether there are likely to be dispositive pretrial motions, and how those motions should be sequenced;

(10) The appropriate sequencing of [formal] discovery;

(11) A schedule for [regular] pretrial conferences with the court about progress in completing pretrial activities;

(12) Whether a procedure should be adopted for filing new actions directly in the [MDL] proceeding;

(13) Whether a special master should be appointed [to assist in managing discovery, discussion of possible resolution, or other matters]. [; and

(14) Any other matter addressed in Rule 16 and designated by the court.]

Alternative 2

(c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should} direct the parties to meet and confer through their attorneys or through coordinating counsel designated under Rule 16.1(b) before the initial conference under Rule 16.1(a). Unless excused by the court, the parties must discuss and prepare a report for the court on [any matter addressed in Rule 16 (a) or (b),] {any matter addressed in Rule 16 and designated by the court,} and in addition on the following:

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

(2) Whether [leadership] {lead} counsel for plaintiffs should be appointed [and whether liaison defense counsel should be appointed], 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];

(3) Whether the court should adopt a schedule for sequencing discovery, or deciding disputed legal issues;

(4) A schedule for pretrial conferences to enable the court to manage the proceedings [including possible resolution of some or all claims].

(d) MANAGEMENT ORDER. After an initial management conference, the court may [must] {should} enter an order dealing with any of the matters identified in Rule 16.1(c). This order controls the course of the proceedings unless the court modifies it.

Notes on Committee Note

(1) This approach is limited to instances in which the Panel grants centralization under § 1407. A committee note can explain why MDL proceedings may present particular judicial management challenges, but also emphasize that such challenges are not true of all instances in which the Panel enters a transfer order or unique to MDL proceedings. Accordingly, it likely will be worth noting that many — perhaps most — MDL proceedings can be effectively managed without resort to Rule 16.1. At the same time, it could also emphasize that similar organizational efforts may be valuable in other multiparty litigation not subject to a Panel transfer order.

(2) Picking a verb: During the March 29 meeting, one thought was that something that says "should consider" is not really a rule, though something that says "must" surely is, and that saying "may" also fits into a rule. To take Rule 16 as a comparison, one could say that it partly adheres to the views expressed during the meeting. Thus, Rule 16(b)(1) says that the court must issue a scheduling order, and Rule 16(b)(3)(A) lists the required contents of that order. Then Rule 16(b)(3)(B) says that the scheduling order "may" also include lots of other things. Rule 16(c)(2), on the other hand, says that at a pretrial conference the court "may consider and take appropriate action on" a long list of things. Perhaps that authorizes action that was not clearly

within the court's authority when this rule was adopted in 1983, but it does not seem much stronger than "should consider." Probably a search through other FRCP rules would identify other instances in which it's difficult to say that the rule either commands action or provides explicit authority for an action that courts previously lacked. Probably the orientation to adopt is "may" for the court but to empower the court to direct that the parties "must" do the things the court directs.

(3) Timing: Rule 16(b)(2) sets a time limit for entry of a scheduling order, triggered by the time when a defendant has been served or appeared. One might insert a time limit in 16.1(a) after the Panel order, but that may not make sense. Moreover, since this is a discretionary rule (unless "must" is used) it would seem odd to have such a mandatory timing aspect.

As adopted in 1983, when case management was a new idea, Rule 16(b) included a time requirement in part to prod judges to act. It is not clear that we are trying to do that. Indeed, it may be that *some* such conference is held in virtually every MDL proceeding even though there is no rule saying there should be such a conference. So a time limit seems unnecessary, and it is hardly clear what the trigger for holding the conference should be. Entry of a Panel order might be considered. Until that order is entered, the transferee judge has no authority to act in this manner. And if something like Rule 16.1 were adopted, perhaps the Panel could call attention to it when it sends the transferee judge whatever introductory information it sends. Particularly given the possible need for the court to designate coordinating counsel to manage the meet-and-confer session that should precede the initial conference with the court, setting a specific time limit for that conference seems unwise.

(4) Rule 16.1(c) is designed to make the parties discuss and share their views with the court on the topics the judge often must address early in MDL proceedings. Before the judge is called upon to make early and perhaps very consequential calls on those things, the parties should be expected to present their positions on these matters. Perhaps the rule should say the parties must submit their report no less than *X* days before the court has scheduled the conference. But given the challenges of putting a time limit on the court's action discussed in (3) above, it is probably best not to try to build in a specific time requirement on this topic either. Alternatively, the rule could say that "unless the court directs otherwise" the report must be submitted *X* days before the initial conference.

The committee note could also observe that this sort of conference resembles a Rule 26(f) conference in some ways, but that the requirements of Rule 26(f) are not really suited to situations in which many separate actions are combined for pretrial treatment in a single MDL docket. In early-filed actions there may have already been 26(f) conferences before the Panel orders a transfer, and Rule 16(b) orders may have been entered in those actions. But it may be that some transferor judges have stayed proceedings in other cases upon learning that a Panel petition is in the works or has been filed. Pre-transfer Rule 16(b) orders are surely subject to revision by the transferee judge, and might often be vacated across the board. Coordinated pretrial judicial management is what should follow instead of a patchwork of scheduling directives for individual actions. Chaos could result from trying to adhere to scheduling orders entered by different judges in cases filed at different times, and might also prevent the benefits of combined pretrial proceedings section 1407 seeks to provide.

(5) Integrating Rule 16.1 with existing Rule 16: The sketch presents alternative approaches to integrating existing Rule 16 with a new MDL-specific Rule 16.1. As a general matter, the question may be whether to direct the lawyers to discuss everything in Rule 16(a) and (b) (excluding Rule 16(c) as being too broad, but also recognizing that Rule 16(b)(3)(B)(vii) invites almost anything under the sun), or to leave it to the court to add specified items from the list of topics in Rule 16.1(c). In that connection, it might be noted that existing Rule 16(b) orders in transferred cases would, in most instances, be superseded by orders of the transferee court. The add-on provisions of Rule 16.1 in no way override the court's authority to act in any way authorized by Rule 16. Rule 16.1(c) is designed to tee these issues up for the judge to make a considered decision whether to enter such orders on various topics.

(6) It may be suitable to limit Rule 16.1 to an initial management conference, in part because 16.1(b)(11) calls for the parties to address the need for and timing of additional conferences, and also because it seems that the main goal is to get this information before the judge at an orderly and informative initial management conference. If we are to maintain flexibility for the judge, it may be inappropriate to seem to direct that additional conferences occur, though it's likely the judge will find those useful and schedule them. On the other hand, on some matters (e.g., appropriate common benefit fund orders) it may be better to defer action for a period of time.

(7) Rule 16.1(b) coordinating counsel may not be needed in many MDLs, but when there are large numbers of counsel it may be critical. A committee note could reflect on the problems that can emerge if the court does not attend to what happens before the initial 16.1(a) management conference, and could mention the "Lone Ranger" and "Tammany Hall" possibilities. To some extent (the "Lone Ranger" problem) this sort of difficulty can appear in multi-defendant cases, suggesting that judicial attention to the defense side's representation in the meet-and-confer session is warranted in some instances. The alternative bracketed last sentences of Rule 16.1(b) may be overly strong, and perhaps a committee note to that effect would suffice. But this issue may be important enough to include in the rule.

On the other hand, it may nonetheless be that appointment of leadership counsel on the plaintiff side is sufficiently distinct from appointment of liaison counsel on the defense side that these topics should be treated separately in a rule. In many instances, there may be only one or a few defendants, making such appointments on the defense side unimportant. But there surely have been MDL proceedings with a large cast of defendants (consider Opioids, for example).

(8) Rule 16.1(d) may be unnecessary. But because any Rule 16(b) scheduling orders entered by transferor courts presumably are no longer in force when all the cases come before the transferee judge, it seemed worth saying. It may be that there are topics to suggest in 16.1(d) that would not be included in the direction regarding the meet-and-confer session called for by 16.1(c), but that is not presently clear.

(9) Unlike prior sketches, there is very little in this one about settlement, though there is brief reference in Alternative 1 of 16.1(c)(2) to the possible role of leadership counsel in achieving "resolution" and the possible appointment of a special master, perhaps to assist in achieving resolution. From what we have heard, it is not clear that there is a need to prod transferee judges

to keep an eye on settlement prospects. Similarly, it is a bit unnerving to think that the judge can authorize leadership counsel to "represent" non-clients in negotiating settlements. Perhaps the committee note can recognize that attention to settlement may loom large in many MDL proceedings, as in other actions (see present Rule 16(c)(2)(I)).

(10) Another subject that might be appropriately addressed in a committee note is the possibility that class actions might be included within an MDL proceeding. It could be somewhat tricky to explicate how class counsel in the class action should collaborate with leadership counsel guiding the MDL proceedings. It is not clear if there are often parallel structures, but it may be that there are sometimes parallel operations. For example, consider an MDL proceeding including class actions for economic loss and consolidated individual damage actions. Although it offers no across-the-board solution, this rule could at least serve to put the issue before the court.

II. Redlining of Rule 16.1 sketch by AAJ and LCJ

The following amalgam is an effort by the Reporter to present the positions offered during the AAJ and LCJ conferences. It bears emphasis that this amalgam reflects the Reporter's assessment and was not reviewed by either AAJ or LCJ. The Subcommittee is indebted to both organizations for their careful attention to the specifics. This kind of thoughtful reaction is invaluable to the Subcommittee as it proceeds with its work. And it is worth emphasizing that the Subcommittee did not provide either group with the reactions offered by the other group, so that this compilation represents their independent thoughts. At the same time, it likely reflects misunderstandings on some points. The Subcommittee continues to discuss these points, and hopes the members of the full Committee will offer their views.

Rule 16.1. [Initial] Management of Multidistrict Proceedings[3]

(a) MDL MANAGEMENT CONFERENCES. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions to a designated transferee judge,[4] that judge may[5] [must[6]] {should}[7] schedule [an early management conference] {one or more management

[3] The title has been simplified and slightly rearranged, and the alternative of "Judicial Management of Multiparty Proceedings" has been removed. Neither AAJ nor LCJ favors that alternative.

[4] LCJ suggests substituting "court" for "judge." 28 U.S.C. § 1407(b) says the Panel may order transfer to a judge, and even a judge who does not usually sit in the transferee district. It does not seem that the Chief Judge of that district can "reassign" the MDL to a different judge.

[5] AAJ prefers "may."

[6] LCJ prefers "must."

[7] The verb choice here remains open. There may be good reason to use "should" here. Even in the "simpler" MDLs, it is probably important to get organized at the outset. For one thing, orders entered by transferor judges, such as Rule 16(b) scheduling orders, probably ought to be supplanted by a combined

conferences} to develop a [schedule[8] and] management plan for orderly pretrial activity in the centralized actions.

