ADVISORY COMMITTEE
ON
CIVIL RULES

October 12, 2022

AGENDA
Meeting of the Advisory Committee on Civil Rules
October 12, 2022

OPENING BUSINESS

ACTION ITEMS

INFORMATION ITEMS

Subcommittee Reports and New Items

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robert M. Dow, Jr. United States District Court Chicago, IL	Professor Edward H. Cooper University of Michigan Law School Ann Arbor, MI
	Associate Reporter
	Professor Richard L. Marcus University of California Hastings College of the Law San Francisco, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON CIVIL RULES

Chair	Reporter
Honorable Robert M. Dow, Jr. United States District Court Chicago, IL	Professor Edward H. Cooper University of Michigan Law School Ann Arbor, MI
	Associate Reporter
	Professor Richard L. Marcus University of California Hastings College of the Law San Francisco, CA

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Pittsburgh, PA

Honorable Jennifer C. Boal
United States District Court
Boston, MA

Honorable Brian M. Boynton*
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United States Department of Justice
Washington, DC

David J. Burman, Esq.
Perkins Coie LLP
Seattle, WA

Honorable David C. Godbey
United States District Court
Dallas, TX

Honorable Kent A. Jordan
United States Court of Appeals
Wilmington, DE

Honorable M. Hannah Lauck
United States District Court
Richmond, VA

Honorable R. David Proctor
United States District Court
Birmingham, AL

Honorable Robin L. Rosenberg
United States District Court
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United States Court of Appeals
Duncansville, PA

Honorable Catherine P. McEwen
(*Bankruptcy*)
United States Bankruptcy Court
Tampa, FL

Clerk of Court Representative

Carmelita Reeder Shinn, Esq.
Clerk
United States District Court
Oklahoma City, OK

Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Date
Robert M. Dow, Jr. Chair	D	Illinois (Northern)	Member: 2013 Chair: 2020	---- 2023
Cathy Bissoon	D	Pennsylvania (Western)	2021	2024
Jennifer C. Boal	M	Massachusetts	2018	2024
Brian M. Boynton (ex-officio)	DOJ	Washington, DC	----	Open
David J. Burman	ESQ	Washington	2021	2023
David C. Godbey	D	Texas (Northern)	2020	2023
Kent A. Jordan	C	Third Circuit	2018	2024
M. Hannah Lauck	D	Virginia (Eastern)	2022	2025
R. David Proctor	D	Alabama (Northern)	2021	2024
Robin L. Rosenberg	D	Florida (Southern)	2018	2024
Joseph M. Sellers	ESQ	Washington, DC	2018	2024
A. Benjamin Spencer	ACAD	Virginia	2017	2023
Ariana J. Tadler	ESQ	New York	2017	2023
Helen E. Witt	ESQ	Illinois	2018	2024
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
Richard Marcus Associate Reporter	ACAD	California	1996	Open

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. Bernice B. Donald *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Honorable D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Honorable Gary Feinerman (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert James Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. M. Hannah Lauck *(Civil)*

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Administrative Analyst

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Dr. Emery G. Lee
Senior Research Associate
(Civil)

Timothy T. Lau, Esq.
Research Associate
(Evidence)

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 7, 2022

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) met in a hybrid in-person/virtual meeting in Washington, DC on June 7, 2022, with the public and certain members attending by videoconference. The following members were in attendance:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Judge Carolyn B. Kuhl
Professor Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

Professor Catherine T. Struve attended as reporter to the Standing Committee.

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell,
Associate Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Standing Committee included: Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Rules Committee Chief Counsel-Designate; Bridget Healy, Rules Committee Staff Acting Chief Counsel; Scott Myers and Allison Bruff, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff; Burton S. DeWitt, Law Clerk to the

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco. Andrew Goldsmith was also present on behalf of the DOJ for a portion of the meeting.

Standing Committee; Dr. Emery G. Lee, Senior Research Associate at the FJC; and Dr. Tim Reagan, Senior Research Associate at the FJC.