(b) DESIGNATION OF [INTERIM] {COORDINATING} COUNSEL FOR PRE-CONFERENCE MEET AND CONFER. The court may[9] designate coordinating[10] [interim] counsel to act on behalf of plaintiffs [and defendants in multi-defendant proceedings][11] during the meet and confer session under Rule 16.1(c). Designation as [interim] {coordinating} counsel is without prejudice to later appointment of leadership counsel[12] and does not imply any determination about whether leadership counsel should be appointed.[13]

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management plan developed by the transferee judge. Indeed, because the 26(f)/16(b) sequence the rules direct for "ordinary" actions doesn't really work in MDL proceedings, there seems a pretty strong reason for the court to hold such a conference. Whether it also directs the parties to meet and confer under 16.1(c), and perhaps appoints interim counsel under 16.1(b), are somewhat separate. Those steps may not be indicated in some MDL proceedings.

[8] LCJ proposes adding "schedule" here.

[9] At this point "may" seems the way to go. Both AAJ and LCJ favor "may." Surely "must" is too strong, and in many MDL proceedings "should" is also too strong. If there are only two or three lawyers on the plaintiff side, "should" would be too strong. But it is valuable (on analogy to Rule 23(g)(3)) for a rule to make it clear that the court can designate somebody to organize and orchestrate the discussions covered by 16.1(c).

[10] LCJ did not balk at "coordinating," but AAJ did. Switching to "interim" (like Rule 23(g)(3)) might send the right signal.

[11] Whether to keep this idea remains open. AAJ wants it out. The LCJ folks did not seem to balk on Aug. 1. But on the defense side there may be more resistance to judicial control than on the plaintiff side, at least from the clients themselves. So putting it into a rule that one defendant gets its lawyer appointed to run the show for all may prompt some resistance, but the reality is that when liaison counsel are appointed that is likely the consequence.

Separately, we have the debate about whether the plaintiff side lawyers must permit the defendants to have a say on who is designated lead counsel for the plaintiffs, mentioned again below. In class actions, defendants may have a valid interest in ensuring adequate representation (particularly in the settlement posture). As Professor Lynn Baker has pointed out in a recent article, in mass settlement situations the defendants often like having a special master devise the formula for distribution in order to deflect challenges to the deal by plaintiffs who argue that their lawyers have sold them short in favor of other "clients." These are sticky points.

[12] The word "permanent" has been dropped.

[13] This is an attempt, as suggested during the July 11 call, to combine the statements in the two alternatives we originally presented. LCJ did not state a preference. AAJ tried to combine the thoughts. Here is what we presented in our sketch:

733 **(c)** PRE-CONFERENCE MEET AND CONFER. The court may [must] {should}[14] direct the parties
734 to meet and confer through their attorneys or through [interim] {coordinating} counsel
735 designated under Rule 16.1(b) before the [initial][15] conference [or conferences][16] under
736 Rule 16.1(a). Unless excused by the court,[17] [If the court directs the parties to meet and
737 confer,] the parties must[18] discuss and prepare a report for the court on [any matter
738 addressed in Rule 16(a) or (b),] {any matter addressed by Rule 16 and designated by the
739 court}[19] and in addition on the following:

[Designation of interim counsel does not imply any determination about the appointment of leadership counsel] {Such appointments are without prejudice to later selection of leadership counsel}.

The amalgam in text seems cumbersome. The word "permanent" has come out. On the other hand, as pointed out during the July 11 AAJ session, it seems useful to say both that the appointment of interim counsel does not mean that this person will be appointed to leadership, and also to say that the appointment of interim counsel does not necessarily mean the court will later appoint leadership counsel.

[14] Both AAJ and LCJ favor "may" here. There is good reason to have the verb here be "may," but perhaps "should" is more appropriate. Rule 26(f) requires counsel to meet and confer in every case unless the case is in a category exempted from initial disclosure. But that 26(f) process seems not to work in MDL proceedings. So saying "should" here would be softer than 26(f) in ordinary cases, and it seems that often it will be desirable for the court to direct the parties to meet and report back before the court is called upon to make important early rulings.

[15] Whether "initial" should be retained here is uncertain. Originally, the idea was that the court could, having been advised by the parties at the initial case management conference following the meet-and-confer session, make a determination about how to proceed from there. On the other hand, 16.1(a) speaks in one alternative of "one or more management conferences." LCJ favors "early management" in place of "initial."

[16] This is added in brackets for parallelism with 16.1(a), but it seems that the main focus is before the first conference with the court. On the other hand, assuming there is a somewhat protracted process of selecting lead counsel it may well be that interim counsel will have a role to play for some time. LCJ appears to favor a singular "initial conference," perhaps because it also favors adopting a schedule for later activities and decisions.

[17] It appears that both LCJ and AAJ favor this locution to the bracketed phrase from our sketch.

[18] Here we want "must." Both AAJ and LCJ seem to accept this verb. The court is not required to do things, but the rule should say that if the court chooses to direct them to meet and confer they have to do so and report to the court.

[19] Both AAJ and LCJ left untouched our alternatives presented here. This may be useful to emphasize that existing Rule 16 remains important, but could give rise to tricky questions about which rule applies to what. At least Rule 16(c)'s very capacious list should be left out of consideration.

740 **(1)** [Whether the parties should be directed to] {A schedule for}[20] exchange {of}
741 information [and evidence[21]] about their claims and defenses at an early point in
742 the proceedings[22];

743 **(2)** Whether [leadership] {lead[23]} counsel for plaintiffs should be appointed [and
744 whether liaison defense counsel should be appointed[24]], the process for such

[20] Though both AAJ and LCJ addressed exchange of information, they did so in different ways. AAJ adheres largely to the approach in the sketch in the Standing Committee agenda book, raising this possibility. LCJ proposes that such exchange be mandatory, and that "and evidence" be added. On this subject, it might be noted that it is not clear whether defendants will often have much to exchange, but the LCJ folks stressed that this was not a "one way" proposal.

[21] LCJ would add this provision. It seems clear LCJ wants plaintiffs to have to provide some backup up front, and that it continues to regard a prime objective as vetting "unsupportable" claims. Saying "information" seems more in keeping with the discovery rules, which emphasize that material sought through discovery need not be admissible to be discoverable. Using "evidence" might invite arguments about whether what plaintiffs were required to proffer would have to satisfy the rules of evidence. In the background is the reality that a PFS is not a *Lone Pine* order, which often leads to an argument about whether proposed expert evidence on causation is admissible. We have studiously avoided any suggestion that *Lone Pine* orders are a suitable starting point for an MDL proceeding.

[22] If this provision is to be written as LCJ suggests — requiring the parties to propose a schedule — it is not clear why it should also say "at an early point in the proceedings." Surely that does not restrict the court's choice of a suitable schedule. Indeed, it may often be that the court will need more information to set up a suitable schedule and leave that open at the initial management conference. To the extent this provision is regarded as mainly imposing burdens on plaintiffs, the "early point" language might be viewed as strengthening the defendants' preference for an early due date. Recall that H.R. 985 in 2017 had a very short fuse on the plaintiffs' obligation to present evidence, and then a further short fuse on the court's required sua sponte evaluation of that showing. The reality seems to be that these sorts of requirements for presentation of specifics by plaintiffs differ from what LCJ appears to prefer.

First, there does not appear to be any appetite among transferee courts for a self-starter role; and second, the courts of appeals have been troubled by dismissals for failure to comply, and have sometimes reversed even when transferee judges dismissed. For some recent examples of appellate decisions in such situations, see *In re Cook Medical, Inc.*, 27 F.4th 539 (7th Cir. 2022) (upholding dismissal); *Hamer v. LivaNova Deutschland GmbH*, 994 F.3d 173 (3d Cir. 2021) (reversing dismissal with prejudice); *In re Deepwater Horizon*, 988 F.3d 192 (5th Cir. 2021) (reversing dismissal with prejudice); *In re Taxotere (Docetaxel) Products Liability Litigation*, 966 F.3d 351 (5th Cir. 2020) (upholding dismissal). There are surely more cases to be considered, if needed, and probably many instances in which defendants have moved to dismiss claims by plaintiffs who missed deadlines but transferee judges have denied those motions. These citations simply happened to be at hand, and provide illustrations of possible reasons to proceed with care.

[23] LCJ seems amenable to either "leadership" or "lead" counsel, but AAJ prefers "leadership."

[24] LCJ did not object to this bracketed provision, but AAJ sought to have it removed. AAJ members expressed worries about permitting defense counsel to have any say on selection of plaintiff leadership. On Aug. 1, the LCJ folks did not offer any examples of such activity by defense counsel, though it was noted

appointments, and the responsibilities of such appointed counsel, [and whether common benefit funds should be created to support the work of such appointed counsel[25]];

[The AAJ/LCJ differences on (3) seem to merit separation in this presentation; surely some amalgam could be devised but for present purposes this seems a clearer way to proceed]

(3) [AAJ] Whether the court should adopt a schedule for ~~sequencing~~ discovery, or deciding[26] disputed legal issues <u>including remand</u>;[27]

(3) [LCJ] ~~Whether the court should adopt~~ <u>A</u> schedule for sequencing discovery, ~~or~~ deciding disputed issues<u>, and dispositive motions; and</u>[28]

(4) A schedule for pretrial conferences to enable the court to manage the proceedings [including <u>trial plans, trials in exigent circumstances, and</u>[29] possible resolution of some or all claims[30]].

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that the judge might turn to them and ask if they have any objections to the appointments being considered by the court.

[25] Both AAJ and LCJ object to inclusion of this bracketed provision. The AAJ folks said it's too early to decide at the initial conference. One might say that Judge Chhabria's 2021 common benefit fund order, cited above, tends in that direction.

[26] AAJ proposes to drop "sequencing," but it is not clear why. Perhaps the concern is that early discovery would too often make more demands on plaintiffs than defendants. On the other hand, there might be a tendency among transferee judges to favor common discovery — often, one would think, from defendants — over individualized discovery from plaintiffs.

[27] AAJ wants remand displayed prominently. It is not certain, but it seems this means remand to the transferor court (something only the Panel can order). But it might mean remand of removed cases back to state court. LCJ did not say that its members wanted early consideration of remand (probably focusing on remand to transferor courts not to state courts, since the removed cases would be in federal court because defendants wanted them there), though some defense-side attorneys in conferences have spoken in favor of remand instead of "forced" global settlement efforts.

[28] It is not surprising that "dispositive motions" is a term the defense side likes. It is not clear why "deciding disputed legal issues" is not sufficient. Perhaps the idea is that individual motions for summary judgment would be "dispositive motions" but not involve "disputed legal issues."

[29] AAJ adds this language. LCJ did not touch our sketch.

[30] AAJ would delete the bracketed language.

[Again, setting out the AAJ and LCJ approaches to (d) separately may aid comprehension. The AAJ proposal changed only the verb, favoring "may." LCJ did more.]

(d) MANAGEMENT ORDER. [AAJ] After an initial management conference, the court may ~~[must] {should}~~ enter an order dealing with any of the matters identified in Rule 16.1(c). This order controls the course of the proceedings unless the court modifies it.