OPENING BUSINESS

Judge Bates called the meeting to order and welcomed everyone. He noted that Deputy Attorney General Lisa O. Monaco would not be able to attend, but he welcomed Elizabeth Shapiro and thanked her for attending on behalf of the Department of Justice (DOJ). He thanked several members whose terms were expiring following this meeting, including Standing Committee members Judge Frank Hull, Peter Keisler, and Judge Jesse Furman. Judge Bates also thanked Judge Raymond Kethledge and Judge Dennis Dow for their service as chairs of the Criminal Rules and Bankruptcy Rules Advisory Committees respectively. He welcomed Tom Byron, who would be joining the Rules Office as Chief Counsel in July, and Allison Bruff, who had joined as counsel. Judge Bates congratulated Professor Troy McKenzie on his appointment as Dean of New York University Law School. In addition, Judge Bates thanked the members of the public who were in attendance by videoconference for their interest in the rulemaking process.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the minutes of the January 4, 2022 meeting.**

JOINT COMMITTEE BUSINESS

Emergency Rules

Judge Bates introduced this agenda item, which concerned final approval of proposed new and amended rules addressing future emergencies. Specifically, the Appellate, Bankruptcy, Civil, and Criminal Advisory Committees were requesting approval of amendments to Appellate Rules 2 and 4, as well as promulgation of new Bankruptcy Rule 9038, new Civil Rule 87, and new Criminal Rule 62.

Professor Struve thanked all the chairs and reporters of the Advisory Committees for their extraordinary work on this project, and especially Professor Capra for leading the project. This project was in response to Congress's mandate to consider rules for emergency situations. In regard to the uniform aspects of these rules (*i.e.*, who declares an emergency, the basic definition of a rules emergency, the duration of an emergency, provisions for additional declarations, and when to terminate an emergency), most of the public comments focused on the role of the Judicial Conference in declaring a rules emergency. One commentator supported the decision to centralize emergency-declaration authority in the Judicial Conference; others criticized the decision in various ways. The Advisory Committees carefully considered this both before and after public comment. The uniform aspects remain unchanged post-public comment.

Professor Capra noted two minor disuniformities that remained within the emergency rules. Proposed Appellate Rule 2(b)(4), concerning additional declarations, was styled differently than the similar provisions in the proposed Bankruptcy, Civil, and Criminal emergency rules. And proposed Civil Rule 87(b)(1), concerning the scope of the emergency declaration, was worded differently than the similar provisions in the proposed Bankruptcy and Criminal emergency rules.

Proposed Civil Rule 87(b)(1), as published, stated that the declaration of emergency must "adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed Bankruptcy and Criminal rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question.

Appellate Rules 2 and 4. Turning to the point raised by Professor Capra, Professor Hartnett noted that proposed amended Rule 2(b)(4), as set out on lines 27 to 29 of page 89 of the agenda book, used the passive voice ("[a]dditional declarations may be made") instead of the active voice used by the other emergency rules ("[t]he Judicial Conference … may issue additional declarations"). He stated that the Appellate Rules Advisory Committee agreed to change the language to bring it into conformity with the other emergency rules.

A judge member focused the group's attention on proposed Appellate Rule 2(b)(5)(A) (page 90, line 36). In the event of a declared emergency, this provision would authorize the court of appeals to suspend Appellate Rules provisions "other than time limits imposed by statute and described in Rule 26(b)(1)-(2)." The member asked whether the "and" should be an "or." The rule, as drafted, could be read as foreclosing suspension of only those time limits that are both imposed by statute and described in Rule 26(b)(1) or (2). Professor Hartnett stated that the use of "and" was intentional. Current Appellate Rule 2 permits suspension (in a particular case) of Appellate Rules provisions "except as otherwise provided in Rule 26(b)," and Appellate Rules 26(b)(1) and (2) currently bar extensions of the time for filing notices of appeal, petitions for permission to appeal, and requests for review of administrative orders. The proposed Appellate emergency rule, by contrast, is intended to permit extensions of those deadlines, so long as they are set only by rule and not also by statute. Changing "and" to "or" would eliminate that feature of the proposed rule. Professor Struve noted that she is unaware of any deadline set by both statute and an Appellate Rule other than those referenced in Rule 26(b).