(d) MANAGEMENT ORDER. [LCJ] After ~~an~~ the ~~initial~~ early management conference and allowing an opportunity for parties not represented by coordinating counsel designated under Rule 16.1(b) to be heard, the court ~~may~~ [must] ~~{should}~~ enter an order establishing deadlines and dealing with any of the matters identified in Rule 16.1(c). This order controls the course of the proceedings unless the court modifies it.

* * * * *

This effort is clearly a work in progress, if indeed it is progress. The foregoing observations in Part II (largely in footnotes) represent principally reactions of the Reporter, not the Subcommittee. But they may call attention to issues deserving further attention. Members of the Subcommittee were able to participate at the Judicial Panel on Multidistrict Litigation Conference for Transferee Judges in October, which included an opportunity to hear some judicial reactions to this new direction.

B. Rule 41 Subcommittee

The Rule 41(a) issue was initially raised by Judges Furman and Halpern (S.D.N.Y) (21-CV-O), and raised again by Messrs. Wenthold and Reynolds (former law clerks in the W.D. Ky.) (22-CV-J). These submissions address a conflict among the courts about the scope of Rule 41(a)(1)(A) right for plaintiffs to dismiss unilaterally without prejudice. The rule says that the plaintiff "may dismiss *an action* without a court order" (emphasis added). In brief, the disagreement among courts is about whether Rule 41(a)(1)(A) always requires dismissal of the entire action against all parties, or could be used to dismiss only certain claims, or only as to certain parties, leaving the action still pending in the district court as to other claims or parties.

A Rule 41 Subcommittee was appointed, chaired by Judge Cathy Bissoon. It has begun work and identified a number of issues, but its work remains at an early stage. One starting point is that, before Rule 41 was adopted in 1938, the practice in many states permitted plaintiffs to dismiss without prejudice when the litigation was well advanced, sometimes even at trial, and recommence the litigation in another court. Now Rule 41(a)(1) permits dismissal without prejudice only if the plaintiff dismisses before any defendant files an answer or a motion for summary judgment. After that point, unless the defendant stipulates, the plaintiff may dismiss without prejudice only pursuant to court order under Rule 41(a)(2).

Giving a "plain meaning" reading to Rule 41(a)(1), as Judges Furman and Halpern explained, some courts permitted use of this device only when the plaintiff dismissed the entire

action and nothing remained pending in the district court. Messrs. Wenthold and Reynolds cite the submission from Judges Furman and Halpern, and say that the issue is a "recurring circumstance," citing the Federal Practice & Procedure treatise for the proposition that "there is a certain amount of inconsistency in the cases" (§ 2362), which they characterize as "an understatement." They suggest that the solution would be to add three words: " . . . dismiss an action or a claim without a court order . . ."

Rules Law Clerk Burton DeWitt provided a research memo on the issues raised by Judges Furman and Halpern. He found that the courts had interpreted "action" in Rules 41(a)(1) and (a)(2) substantially identically. And the most common issue that turned up in the reported cases arose when plaintiffs in multi-defendant cases sought to dismiss as to some but not all defendants. On this question, the circuits are split. Similar issues have arisen in multi-plaintiff actions in which some but not all plaintiffs wish to dismiss. As to dismissal of some but not all claims against a given defendant, no circuit has explicitly permitted Rule 41(a)(1) to be used to effect such a dismissal, though intra-circuit splits have developed at the district-court level. His conclusion was that the rule should be amended to resolve the existing circuit split about whether the rule may be used to dismiss all claims against some but not all defendants in multi-defendant cases. He also suggested that there might soon be a split among the circuits on whether the rule can be used to dismiss some but not all claims against a given defendant.

Rules Law Clerk DeWitt also provided a brief memorandum about state-court practices regarding situations analogous to those governed by Rule 41(a)(1)(A). Of course, state practice is not controlling in federal court. Indeed, the 1938 adoption of original Rule 41(a) was designed in part to supplant state practice, which often permitted unilateral dismissal by plaintiff until late in the proceeding, sometimes even during trial. The current variety in state practice means that no revision to Rule 41(a)(1)(A) would bring it into concord with all state practices. And the current rule is largely as in the original 1938 rules:

> Federal Rule of Civil Procedure 41 has been amended seven times since it was promulgated in 1938. The amendments, however, have been substantively insignificant. It is doubtful that a single case would have been decided differently if the Rule remained as it was in 1938, although in some cases it is quite possible that its former text would have made it more difficult to achieve the same results or would have created some constructional problems.

9 Fed. Prac. & Pro. § 2361 at 471.

Rule 41(a)(1) currently provides:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) ***By the plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(a), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Rule 41 Subcommittee consideration

The Rule 41 Subcommittee has held two online meetings. But it has not reached a consensus on whether an amendment should be pursued, or what amendment should be considered if there is to be an amendment proposal. One view on the Subcommittee is that the literal reading of Rule 41(a)(1)(A) is right — in order to utilize the Rule 41(a)(1) option the plaintiff must dismiss the entire action. So no amendment should be pursued. Other Subcommittee members are more receptive to introducing greater flexibility.

The heart of the problem is that Rule 41 speaks about dismissal of an "action" in (a)(1)(A), and then, in (a)(1)(B), focuses on whether the plaintiff earlier dismissed an "action based on or including the same *claim*," in which event the dismissal of the current "action" operates as an adjudication on the merits (unless the court directs otherwise under Rule 41(a)(2)). In addition, the rule makes no particular mention of dismissal of either an action or a claim by one (but not all) of multiple plaintiffs or against one (but not all) of multiple defendants. And beyond that, Rule 41(c) appears to say that it applies to dismissal of claims, not actions, while Rule 41(a) is about dismissal

of actions (as the title of the rule — "Dismissal of *Actions*" — implies). That is the problem that Judges Furman and Halpern brought to our attention, and also that Messrs. Wenthold and Reynolds have raised.

To illustrate these points, an Appendix to this section of the report provides footnotes exploring the variety of points that might be made about the terminology used in the current rule, including Rule 41(c).

Additional wrinkles merit mention. One is that, as to plaintiffs, Rule 15(a)(1)(B) permits amending a complaint once as a matter of course within 21 days of service of an answer or Rule 12 motion. So this method could be used by a plaintiff to drop (or add) plaintiffs or defendants even after an answer is served, though service of an answer cuts off the Rule 41(a)(1)(A)(i) option. And there might be some reason to limit dismissal without prejudice whenever a Rule 12 motion is filed, since preparing such a motion may require considerable effort by the defendant. But Rule 15(a)(1)(B) nevertheless permits plaintiffs to amend without stipulation or leave of court. Another possibly pertinent rule is Rule 21, which says that the court may, at any time and without a motion, "add or drop a party." Finally, it might be mentioned that Rule 11(c)(2) also contemplates unilateral action by plaintiffs threatened with a Rule 11 motion during the 21-day "safe harbor" period, for it says a claim may be "withdrawn."

One might urge that dismissals without prejudice should never be permitted unless the court so orders. But that outcome seems too severe; suppose plaintiff files the action on Day 1 and decides not to serve it or otherwise pursue it on Day 2. In order to avoid preclusion should the action be filed in another court, must the plaintiff seek a court order of dismissal without prejudice? Even after an answer or motion for summary judgment is filed, Rule 41(a)(2) presumes that the court's order of dismissal is without prejudice unless the order states otherwise.

The Subcommittee might pursue a simple project or a more elaborate one, possibly moving beyond Rule 41(a) and considering other parts of the rule. The Appendix identifies a variety of questions that might be raised. It is not clear that there is a consistent policy or set of policies to inform a more ambitious Rule 41 project, and the Subcommittee's initial orientation has been to limit its attention to Rule 41(a)(1). Though the Subcommittee is not convinced that any change is really needed, the existing (and possibly impending) circuit conflicts suggest a number of possible amendment routes. So deciding that an amendment is not needed is also a route under consideration. The fact that this report includes exemplars of possible rule-amendment ideas does not signify any commitment to proceed with any amendment proposal.

The Advisory Committee's discussion of Rule 41 during its October 2022 meeting concluded with many options remaining open. One focus of discussion was the existence of inconsistent circuit decisions, suggesting that clear guidance was needed. At the same time, consensus has not been reached on what the policy objectives of any change should be beyond resolving existing disagreements about the proper interpretation of the current rule. Given the option of a Rule 15 amendment of complaint to drop specific claims or parties without the need for a court order, it may be that sufficient options already exist to enable parties to reconfigure their cases.

The following enumeration of possible directions for work suggests the range of possibilities if rulemaking is pursued. Standing Committee members' experience would be valuable in the effort to choose among these alternative routes. The Subcommittee will continue its work.

1. Adopting the minority "literal" view

Rules Law Clerk Burton DeWitt's memo reported that three circuits read the rule literally to require dismissal as to all defendants. That could be made clear relatively easily:

(a) Voluntary Dismissal.

(1) ***By the Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any federal statute, the plaintiff [or plaintiffs][31] may dismiss an entire action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

The multi-plaintiff problem would be partly addressed by the bracketed language but would still exist as to multiple defendants unless the Subcommittee ultimately lands on all or nothing ("an entire action") as the right solution. No. 4 below takes a more global approach to the multi-party problem.

2. Adopting the majority view

The Rules Law Clerk's original memo says that the majority approach is that a single plaintiff may dismiss all claims against some but not all defendants.

(a) Voluntary Dismissal.

(1) ***By the Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any federal statute, the plaintiff [or plaintiffs] may dismiss an action as to [any] {a} defendant[32] without a court order by filing:

---

[31] An alternative would be: "all ~~the~~ plaintiffs may dismiss an entire action . . . ."

[32] Under current style conventions, "a" is regarded as including "any," but given the purpose of this possible amendment it may be preferable to use "any."

(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.

Of course, a rule amendment is not bound by the courts' interpretation of the current rule, since by definition it's amending the rule. One suggestion that has been made would go further — "the plaintiff may dismiss an action or a claim or party from the action by filing * * *" That has more moving parts, and it seems that the majority view is expressed in terms of one plaintiff and multiple defendants, with plaintiff wanting to drop some defendants but continue to pursue the others. A more expansive effort is presented in no. 6 below.

3. Adding some Rule 12 motion cutoffs

Another moving part is the handling of the cutoff. One might try to borrow from Rule 15(a)(1)(B), which cuts off the right to amend once 21 days after service of some Rule 12 motions:

(a) Voluntary Dismissal.

(1) ***By the Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves ~~either~~ a motion under Rule 12(b), (e), or (f), an answer, or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

This approach seems potentially out of step with Rule 15(a)(1)(B), for that rule permits filing an amended complaint within 21 days after service of one of those Rule 12 motions.

4. Addressing the multi-party case

(a) Voluntary Dismissal.

(1) ***By ~~the~~ Plaintiffs.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any federal statute, [any] {a} ~~the~~ plaintiff may dismiss an action as to [any] {a} defendant without a court order by filing:

(i) a notice of dismissal before [any defendant] {the defendant to be dismissed} ~~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.

5. Addressing the dismissal of fewer than all claims[33]

(a) Voluntary Dismissal.

(1) ***By the Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any federal statute, the plaintiff may dismiss any claim ~~an action~~ without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

A committee note could mention Rule 18, and also that this rule says nothing about whether claim preclusion or issue preclusion might limit the plaintiff's pursuit of dismissed claims after entry of a final judgment in this action.

6. Combining multiple plaintiffs and multiple claims

This variation builds on something included in the March 2022 agenda book:

(a) Voluntary Dismissal.

(1) ***By the Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any federal statute, [any] {a} ~~the~~ plaintiff may dismiss any claim or party from the action ~~an action~~ without a court order by filing:

(i) a notice of dismissal before the [defendant or defendants to be dismissed] {any defendant} ~~opposing party~~ serve[s] either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

[33] The variety of uses of the word "claim" in the rules counsels caution here.

This may be the most plaintiff-friendly version. Whether that is a good idea may be debated.

* * * * *

There are surely additional permutations, but this may provide a starting point. It is not clear whether all these permutations flow from the decisions surveyed by the Rules Law Clerk's original research memo. And some of the variations above could be combined. Thus, for example, the "any plaintiff" and "any defendant" approach (no. 4) could readily be combined with the addition of the Rule 12 motions additions (no. 3). Alternatively (see no. 1) it's possible to insist that the rule means what it says. A committee note could mention that Rule 15(a) may provide an alternative route to a very similar result.

7. Focusing also on Rule 41(c)

As suggested in the Appendix, considering the changes discussed above regarding Rule 41(a)(1) might lead to discussion of possible changes to Rule 41(c) as well. But no submission has suggested changes to this rule. And Rule 41(c) does not appear to have generated much controversy.[34] As noted in the Appendix, it is somewhat curious that Rule 41(c) says "this rule" applies to unilateral dismissals of counterclaims, crossclaims, and third-party claims even though none of those inherently will involve dismissal of an entire "action."

The Federal Practice & Procedure treatise addresses Rule 41(c) by saying that it includes an "exception" for "voluntary dismissals," as follows:

> Federal Rule of Civil Procedure 41(c) provides, with an exception for certain voluntary dismissals discussed below, that the other subdivisions of Rule 41, which state the procedure for and the consequences of voluntary and involuntary dismissals, apply to the dismissal of a counterclaim, a crossclaim, or a third-party claim. Thus, subject to the voluntary dismissal exception, the [rule's provisions regarding dismissals] are applicable to the dismissal of a claim asserted by a defendant under Federal Rules of Civil Procedure 13 or 14 just as they are to claims asserted by a plaintiff.

9 Fed. Prac. & Pro. § 2374 at 952. One may be left to wonder why a unilateral dismissal of a "claim" by a defendant is not a "voluntary dismissal." Indeed, the last sentence of Rule 41(c) says it applies to a "voluntary dismissal under Rule 41(a)(1)(A)(i)," subject to the time limit stated in Rule 41(c), but does not say this must result in the dismissal of the entire "action." Given the seeming absence of litigation about this topic, however, it may be best not to venture into these waters.

[34] In the Federal Practice & Procedure treatise, for example, the discussion of Rule 41(a) occupies nearly 200 pages, and the discussion of Rule 41(b) on involuntary dismissals fills nearly 270 pages. The discussion of Rule 41(c) is about three pages long, largely occupied with the material quoted in text above.

The Federal Practice & Procedure treatise nevertheless does suggest that revising Rule 41(c) might be worthy of attention:

> The exception in Rule 41(c)'s second sentence for certain voluntary dismissals was necessary because the right of dismissal by notice, given by Rule 41(a)(1)(A)(i), is terminated by an answer or a summary judgment motion. This does not work for counterclaims, crossclaims, or third-party claims, since the defendant ordinarily will assert these with, or subsequent to the filing of, an answer. For this reason, Rule 41(c) provides that a voluntary dismissal by a defendant, or another claimant, of a counterclaim, crossclaim, or third-party claim must be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing. * * *
>
> In 1948, * * * [Rule 41(a)(1)(A)(i)] was amended to provide that a summary judgment motion also terminates the right to dismiss by notice. A similar change should have been made in Rule 41(c). If a summary judgment motion defeats the right of a plaintiff to dismiss an action, a similar motion should defeat the right to dismiss a counterclaim, crossclaim, or third-party claim. This parallelism was overlooked, however, in the 1948 amendments and the matter remains uncorrected.

Id., § 2374 at 952-54.

Correcting this oversight 75 years ago may warrant current action to achieve parallelism. Doing so might be more important if (as discussed above under heading 3) Rule 41(a)(1) is revised to terminate the unilateral power of plaintiffs to dismiss upon the service of certain Rule 12 motions, possibly magnifying the need for parallelism. On the other hand, retaining the requirement that the entire "action" be dismissed under Rule 41(a)(1)(A)(i), but permitting unilateral dismissals of "claims" by other parties may be warranted by the fact that parties in a defensive posture ordinarily do not choose the time or location of litigation.

APPENDIX — ILLUSTRATION OF ISSUES

The Subcommittee could look farther than the problem called to its attention by these two submissions. Indeed, a variety of questions might be raised by the current rule. This Appendix illustrates that point with footnotes to the current rule. It is offered here only to illustrate the range of questions the Committee might choose to address.

Rule 41. Dismissal of Actions[35]

(a) Voluntary Dismissal.

(1) ***By the plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(a), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff[36] may dismiss an action[37] without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment;[38] or

(ii) a stipulation of dismissal signed by all parties who have appeared.

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[35] The title of the rule is not fully accurate, since at least Rule 41(c) refers to dismissals of claims rather than the entire action. It may be that adding "or Claims" would suffice. In multiparty litigations, dismissal as to one plaintiff or one defendant can be viewed as a dismissal of a claim.

[36] Note: This provision does not seem to take account of the possibility that there is more than one plaintiff, or that when that is true one but not all plaintiffs want to dismiss unilaterally without prejudice.

[37] Note that this provision does not say the plaintiff may dismiss some but not all claims, and continue the action with regard to the remaining claims.

[38] This cuts way back on an old common law attitude under which plaintiff could pull the plug without prejudice after the action had proceeded to an advanced stage, perhaps even to trial.

But it could be tightened up. For example, perhaps unilateral dismissal should not be allowed if the defendant has filed a motion to dismiss. Such an exception might exclude motions under Rule 12(b)(1), (2), (3), (4), or (5) which do not challenge the merits of the claim asserted, or perhaps (7) (Rule 19(a) party not joined). Rule 12(b)(6) does nowadays attack the merits of the claim asserted. If the idea is that the defendant should be heard before dismissal without prejudice because it has invested effort into the case, it may often be that a Rule 12(b)(6) motion involves such effort.

On the other hand, other motion proceedings that can involve a great deal of effort by defendant may occur before the time to plead has arrived. A prominent and old example is *Harvey Aluminum, Inc. v. American Cyanimid Co.*, 203 F.2d 105 (2d Cir. 1953) (extensive proceedings on motion for preliminary injunction did not cut off plaintiff's right to dismiss without prejudice after the court denied the motion but before defendant filed its answer). The Subcommittee is not inclined to try to deal with this sort of situation in the rule. *See D.C. Electronics, Inc. v. Narton Corp.*, 511 F.2d 294 (6th Cir. 1975) ("The defendant can protect himself by merely filing an answer or motion for summary judgment."). And the Second Circuit seems largely to have limited the *Harvey Aluminum* decision to its facts.

It is also worth noting that Rule 15(a)(1)(B) permits the plaintiff to file an amended complaint once after service of "a motion under Rule 12(b), (e), or (f)."

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff[39] previously dismissed any federal- or state-court action[40] based on or including the same claim,[41] a notice of dismissal operates as an adjudication on the merits.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action[42] may be dismissed over the defendant's[43] objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

* * * * *

[39] Again a singular plaintiff.

[40] If "action" should be changed to "claim," should this provision be changed?

[41] This time, it's "claim." So perhaps a prior "action" was not dismissed, but the claim asserted in the present case was voluntarily dismissed from that earlier action. If the earlier action reached final judgment, that may preclude the assertion of the claim in this action if it is regarded as the same "claim" for claim preclusion purposes. See Restatement (Second) of Judgments, § 24 (adopting "transactional" approach to whether the current action involves the same claim). To the extent the issues raised and necessarily decided in the earlier action are identical with issues in the current action, issue preclusion might also apply.

[42] Again, it's "the action." But the rule goes on to say that perhaps the defendant's counterclaim remains pending, which suggests that the "action" is not really dismissed. This possibility raises the question whether the ongoing litigation is no longer the same "action." Does it get a new case number in the district court?

[43] Again, only a single defendant, not any defendant's objection.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule[44] applies to the dismissal of any counterclaim, crossclaim, or third-party claim.[45] A claimant's[46] voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served;[47] or

(2) if there is no responsive pleading, before evidence is introduced at a trial or hearing.[48]

III. Continuing work information Items

Besides the subcommittee projects described in Part II above, the Advisory Committee is addressing a number of additional issues, mainly in response to submissions.

A. Rule 7.1 — Recusal Disclosure

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

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

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[44] "This rule" seems to mean Rule 41(c), not the rest of Rule 41. But if it means Rule 41(a), how can it apply unless the entire "action" is dismissed? The Federal Practice & Procedure treatise quoted above under heading 7 addresses this point.

[45] As above with regard to plaintiff's initial claim against defendants, it is not clear from the rule's language that this voluntary dismissal may be done unilaterally if there are multiple responding parties on the counterclaim [remember that Rule 13(h) permits the counterclaimant to add additional parties under Rule 20 to a counterclaim or a crossclaim).

[46] This term is expansive to include the initiating party with regard to lots of different sorts of claims.

[47] Again, one might change this provision to include a Rule 12(b), (e), or (f) motion.

[48] This deadline is a lot like the old-fashioned liberty accorded plaintiffs to dismiss without prejudice right up until trial.

Whether this bill will advance is uncertain, but ongoing legislative attention to the general issues seem likely.

Two submissions to the Advisory Committee have addressed related concerns. 22-CV-H, from Judge Ralph Erickson (8th Cir.), addresses concerns raised by a number of judges about their holdings in Berkshire Hathaway. One problem is a result of this holding company's wide ownership of other companies. The example given is that, if Orange Julius is a party to a suit before a judge, under current Rule 7.1 Orange Julius would have to disclose that it is wholly owned by International Dairy Queen. But that disclosure would not go farther, even though Dairy Queen is wholly owned by Berkshire Hathaway, so the disclosure would not alert the judge to the problem if the judge had Berkshire Hathaway holdings.

This is not to suggest that Berkshire Hathaway is the only company that might present such problems; Judge Erickson points out that CitiGroup has a controlling interest in some 300 companies. So a judge who had shares of CitiGroup could face similar problems. Judge Erickson suggests that it would be useful to consider an amendment to Rule 7.1 to require disclosure of companies that hold the parent corporations in a parent relationship.