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Appellate Rules 2 and 4, with the revision to proposed Appellate Rule 2(b)(4) (lines 27-29) as discussed above.**

New Bankruptcy Rule 9038. Judge Dennis Dow introduced proposed new Bankruptcy Rule 9038. The proposed new rule would authorize extensions of time in emergency situations where extensions would not otherwise be authorized. The Bankruptcy Rules Advisory Committee received only one relevant public comment, which was positive and not specific to the Bankruptcy rule. He requested the Standing Committee give its final approval to proposed new Rule 9038 as published.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved proposed new Bankruptcy Rule 9038.**

New Civil Rule 87. Judge Robert Dow introduced proposed new Civil Rule 87. The Civil Rules Advisory Committee received a handful of comments. The CARES Act Subcommittee considered these comments and determined that no changes were necessary, and the Advisory Committee agreed. The Advisory Committee made some small changes concerning bracketed

language in the committee note, but otherwise the rule looks similar to the language that came before the Standing Committee prior to publication for public comment.

Professor Cooper noted a pair of changes to the portion of the committee note shown on page 124 of the agenda book. Emergency Rule 6(b)(2)(A) authorizes a court under a declared rules emergency to "apply Rule 6(b)(1)(A) to extend" the deadlines for post-judgment motions. (Ordinarily, Civil Rule 6(b)(2) forbids a court from extending those deadlines.) Rule 6(b)(1)(A) authorizes a court, "for good cause, [to] extend the time … with or without motion or notice if the court acts, or if a request is made, before the original time *or its extension* expires." (emphasis added.) Prior to the Standing Committee meeting, a judge member had pointed out that, as published, the text of the rule, by referring to Rule 6(b)(1)(A), authorizes sequential extensions (that is, a court could grant an extension under Rule 6(b)(1)(A) and, before time expired under that extension, grant a second extension). But, the member observed, the committee note did not reflect this possibility. Professor Cooper agreed with this assessment of the committee note. The Advisory Committee therefore agreed to add language (in the first and fifth sentences of the relevant committee note paragraph) clarifying that such further extensions were possible. Separately, the Advisory Committee had decided to delete the first sentence of the next paragraph of the committee note, and to combine the remainder of that paragraph with the following paragraph to form one paragraph.

Discussion then turned to the wording of proposed Civil Rule 87(b)(1). A practitioner member noted that as he read the proposed Criminal and Bankruptcy emergency rules, if the Judicial Conference failed to specify which emergency provisions it was invoking or exempting, the default was that all the emergency provisions would go into effect. However, proposed new Civil Rule 87(b)(1)(B) by its terms worked differently: "The declaration must … adopt all the emergency rules … unless it excepts one or more of them." Under this wording, the member suggested, if the declaration did not specify which provisions it was adopting, it would be an invalid declaration. Professor Cooper stated that, originally, the relevant portion of Rule 87(b)(1) had said simply that "[t]he declaration *adopts* all the emergency rules unless it excepts one or more of them," thus setting the same default principle as the proposed Bankruptcy and Criminal rules. But in the quest for uniformity in wording across the three proposed emergency rules, the word "must" had been moved up into the initial language in Rule 87(b), which had the effect of inserting "must" into proposed Rule 87(b)(1)(B). Professor Cooper explained that (for the reasons set forth on page 111 of the agenda book) it was not possible for Civil Rule 87(b)(1)(B) to use identical wording to that in the proposed Bankruptcy and Criminal emergency rules. The Bankruptcy and Criminal provisions directed that the emergency declaration "must … state any restrictions on" the emergency authority otherwise granted by the relevant emergency rule—a formulation that would not be appropriate in the Civil rule given the indivisible nature of each particular Civil emergency rule. Professor Cooper expressed the hope that the Judicial Conference would remember to specify which courts were affected and which rules it was adopting by its emergency order. Judge Bates added that if the rule would require the Judicial Conference to make a specific declaration for Civil that need not be made for the other emergency rules, members should consider whether it would cause any problems.

Professor Struve suggested that there were actually two uniformity questions at issue—stylistic uniformity, and a deeper uniformity as to the substance. Uniformity on the substance, she

offered, could be achieved through revisions to Civil Rule 87(b)(1) (on pages 116-17)—namely, deleting the word "must" from line 10 and instead inserting it at the beginning of lines 11 and 15, and changing "adopt" at the beginning of line 12 to "adopts." Under that revised wording, if the declaration failed to specify any exceptions, it would adopt all the emergency rules in Rule 87(c)—thus achieving the same default rule as the Bankruptcy and Criminal provisions.