Currently, Rule 7.1 requires nongovernmental corporate parties to identify "any parent corporation and any publicly held corporation owning 10% or more of its stock." That would not seem to reach Berkshire Hathaway in the Orange Julius example, for the "parent corporation" was Dairy Queen. The fact Berkshire Hathaway apparently owns 100% of the stock of Dairy Queen would not seemingly make it a "parent corporation" of Orange Julius.

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

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

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

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

It may be that somewhat similar issues could be raised for the Appellate Rules Committee and the Bankruptcy Rules Committee, but this advisory committee may be a suitable venue for initial consideration of these questions. Whether the disclosure requirements of Rule 12.4 of the

Criminal Rules raise similar issues is less clear. But it does seem clear that difficult and delicate issues are presented, so considerable careful study seems necessary.

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

Failure of a party to check the judge's financial disclosures or to file a motion to recuse within 14 days (Magistrate Judge Barksdale's proposal) likely would not affect the statutory requirement to recuse, but that does not mean that amending the rule is unwise. For example, the amendment to Rule 7.1 that went into effect on Dec. 1, 2022, was designed to alert the judge to the possible absence of diversity resulting from having an LLC as a party to a diversity case. If there is no diversity of citizenship, the judge must dismiss (though sometimes the non-diverse party can be dropped and the case can continue among the remaining parties). The basic point is that the mandatory language of § 455(b) might be more effectively implemented by expanding the duty to disclose under Rule 7.1.

The fact that the database required by the Courthouse Ethics and Transparency Act has only recently begun to operate may be a reason for awaiting some experience with that database, at least before considering a rule that requires parties to consult it. It might also be relevant that those who request information from this database reportedly may have to provide information about themselves that is shared with the judge whose disclosure report is requested. On that score, one might say that the recent amendment to Rule 7.1 to deal with LLC issues might seem to focus on a party best able to provide the needed information, while a certification requirement imposed on parties with regard to possible judicial interests in other parties might not seem similarly targeted. But perhaps parties are better positioned to determine whether their interests are somehow tied to the judge's interests.

A July 1, 2022, New York Times story illustrates possible future developments. "Why Judges Keep Recusing Themselves From a N.Y.C. Vaccine Mandate Case," by Benjamin Weiser, reports that plaintiffs challenged the assignment of a case about requiring teachers to be vaccinated against COVID to three judges. Using disclosure forms, plaintiffs successfully challenged the first two judges on the ground they owned some Pfizer stock. The third judge refused to recuse herself on the ground that, though it seems she once did own such stock, she no longer owned it. Plaintiffs responded that she should "certify" that she no longer owns such stock.

At the October 2022 Advisory Committee meeting, these issues were introduced. Some concern was expressed about a rule requiring parties to certify that they have checked the judge's disclosures. At least some parties — self-represented litigants, for example — might experience difficulty in complying. And the likelihood that failure to check the judge's disclosures, or to file a recusal motion, would have no bearing on whether the statute required recusal was noted. Another possibility raised was whether these issues are well suited to resolution through the Rules Enabling Act process, or whether another Judicial Conference committee might more suitably address these problems. And it may be that some circuits are engaged in improving their systems for financial disclosures by judges.

A contrast drawn during the Advisory Committee meeting was to the conflicts checks needed in large law firms. Experience from those burdensome efforts at large law firms suggests that they might be more onerous for small law firms, much less self-represented litigants. Though shifting some responsibility to the parties to assist the court in this effort may be attractive, it may also be unduly burdensome for some parties, and some smaller law firms.

Another point made was that the Berkshire Hathaway example, though intriguing, may not convey the true complexity of such problems. As a holding company, it may have a singular profile in regard to its holdings. Other corporations may have substantial holdings in companies that have substantial holdings in other companies. With regard to LLCs, the focus of the recent amendment to Rule 7.1, one complication was that the "members" of LLCs are often themselves LLCs; the spider web can spread wide.

This report is intended only to introduce the issues possibly presented. Further work will be needed before any specific action is proposed. It may be that the Civil Rules Advisory Committee could take the "lead" in working on these issues, which may affect other sets of rules. In any event, it would be very helpful to learn the views of members of the Standing Committee on how to proceed with these matters, and perhaps guidance on who should proceed with them.

B. Rule 45 — Service of Subpoena

Judge Catherine McEwen (liaison to Civil Rules from Bankruptcy Rules) has submitted 22-CV-I, recommending an amendment to Rule 45(b)(1) on service of a subpoena. At present, Rule 45(b)(1) provides:

> **(1)** ***By Whom and How; Tendering Fees.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.

Judge McEwen's submission addresses the requirement of "delivering a copy to the named person," and suggests that service by U.S. Mail or overnight courier should be added as sufficient under this rule. She attaches copies of two cases from her district:

SEC v. Rex Venture Group, LLC, 2013 WL 1278088 (M.D. Fla., March 28, 2013) (holding that service by federal express and certified mail sufficed because the witness stated that he received the subpoena and "the purpose of service * * * has been effectuated").

Corrington v. Anheuser-Busch, Inc., 1999 WL 1043861 (M.D. Fla., Oct. 15, 1999) (finding service by U.S. Mail was sufficient and disagreeing with *In re Nathurst*, 183 B.R. 953, 955 (M.D. Fla. 1995), which stated that "a subpoena cannot be effectively served by mail even if sent by certified mail").

This is not the first time this provision of Rule 45(b)(1) has been raised. In 2016, the State Bar of Michigan raised the question (16-CV-B); in 2009 William Callahan, president of Unitel did so (09-CV-C), and in 2005 a committee of the New York State Bar Association submitted a 20-page memo on the question (05-CV-H).

It is worth mentioning at the outset that the method of serving a subpoena comes up in other sets of rules:

Bankruptcy Rule 9016: "Rule 45 F.R. Civ. P. applies in cases under the Code."

Fed. R. Crim. P. 17(d): "A marshall, a deputy marshall, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance."

One more thing worth noting at the outset is that Rule 45 applies to discovery subpoenas and subpoenas to appear and testify in court. It may be that the issues differ in the two contexts — testimony in court seems less flexible, both temporally and geographically.

A starting point, then, is the history of this issue before the Advisory Committee.

2009-13 Rule 45 project

Rule 45 was extensively revised effective 2013, the fruit of a multi-year project. At the beginning of this project, the Discovery Subcommittee (then chaired by Judge Campbell) reported at the Committee's April 2009 meeting that it had identified 17 possible issues to be studied (April 2009 agenda book at 255-73). No. 11 on that list was:

Whether hand delivery of the subpoena should be required. Comments received in the Committee's inbox had initially raised this issue. Although service of a summons and complaint may be made in any manner permitted by Rule 4, Rule 45 requires personal hand delivery to the person subpoenaed. Should the provisions for service be the same?

As the Rule 45 project moved forward, the Subcommittee focused more precisely on various issues. The minutes of the October 2009 Committee meeting reflect the following discussion pertinent to the current issue (p. 25):

> In-hand service: The earlier discussion noted the question whether in-hand service should be required for nonparty subpoenas. Judge Campbell [then Chair of the Discovery Subcommittee] noted that in-hand service may serve an important purpose. The nonparty is, after all, not a party to the action. Often that nonparty will not have a lawyer. The penalty for noncompliance is contempt. "We need a dramatic event to signal the importance of the subpoena."
>
> Professor Marcus observed that a recent decision held service by certified mail sufficient.
>
> The analogy to service of summons and complaint on an intended defendant was questioned by observing that it would be odd to allow substituted service of a subpoena on a state official in the mode often used in long-arm statutes.

Meanwhile, the Rule 45 Project moved forward on a number of issues, including making the duty to give notice to the other parties prior to serving the subpoena more prominent, permitting the "issuing court" to be the court in which the action was pending, reorganizing the place of compliance provisions into a new Rule 45(c) which made the place of service unimportant in determining where the subpoenaed person must appear, and authorizing transfer of a motion to compel in the district where compliance was demanded to the district where the underlying action was pending. A preliminary draft with proposed amendments addressing these matters was published in 2011 and, after modification in light of public comment, adopted with effective date of Dec. 1, 2013.

The "delivery" question was discussed during the March 2010 Committee meeting. For that meeting, the Subcommittee agenda report identified items among the 17 originally considered that were considered "off the list." At p. 14, the minutes of that meeting reflect the following:

> No Change: Two issues seem ready to be put aside without further work. One is whether Rule 45 should require personal, in-hand service of a subpoena. As compared to Rule 4 methods of service, the issue seems to be a theoretical point, "not a real problem." When service is on a nonparty, "the drama of personal service may be useful." * * *
>
> Discussion began with the means of serving a subpoena. It was noted that there is a good bit of district-court law allowing "Rule 5-ish" service. These rulings are made in response to objections to service by means other than delivery in hand. Do we want somehow to rein that in? It was further observed that Rule 45(b)(1) is ambiguous. It says only that "[s]erving a subpoena requires delivering a copy to the named person * * *." "[D]elivering" can easily encompass delivery by means other than in-hand service. If indeed it is wise to limit service to in-hand delivery, a couple of words could be added to the rule to make that direction unambiguous. Lawyers seem to think in-hand delivery is not a big problem.
>
> Discussion continued by asking whether the possible ambiguity is creating unnecessary work for courts — are they being asked to resolve the problem by ruling on motions to quash, or motions to compel? Do we need to add the "two words" to close this down? The response was that this does not seem to be a huge problem in terms of burdening the courts.

The issue may be a problem for the lawyer who cannot accomplish in-hand service. Sometimes other means of service are made with the judge's blessing. The most obvious problem arises when a nonparty is evading service. One response is to adopt state-court methods of service.

It was further noted that in practice, subpoenas are often mailed when the lawyer expects there will be no objection. In-hand service tends to be reserved for cases in which resistance is expected. The Subcommittee will consider this question further.

The issue disappeared from the record.[49]

Ongoing debates about manner of service
under Rule 45

It does seem that the current language in Rule 45(b)(1) is less than crystal clear. Consider, for example, *Hall v. Sullivan*, 229 F.R.D. 501 (D. Md. 2005), in which Judge Paul Grimm (also a former Chair of a Discovery Subcommittee) said (*id.* at 504, quoting *Doe v. Hershmann*, 155 F.R.D. 630, 631 (N.D. Ind. 1994)):

> Nothing in the language of the rule suggests in-hand personal service is required to effectuate "delivery," or that service by certified mail is *verboten*. The *plain* language of the rule requires only that the subpoena be delivered to the person served by a qualified person. Delivery connotes simply "the act by which the res or substance thereof is placed within the actual . . . possession or control of another."

As the 2005 submission from the New York State Bar Association showed, this ambiguity has received attention for some time. But comments during the Rule 45 project suggested the problem was not significant.

Possible solutions
U.S. Mail and Overnight Courier

Judge McEwen suggests that the rule could be rewritten to clarify that service by U.S. Mail or overnight courier suffices for service of a subpoena. Something like that might be accomplished along the following lines:

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[49] It might be worth noting that the Subcommittee held a mini-conference on Oct. 4, 2010, and that the notes to that event (in the agenda book for the November 2010 Committee meeting at 130) include the following:

> Another issue was the manner of service — should it be by hand delivery or by mail? This is handled differently in different cases. It was noted that the Subcommittee did discuss these issues, and concluded that there seemed no need for immediate action. A participant noted that "Some people prefer mail, regarding personal service as an intrusion."

> **(1)** ***By Whom and How; Tendering Fees.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person by in-hand delivery or by United States Mail that requires a return receipt or by commercial carrier and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.

It seems that use of U.S. Mail has been common but is far from universal. Whether "commercial carrier" would be specific enough in a rule could be debated — is Sam's Delivery Service as good as FedEx? A rule cannot appropriately name acceptable commercial carriers and exclude others (perhaps not yet founded at the time the rule is adopted). And some commentary during the Rule 45 project suggested that informal exchanges among counsel often hit upon solutions acceptable to the participants. It could prove challenging to devise an appropriate description for service by a means other than in-hand delivery or U.S. Mail.[50]

It may be that subpoenas to testify in court should be treated differently from subpoenas to attend a deposition or produce documents. During the 2009-13 examination of the rule there was some discussion of moving the use of subpoenas for discovery out of Rule 45 and into the 26-37 series, but that change seemed to present significant obstacles, and lead to unwanted duplication.

At least with subpoenas to testify in court, it may be that the court wants hand delivery before it is asked to hold a person who does not appear in contempt or issue a bench warrant. (Such concerns might be more important under Criminal Rule 17(d).[51]) But it is also worth noting that were Rule 45 to be changed nothing would prevent parties from relying on in-hand delivery,

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[50] Provisions elsewhere in the civil rules or in other rules may be useful referents. Here are some examples:

> Civil Rule 4(f)(2)(C)(ii), regarding service of summons outside this country, permits "using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt."
>
> Appellate Rule 25(c)(1), regarding non-electronic service: "(B) by mail; or (C) by third-party commercial carrier for delivery within 3 days."
>
> Bankruptcy Rule 7004(a) authorizes service of a summons and complaint in an adversary proceeding by any means authorized by multiple provisions of Civil Rule 4. Rule 7004(b)(1) authorizes service within the United States "by fist class mail postage prepaid * * * by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession."
>
> Criminal Rule 17(d) (also quoted in text) provides, with regard to service of a subpoena: "The server must deliver a copy of the subpoena to the witness and must also tender to the witness one day's witness-attendance fee and the legal mileage allowance."

[51] It might be noted that subpoenas to testify in criminal trials are not subject to geographical limitations like the ones that apply to subpoenas under Rule 45.

particularly if time was short or they anticipated a possible need to apply to the court for assistance in compelling compliance with the subpoena.

A consideration raised during the prior Rule 45 project was to ensure that the person subject to the subpoena is effectively notified of what it demands be done. During the public comment on the 2018 change to Rule 23(c)(2)(B), permitting notice of certification to a Rule 23(b)(3) class to class members to be sent by "United States mail, electronic means, or other appropriate means," public commentary included reports that some Americans (particularly those born after 1990?) may pay no attention to things received by U.S. Mail.

So there may be reasons to prefer the old-fashioned delivery in hand to U.S. Mail. If that were clearly correct, the rule could be amended to say so: "Serving a subpoena requires delivering a copy of the named person by in-hand delivery . . ."[52] That would seem to overcome the ambiguity in the current rule. At least for trial subpoenas and subpoenas to testify during a court hearing, it might be preferred.

An additional issue might be when service by alternative means is deemed effective. Relying on an "overnight courier" seems to ensure relatively prompt efforts to deliver to the location specified by the sender. Whether U.S. Mail is similarly prompt could be debated. Particularly for hearings in court, however, time may be of the essence. And delivery by U.S. Mail or overnight courier is no better than the address given by the party seeking service of the subpoena. In light of the possibility the address is wrong, that could be a reason to favor an explicit requirement of hand delivery.

Related issues might arise with Rule 45(b)(4), providing:

> **(4)** ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement, including a return receipt signed by the witness or a commercial carrier's proof of delivery to the witness, showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

Perhaps a return receipt obtained by the U.S. Postal Service would suffice as providing the "names of the persons served." Certified or Registered mail could provide similar assurance, particularly if it directed that delivery should only be to the named addressee. Devising a reliable directive could produce some challenges.

Permitting service under Rule 4

As mentioned at the beginning of this memo, one approach offered in 2009 was to make the requirements for service of a subpoena the same as for service of a summons and complaint under Rule 4. Certainly one can suggest that the stakes for a witness are not often as large as they

[52] Perhaps a model would be Rule 4(f)(2)(C)(i) for service outside this country in the absence of an international agreement on means of service — "delivering a copy of the summons and of the complaint to the individual personally."

are for a defendant, but Rule 4 service is permitted in a variety of manners not requiring delivery in hand.

One consideration is that service of a summons and complaint does not necessarily call for such immediate action as some subpoenas do. If a defendant does not file an answer or Rule 12 motion in time, the plaintiff can seek entry of default. But under Rule 55, courts are generally relatively lenient in setting aside such defaults, particularly if defendant raises some non-frivolous reason to doubt proper or effective service. Usually courts will set aside a default unless the plaintiff can show significant prejudice resulting from the failure to respond by the due date. And plaintiffs often agree to extend the time to respond. So a summons and complaint may in reality offer considerable lag time as compared, for example, with a subpoena to appear and testify at trial a few days after service.

Putting aside those considerations, it does seem that several provisions in Rule 4 might not be suitable for a subpoena.[53] Additional provisions of Rule 4 deal with serving corporations,

[53] Here are some examples:

Rule 4(d): This rule permits a defendant to waive service (and thereby to get extra time to respond) by completing and sending in a form. Defendant then must have at least 30 days "after the request was sent * * * by first-class mail or other reliable means" to waive service. Waiver is not the same as service, and Rule 4(d) should not apply to a subpoena.

Rule 4(e)(1) permits service as permitted by state law in the state where the district court is located. In California, at least, that would seem to permit use of Cal. Code Civ. Proc. § 415.40:

> A summons may be served on a person outside this state * * * by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of summons by this form of mail is deemed complete on the 10th day after such mailing.

That is not the method specified by § 1987(a) of the California Code for serving a subpoena: "the service of a subpoena is made by delivering a copy, or a ticket containing its substance, to the witness personally." It may be that research about methods of service of subpoenas in various state courts would be useful.

Rule 4(e)(2)(B) permits leaving a copy of the summons and complaint at "an individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there." That might be suitable under many circumstances, but what if the person subject to the subpoena is on the opposite coast, and the subpoena calls for action before the scheduled return from that travel?

Rule 4(e)(2)(C) authorizes service on "an agent authorized by appointment or law to receive service of process." Whether such authorization extends to service of a subpoena might be debated. In particular, if the appointment is due to the absence of the person from the jurisdiction for business or a vacation would not seem sufficient to compel compliance with a subpoena.

Rule 4(f): When service is on a person outside this country, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents may be used or, if not available, among other things, "delivering a copy of the summons and of the complaint to the individual personally."

partnerships, and governmental entities. It seems unlikely they are frequently subpoenaed to give testimony at trials, though a Rule 30(b)(6) deposition might be considered. In that instance, however, the entity is authorized to pick the person to deliver testimony, so service on the entity should not present great difficulties.

More general revision of service methods
to permit use of electronic means under Rule 4

As emphasized in the public comment period about the 2018 amendments to Rule 23(c) on giving notice to class members in 23(b)(3) class actions, the reality is that there has been a sea change in American methods of communication. That change may not matter for service of a subpoena. As introduced above, the solemnity and clarity of in-hand service may be important for subpoenas.

But the idea of permitting use of alternatives found sufficient for service of the summons and complaint may call for inaugurating a more comprehensive review of Rule 4's service methods.

For example, 21-CV-Y (from Joshua Goodbaum) proposes that Rule 4(d) on waiver of service be amended to permit the request to waive be served electronically. He says that is in fact used regularly.

In somewhat the same vein, district courts have authorized service by electronic means on defendants located outside this country under Rule 4(f)(2) or (3). *See, e.g.*, *Rio Properties, Inc. v. Rio International Interlink, Inc.*, 284 F.3d 1007 (9th Cir. 2002) (service by email); *Lexmark Int'l, Inc., v. INK Technologies Printer Supplies, LLC*, 295 F.R.D. 259 (S.D. Ohio 2013) (service by email); *St. Francis Assisi v. Kuwait Fin. House*, 2016 WL 5725002 (N.D. Cal., Sept. 30, 2016) (service by Twitter). In *Water Splash, Inc. v. Menon*, 137 S.Ct. 1504 (2017), the Court held that because the Hague Convention uses the verb "send" in connection with service of process, service by mail on a defendant residing in Canada was not forbidden by the Convention.

There are also signs of possible problems along this line. *See, e.g.*, *Anova Applied Electronics, Inc. v. Hong King Group, Ltd.*, 334 F.R.D. 465 (D. Mass. 2020), holding that service by email is inconsistent with the Hague Convention. In *Keck v. Alibaba.com, Inc.*, 330 F.R.D. 255 (N.D. Cal. 2018), the court held that plaintiff did not make an adequate showing to justify an order authorizing electronic service on a Chinese company because it had not tried to find the defendant's physical address or shown that service pursuant to the Hague Convention would not work.

Rule 4(g) deals with serving a minor or incompetent person and directs reliance on state law. Whether subpoenas are often used for such persons is unclear.

The Standing Committee approved emergency Rule 87(c)(1) at its June 2022 meeting. That rule provides another possible model for case-specific orders:

> The court may by order authorize service on a defendant described in Rule 4(e), (h)(1), (i), or (j)(2) — or a minor or incompetent person in a judicial district of the United States — by a method that is reasonably calculated to give notice.

This rule is largely modeled on the current provisions of Rule 4(f) for persons outside the United States. As noted above, that rule has been found to provide authority (on a sufficient showing) to support service by electronic means.

Experience in drafting Rule 87(c)(1) suggests it may soon be time to consider authorizing electronic service more generally of the summons and complaint. Under Rule 5(b), electronic service has become commonplace, and there have been submissions urging that pro se litigants be authorized to file electronically. Undertaking this study would likely involve considerable time and effort, and it is not clear that the time to do so has arrived.

* * * * *

In sum, these submissions raised a number of possible dispositions:

(1) Leave Rule 45(b)(1) as it is because it has proven sufficiently flexible.

(2) Revise Rule 45(b)(1) to specify that service by U.S. Mail, overnight courier, or some similar means suffices for a subpoena.