Professor Capra, however, stated that this proposed revision would deepen rather than alleviate the uniformity problem. He predicted that the good sense of the Judicial Conference would surmount any problem with the language of the rule as published. Professor Coquillette agreed that the Judicial Conference would know what it needed to do to declare a Civil Rules emergency. Judge Bates added that he believed the Rules Office would inform the Judicial Conference of the procedures it needed to follow to declare a Civil Rules emergency. Professor Struve expressed her confidence in the meticulousness of the Rules Office, but she questioned why the rulemakers would want to impose an additional task on the Rules Office in the event of an emergency. Making it as simple as possible for all actors to act in an emergency situation seemed desirable.

Judge Bates highlighted two goals: First, the desire for uniformity. Second, the desire to not have to ask the Judicial Conference to do something unique with respect to the Civil Rules. Judge Bates thought that Professor Struve's suggestion would accomplish the second goal, although it would offend uniformity. And, he suggested, the proposed rule as published already offended uniformity. Therefore, the question under debate was not about *creating* disuniformity but rather fixing one issue while continuing the lack of uniformity.

A practitioner member stated that she agreed with the proposed change. The change would make the rule read more clearly while also safeguarding against something being overlooked in an emergency. Professor Marcus said that the goal of the Advisory Committee was to make it as easy as possible for the Judicial Conference to declare a rules emergency, with all the emergency rules going into effect unless the Judicial Conference explicitly excluded a rule. To the extent the rule as written did not do so, it would be good to make changes to get there. A judge member agreed that the rule should not create more work for people to do in order to declare a rules emergency.

Judge Robert Dow stated that he believed Professor Struve's proposed change was friendly and therefore acceptable to the Advisory Committee. While it would add a disuniformity to the proposed new Rule 87, that disuniformity occurred in a place where the rule already was not uniform in relation to the other emergency rules. He asked the Standing Committee to grant final approval to proposed new Civil Rule 87, with the noted changes both to the committee note and to lines 10 through 15 of the rule text.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved proposed new Civil Rule 87.**

New Criminal Rule 62. Judge Kethledge introduced proposed new Criminal Rule 62. The Criminal Rules Advisory Committee received ten or so public comments, some of which were overlapping. He highlighted one change to the committee note plus two of the public comments.

First, the change to the committee note concerned a passage addressing proposed Rule 62(d)(1)'s requirement that courts provide "reasonable alternative access" to the public when conducting remote proceedings. The note as published stated that "[t]he rule creates a duty to provide the public, including victims, with 'reasonable alternative access.'" DOJ requested that the note be revised to mention the Crime Victims' Rights Act (CVRA). A pair of comments opposed this suggestion, and one of those comments requested deletion of the phrase "including victims." The latter phrase had been included to ensure that district courts did not overlook the requirements of the CVRA when holding remote proceedings, not to suggest an order of priority among observers of remote proceedings. Accordingly, the Advisory Committee revised the note as shown on page 161 of the agenda book by deleting the phrase "including victims" and by adding a sentence directing courts to "be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act." This language reminds courts to consider both the First and Sixth Amendments' guarantees of public access, in addition to any statutory rights, such as the CVRA. Later in the meeting, an attorney member suggested changing "be mindful of" to "comply with," and Judge Kethledge (on behalf of the Advisory Committee) acquiesced in that change.

Second, one of the public comments concerned proposed new Rule 62(d)(2), which provides that, if "emergency conditions limit a defendant's ability to sign[,] defense counsel may sign for the defendant if the defendant consents on the record." A district judge suggested that this language be revised to allow the court to sign for the defendant as well. The Advisory Committee did not support this suggestion. There was no demonstrated need to have the court sign for the defendant when counsel would be perfectly able to do so. The Advisory Committee was particularly concerned that this would infringe upon the attorney-client relationship. And the Advisory Committee was concerned that this would allow the court to sign a request to hold felony plea or sentencing hearings remotely under proposed new Rule 62(e)(3)(B).