(3) Revise Rule 45(b)(1) to require hand delivery because that has an important signaling function.

(4) Commence a more general study of manner of service of the summons and complaint as well as of subpoenas.

During the Advisory Committee's October 2022 meeting, members were uncertain about actual experience or difficulties resulting from current Rule 45(b)(1). There were also suggestions of caution in proceeding before the Advisory Committee feels comfortable about the larger question of expanding the methods for service of original process under Rule 4.

The Advisory Committee's Discovery Subcommittee is expected to address these issues, and would benefit from any insights from members of the Standing Committee.

C. Rule 55 — Clerk "must" enter default, and sometimes default judgment

Questions have been raised about directives to court clerks in Rule 55 on entry of default and default judgment. As relevant, the rule presently provides:

> **(a) Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.
>
> **(b) Entering a Default Judgment.**
>
> > **(1)** ***By the Clerk.*** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

Though these provisions have been in the rule for a long time, initial reports indicate that in some courts the clerks do not often do what the rule says they "must" do, particularly as to entering judgment. At least in other circumstances, clerks are not asked to make determinations about such things as whether service was properly effected, whether the party against whom default was sought has failed to "plead or otherwise defend," and whether the claim is for "a sum certain or a sum that can be made certain by computation."

Compare Rule 41(a)(1) on voluntary dismissal, which requires that the clerk dismiss on plaintiff's application in the absence of a court order to that effect. The Federal Practice & Procedure treatise explains why only an unconditional dismissal will do:

> Because Rule 41(a)(1) operates in this simple and routine fashion, the plaintiff may not attach conditions to the voluntary dismissal. If conditioning a notice were allowed, the clerk would have to construe the condition "and perhaps even become a fact-finder to determine when the condition is satisfied."

9 Fed. Prac. & Pro. § 2363 at 517, quoting *Hyde Const. Co. v. Koehring Co.*, 388 F.2d 501, 507 (10th Cir. 1968).

One recent case suggests that Rule 55 could present similar challenges for the clerk. In *Leighton v. Homesite Ins. Co. of the Midwest*, 580 F.Supp.3d 330 (E.D. Va. 2022), there were two defendants. One of them filed an answer, but the other one did not. Plaintiff obtained entry of default from the clerk against the defendant that failed to respond. Plaintiff then moved the court for entry of judgment against the defaulted defendant.

Plaintiff's claim in the *Leighton* case was for damage to his property, asserted against both the moving company (which was in default) and the insurance company that issued plaintiff's policy of homeowner's insurance. It was not entirely clear whether plaintiff claimed that the two defendants were jointly liable or severally liable. But it was clear from the insurer's answer that it

intended to defend against liability, including raising the possibility that plaintiff's losses were actually the result of his own wrongdoing. Presumably this was not a suit for a sum that could be made certain by computation, but even if it were that might not have resolved the problem.

The district court refused to enter judgment by default, noting that Rule 54(b) says that "when multiple parties are involved the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." In this case, the judge found that there was a reason for delay under *Frau v. De La Vega*, 82 U.S. 552 (1872), because there was a risk of inconsistent judgments against different defendants.

The FJC is gathering experience from various courts about their interpretation of Rule 55. It may be that an amendment to the rule would save the clerk from becoming a "fact-finder." And it also may be that something useful can be learned by exploring the reasons that have led some courts to depart from the rule text, often to allow only a judge to enter a default judgment, and at least in some courts to allow only a judge to enter a default. During the Advisory Committee's October 2022 meeting, there was a brief discussion including an example of a court in which the clerk enters defaults but judges enter default judgments, and another in which judges enter both defaults and default judgments.

Further information from the FJC is expected. Any experience or insights from members of the Standing Committee would assist the Advisory Committee.

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

At the Advisory Committee's March 2022 meeting, there was a report about consideration of proposals to consider changes to the current rule provisions on demanding a jury trial. One submission (15-CV-A) raised concerns about the 2007 style change to Rule 81(c)(1) regarding removed cases. Another (16-CV-F, from Judge Susan Graber and then-Judge Neil Gorsuch) proposed "switching the default" in Rule 38 into accord with Criminal Rule 23(a), which mandates a jury trial whenever the defendant is entitled to a jury trial unless the defendant waives in writing, the government consents, and the court approves. A concern was that one possible explanation for the declining frequency of civil jury trials has been failure to make a timely jury demand.

The FJC undertook docket research regarding the frequency of jury trial demands in civil cases, the frequency of termination after commencement of a civil jury trial, and the frequency of orders for a jury trial despite failure to make a timely demand. The initial FJC report did not show that the rule requirements to demand a jury trial are a major factor in whether jury trial occurs. Type of case seems more prominent. For example, more than 90% of product liability cases show a jury demand, while only about 1% of prisoner cases show such a demand. And the incidence of actual jury trials is affected by settlement. An action may settle before the deadline for demanding a jury. Nor does the study show whether settlement occurs more frequently in cases in which a timely jury demand was not made, something that may not appear on reviewing docket entries. And the effect of facing a prospect of jury trial might be ambiguous in terms of affecting willingness to settle.

This FJC report will become part of a more general report on civil jury trials focusing in part on the variation (or lack thereof) in jury trial rates across districts. That work is ongoing, and these items remain on the Committee's agenda. The declining rate of civil jury trials is much lamented, but it is not clear that the Civil Rules concerning jury demands contribute to that decline. The FJC's ongoing study is a major project mandated by Congress about different rates of jury trials in different districts. During the October 2022 meeting of the Advisory Committee, it was noted that this study has already progressed to a point that shows that jury trials have occurred in some cases even though the docket for those cases does not show a jury demand. It may be that completion of the FJC study will not shed further light on the desirability of amending Rule 38 or Rule 81(c), but the topics remain on the agenda pending completion of the FJC study.

E. Standards and procedures for deciding ifp status

Disparate practices in handling in forma pauperis applications have recently received academic attention. One example is Professor Hammond's article Pleading Poverty in Federal Court, 128 Yale L.J. 1478 (2019). Professor Hammond (Indiana U.) and Professor Clopton (Northwestern) have submitted 21-CV-C, raising various concerns about divergent treatment of ifp petitions in different district courts.

There is strong evidence of divergent practices that seem difficult to justify. But it is far from clear this is a rules problem: it appears that no Civil Rule presently addresses these issues,[54] and ifp status is generally set by statute. It is thus not clear that there is a ready rules solution to this problem.

Devising a nationwide solution would prove very challenging. For example, the stark disparities in cost of living in different parts of the country make articulating a national standard a major challenge. And in terms of court operations, there may be significant inter-district differences (such as whether there is a sufficient supply of *pro se* law clerks to evaluate applications for fee waivers) that bear on how ifp petitions are handled. But one might have difficulty explaining significant divergences between judges in the same district in resolving such applications.

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

Though the case can be made for action on this front, then, the content of the action and the source for directions are not clear. The Administrative Office has convened a working group examining these issues. It may well emerge that the Court Administration and Case Management

[54] Professor Hammond's article, cited in text, does focus on Rule 4(c)(3) and also mentions Rule 83, but those rules do not prescribe criteria or procedures for ifp determinations. Professor Hammond also mentions Appellate Rule 24(a), which imports into appellate practice the district court determination regarding ifp practice. A major focus of the article, however, is on A.O. forms used by different courts (perhaps by local rule; see Rule 83).

Committee is the appropriate vehicle for addressing these issues rather than the somewhat cumbersome Rules Enabling Act process. Presently, for example, there is some concern about the varying application of different Administrative Office forms that are used in different districts to review ifp applications. Those forms do not emerge from the Enabling Act process.

During the Advisory Committee's October 2022 meeting, attention was drawn to prisoner cases, and also to an Administrative Office memorandum to court clerks about when to close prisoner cases. In cases governed by the Prison Litigation Reform Act, it is said, the filing fee becomes the minimum settlement value. It was also suggested that the Court Administration and Case Management Committee is better equipped than the rules process to address ifp practices. No specific further action is presently contemplated, but the Advisory Committee would benefit from the views of the Standing Committee.

For the present, the topic remains on the agenda pending further developments.

F. Class representative awards

Discussion during the October 2022 meeting raised an issue not initially included on the Advisory Committee's agenda — the ongoing viability of "incentive awards" to class representatives in class actions.

In *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020), a panel of the Eleventh Circuit, by a 2-1 vote, held that "incentive awards" for class representatives in class actions were prohibited under two 19th century Supreme Court decisions. In 2022, the court of appeals voted not to rehear the case *en banc*. *Johnson v. NPAS Solutions, LLC*, 43 F.4th 1138 (11th Cir. 2022). Meanwhile, the Ninth Circuit and the Second Circuit took a different view of incentive awards. See *Hyland v. Navient Corp.*, 48 F.4th 110 (2d Cir. 2022); *In re Apple Device Performance Litigation*, 50 F.4th 769 (9th Cir. 2022). At least some lower courts resisted the Eleventh Circuit's conclusion. *See, e.g.*, *Somogyi v. Freedom Mortg. Corp.*, 495 F.Supp.3d 339, 354 (D.N.J. 2020) ("Until and unless the Supreme Court or the Third Circuit bans incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances.").

A petition for certiorari regarding the Eleventh Circuit decision has been filed in the Supreme Court. *See Johnson v. Jenna Dickenson* (no. 22-389) (Oct. 25, 2022). During the Advisory Committee's October 2022 meeting, the issue received some discussion. One suggestion was that "service award" would be a more appropriate term than "incentive award." It is impossible to determine the importance of this development at this time, and the topic will be carried forward on the Advisory Committee's agenda pending developments.

G. Filing under seal in court

The Advisory Committee has received several submissions urging that it consider rule amendments to recognize that there is a difference between the grounds sufficient to justify a Rule 26(c) protective order guarding the confidentiality of materials exchanged in discovery and the grounds for sealing court records, which are affected by both common law and First

Amendment considerations relevant to public access to court proceedings and court records. The Discovery Subcommittee has considered possible amendments to Rule 26(c) and Rule 5(d) to recognize the disparate issues involved. The Administrative Office has embarked on a more general study of filing under seal, and the Subcommittee has stayed its hand pending completion of that effort. The general subject continues to receive attention in Congress as well.[55]

IV. Items to be removed from agenda

A. Rule 63 — Successor Judge

Submission 21-CV-R from Judge Richard Hertling of the U.S. Court of Federal Claims was prompted by the interpretation of Rule 63 of the Rules of the Court of Federal Claims in *Union Telecom, LLC v. United States*, 2021 WL 3086212 (Fed. Cir., July 22, 2021). This rule of the Court of Federal Claims, Judge Hertling notes, is "parallel and identical" with Civil Rule 63.

Judge Hertling suggests that, "in light of the broader use of technology that has been accelerated by the pandemic," it might be useful to consider a small change to Rule 63 to clarify the latitude available to a district judge when the original judge cannot continue and a party asks the new judge to recall a witness already heard by the original judge.

This submission was initially presented at the Advisory Committee's March 2022 meeting. Some Committee members then expressed concern that Rule 63 might be applied to require recalling a witness when the circumstances did not justify recall. It was retained on the agenda to afford a chance to consider that possibility. Among other things, one of the law clerks for Judge Flaum (7th Cir.) provided a research memo on Rule 63 experience. Though that memo relates to work that may in the future be appropriate with other rules, it does not point up any existing difficulty with Rule 63 that might call for action presently. This report, therefore, is provided to apprise the Standing Committee of possible future issues regarding other rules, particularly Rule 43(a).

By way of background, as suggested by Judge Hertling, it is useful to consider the recent genesis of Rule 87, which involved discussion of similar issues with regard to other rules in which the question seems to arise considerably more frequently than under Rule 63. Specifically, the CARES Act Subcommittee, chaired by Judge Jordan, gave considerable attention to whether the Rule 43(a) requirement that witnesses testify live in person during trials and hearings in the courtroom should be softened.

Besides directing that "the witnesses' testimony must be taken in open court," Rule 43(a) does also say: "For good cause in compelling circumstances and with appropriate safeguards, the

[55] Section 12 of the proposed Judicial Ethics and Anti-Corruption Act of 2022, S. 4177 and H.R. 7706, is entitled "Restrictions on Protective Orders and Sealing of Cases and Settlements." It would add a new 28 U.S.C. § 1660, placing limits on judicial orders granting confidentiality in cases in which "the pleadings state facts that are relevant to the protection of public health or safety." It is not clear whether this legislation will move forward.

court may permit testimony in open court by contemporaneous transmission from a different location." That provision is strikingly more restrictive than the Rule 63 provision on recalling witnesses. Reports in the legal press indicate, however, that remote testimony was actually used in many proceedings that have occurred since March 2020, including some trials.

After considerable discussion, the CARES Act Subcommittee concluded that there was no need to propose that after a declaration of a judicial emergency by the Judicial Conference, an "Emergency Rule 43(a)" be applied to relax the ordinary constraints on remote testimony during hearings and trials. In large measure, this decision reflected the considerable latitude available under the current rule, which had seemingly well addressed the set of problems the pandemic imposed on the courts. Subsequent reports about remote proceedings appear to confirm this view.

At the same time, there was also discussion of the question whether there should be serious consideration of amending Rule 43(a), without regard to emergency conditions, to relax its limits on remote testimony. A related question was whether Rule 30(b)(4) should be amended to facilitate taking remote depositions.

This submission is not about either Rule 43(a) or Rule 30(b)(4), which proved to be the pressure points during the CARES Act Subcommittee deliberations. Changing those rules could be very important and could affect a large number of cases. Indeed, "Zoom depositions" occurred hundreds of times, or more probably thousands of times, during the pandemic, and it is likely that at least dozens and maybe hundreds of witnesses provided remote testimony at trials or hearings. It may soon be worth reconsidering the provisions in those rules outside the emergency context.

Rule 63 does not appear to deal with issues of similar consequence, although there is surely a parallel between a judicial decision based on the recorded testimony of a witness who testified before a different judge and reliance on remote testimony in a court proceeding.

Rule 63 provides, in full:

> If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a 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. The successor judge may also recall any other witness.

The problem identified by Judge Hertling is that the rule does say the successor judge "must" recall a witness under some circumstances. Before turning to the Federal Circuit decision that prompted the submission, it seems useful to consider the latitude already built into the rule. The judge "must" recall a witness whose testimony is "material" and "disputed" and who is "available" to testify "without undue burden." To substitute "may" for "must" in the rule would virtually nullify that sentence of the rule, so it could be deleted, and the last sentence could be retained without the words "also" and "other," so that it would read: "The successor judge may

recall any witness." Perhaps "must" could be replaced by "should," but the cited unpublished Federal Circuit decision does not offer strong support for such a change.

Union Telecom v. United States, 2021 WL 3086212 (Fed. Cir., July 22, 2021), involved a claim for a tax refund paid in relation to sales of prepaid phonecards. There was a three-day bench trial before a judge who subsequently retired, and the case was reassigned to a different judge of the Court of Federal Claims. But since the judge who presided over the trial had not yet decided the case when she retired the decision fell to the successor judge.

Union Telecom argued the successor judge had to recall two witnesses who had testified at the trial. The successor judge assured the parties he was familiar with the record and well-positioned to render a decision without rehearing witnesses. But he did not invoke the rule's criteria when refusing to recall the witnesses.

The Federal Circuit noted that the rule says "must," and that "there are only three listed exceptions: (1) the testimony is immaterial, (2) the testimony is undisputed, or (3) there would be an undue burden on the witness." But the successor judge "did not mention any of the three exceptions in its opinion. * * * Because the trial court must find one of the three exceptions in order to refuse to recall witnesses, we hold that the trial court erred in its reasoning."

Immediately after finding this error, however, the court of appeals also said the error was harmless: "None of the testimony that the plaintiff requested be reheard could have altered the outcome of the case." That certainly sounds like saying the testimony would not have been material. The refund claim was defeated by uncontradicted evidence that no taxes had been paid. The request to recall witnesses named witnesses who had no knowledge whether the taxes had been paid. The error was failure to articulate this conclusion in the vocabulary of Rule 63.

As noted above, Rule 63 could be rewritten on this point to change "must" to "should." Perhaps that change would afford useful protection in some instances to trial court latitude to decide whether to recall witnesses.

But there seems little reason to make this change. To begin, the change would not have affected the ultimate resolution of the unreported case that prompted the submission. In addition, it appears that Rule 63 is involved in very few decisions. The entire coverage of Rule 63 in the Federal Practice & Procedure treatise occupies 14 pages. By way of contrast, the treatise devotes about 950 pages of text and 250 pages of pocket parts to Rule 26. Most of the discussion of Rule 63 in the treatise is about standards for recusal, evidently the main reason why cases are reassigned (not due to retirement or health problems). See § 2922 (9 of the 13 pages on the rule). The pocket part to this bound volume (published in 2012) cites one case on Rule 63 during this ten-year period.

Regarding the issue raised by this submission, the treatise has only one sentence, repeating what the rule says about recalling witnesses and citing no cases involving this provision. See § 2921 at 740. In order to determine whether there was a problem not reflected in the treatise, the Committee was able to obtain the research help of one of the law clerks for Judge Flaum (7th Cir.). Though her memo certainly raises issues about the sorts of concerns that have arisen under

Rules 43(a) and 30(b)(4), mentioned above, and about the possible desirability of considering rule changes to facilitate and perhaps regulate remote proceedings, it does not identify a current problem with Rule 63. Instead, as the memo's conclusion notes, it is "part of a broader policy choice on the extent the judiciary wishes to carry forward remote testimony." That is an important topic, but Rule 63 is not the vehicle to consider it.

At its October 2022 meeting, the Advisory Committee removed the proposal from its agenda without dissent.

B. Rule 17(a) and (c)

Christopher Cross submitted a proposal to amend Rule 17(a) or (c). As presently written, Rule 17(a)(1) and (c)(1) address the requirement that a case must be prosecuted in the name of the real party in interest:

> **(a) Real Party in Interest.**
>
> **(1)** ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:
>
> * * * * *
>
> **(C)** a guardian;
>
> * * * * *
>
> **(c) Minor or incompetent person**
>
> **(1)** ***With a Representative.*** The following representatives may sue or defend on behalf of a minor or incompetent person:
>
> * * * * *
>
> **(A)** a general guardian;
>
> **(B)** a committee;
>
> **(C)** a conservator; or
>
> **(D)** a like fiduciary.
>
> * * * * *

Mr. Cross asserts that he is "a duly appointed legal guardian of an adult ward with severe disabilities" pursuant to Mo. Rev. Stats. § 475.120.3. Accordingly, he asserts, under Rule 17 he may file and litigate a case in federal court as real party in interest for the benefit of the ward.

It does seem that Rules 17(a)(1)(C) and 17(c)(1)(A) should enable Mr. Cross to do these things. Though the determination is made under Rule 17, it seems that the Missouri statutory authority he cites would cover him:

> State substantive law usually provides that the general guardian of a minor or incompetent has the right to maintain an action in the guardian's own name for the benefit of the ward. Under a rule or statute of this type, the general guardian is the real party in interest for purposes of Rule 17(a)(1).

6A Fed. Prac. & Pro. § 1548.

Mr. Cross's signature block says he holds the following degrees: M.A., C.M.A., and D.S.P. and that he is a "Court appointed guardian, with full powers & Federally appointed payee." Nevertheless, Mr. Cross asserts, "two federal trial court judges I have encountered have flat out refused to comply with the rule." He also says that even though he presented one judge with "8th Circuit case law on the subject," that judge "refused to permit me to litigate the case for damages and injuries that I suffered, and those that my ward also suffered."

Mr. Cross therefore purposes that Rule 17(a) and (c) "must explicitly state that the guardian is duly entitled to act pro se in filing and litigating a case for and on his own behalf" independent of naming the ward as well.

In terms of the real party in interest rule, it does not seem that Mr. Cross sees any actual problem with the current rule but believes some district judges are not following it. Perhaps an appeal is his correct remedy; a rule change does not seem to be a cure since the rule already appears to authorize what he wants. Indeed, he recognizes that the rule does what he wants but he says some judges refuse to follow it.

It appears that the difficulty Mr. Cross has encountered in part is that judges insist that he obtain an attorney to act on behalf of the ward rather than proceeding in propria persona. So he also urges that the rule be amended to "state in explicitly clear terms that a duly court appointed legal guardian is permitted to act pro se in filing and litigating the case." Beyond that, he says that "if a trial court is to assert that the guardian must be represented by an attorney, then the trial court shall (not may, or can) appoint the guardian an attorney."

The rules recognize that parties may proceed without counsel. *See, e.g.*, Rule 11(a) (requiring that every paper filed in court be signed by counsel "or by the party personally if the party is unrepresented"). Whether a court may limit representation by a guardian who acts without counsel might be debated, but Rule 17(a)(1) says such people may "sue in their own names," which would presumably include doing so without counsel. 28 U.S.C. § 1654 also generally permits parties to "plead and conduct their own cases personally or by counsel." There seems to be no reason to believe Rule 17 was intended to interpret § 1654, one way or the other. The proper interpretation of that statute seems better left to the courts than addressed in a rule.

There may be some inherent authority for a court to insist that a litigant be represented by counsel, but nothing in the Civil Rules appears to address that question directly. And to the extent there is such authority, Mr. Cross does not seem to want a Civil Rule to limit it.

Instead, the main thing Mr. Cross proposes is that the rules require courts to appoint (and pay for?) legal representation when they insist upon it. There are statutory provisions about appointment of counsel to represent parties in civil cases in some circumstances, and many district courts have made local arrangements for counsel available to be appointed when necessary. But these arrangements are not required or regulated by the Civil Rules.

At its October 2022 meeting, the Advisory Committee decided without dissent to remove this matter from its agenda.