Third, the Advisory Committee received public comments regarding proposed new Rule 62(e)(3)(B), which addresses holding felony plea or sentencing hearings remotely. This is by far the most sensitive subject that Rule 62 addresses. A defendant's decision to plead guilty and the court's decision to send a person to prison are the most important proceedings that happen in a federal court. The Advisory Committee has an institutional perspective that remote proceedings for pleas and sentencing truly should be a last resort; holding such a proceeding remotely is always regrettable, even if it is sometimes necessary. A court does not have as much information when proceeding remotely as it would have in a face-to-face proceeding. The Advisory Committee has a strong concern that there are judges who would want to hold remote sentencing proceedings even when not necessary. These concerns underpinned Rule 62(e)(3)(B), which set as a requirement for a remote felony plea or sentencing that "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." The goal of this language was to make sure the decision was unpressured and therefore truly the decision of the defendant. Comments from some judges argued, on logistical grounds, that this provision should be revised to allow the court to sign for the defendant. However, the Advisory Committee rejected those suggestions, noting that counsel for the defendant could sign the request on the defendant's behalf.

At the Advisory Committee meeting, the liaison from the Standing Committee had suggested that the committee note be revised to make clear that the requisite writing could be provided at the outset of the plea or sentencing proceeding itself. Judge Kethledge invited this member of the Standing Committee to discuss his suggestion. The member observed that Rule 62(e)(3)(B) required a "request" from the defendant, but he did not think that the rule required the request be made at any specific time. However, he suggested, it was possible to read the rule as requiring that the request be made *before* the hearing, and the note should be revised to resolve this ambiguity. He suggested (based on the challenges of arranging opportunities for counsel to confer with their clients during the pandemic) that the note say that, while it was preferable to provide the request in advance of the hearing, it could be provided at the hearing if the defendant had an opportunity to confer with counsel.

Judge Bates questioned the use of "requests" in Rule 62(e)(3)(B). If that language required that the idea of proceeding remotely must originate with the defendant, he suggested that could cause practical problems in cases where the remote option is first mentioned by the judge or the prosecutor.

A judge member stated that requiring the request in advance of the hearing could create logistical problems: a need to monitor the docket to check for the required request, and potential last-minute cancellations for lack of the required request. Also, this member suggested, the focus should be on whether the defendant freely consented to the remote proceeding, not on whether it was the defendant who had requested the remote proceeding. Later, Professor Beale stated that the Advisory Committee members recognized that requiring the request in advance of the hearing might not be efficient and could slow things down, but members felt strongly that it was important to protect the ability of the defendant to consult freely with counsel before making the decision to proceed remotely. As to the challenges presented by districts that cover large areas, Professor Beale recalled that the Advisory Committee was persuaded by a member's argument that the rules should not relax standards to accommodate infrastructure failures.

Judge Kethledge noted that the Advisory Committee was not unanimous regarding whether the request in writing must precede the proceeding, although most members of the Advisory Committee (including Judge Kethledge) thought that the request to hold the proceeding remotely must precede the plea or sentencing proceeding. The rule requires that the request be effectuated by a writing—which can only be true if the court has received the writing. Furthermore, another prerequisite for remote proceedings (including felony pleas and sentencings) is Rule 62(e)(2)(B)'s requirement that the defendant have an "opportunity to consult confidentially with counsel both before and during the proceeding." If Rule 62(e)(3)(B) permitted a request to be made midstream in a proceeding (rather than only beforehand), in such midstream instances there would have been no opportunity for consulting prior to the proceeding. Additionally, the contrast between Rules 62(e)(1) and 62(e)(2)(B) (which both require an opportunity for the defendant to consult with counsel "confidentially") and Rule 62(e)(3)(B) (which makes no mention of confidentiality) suggests that the consultation and request under Rule 62(e)(3)(B) must come before the proceeding.

The practical concern, Judge Kethledge explained, was that allowing mid-proceeding requests would open the door to exactly the type of judicial pressure that the request-in-writing

requirement was meant to prevent. During a remote proceeding, the judge could solicit from the defendant a request for the plea or sentencing to proceed remotely. A resulting request from the defendant would not be the unpressured, deliberate decision that the Advisory Committee insisted upon before the defendant gives up the very important right to an in-person proceeding. Permitting the request to occur during rather than before the hearing could greatly undermine the purpose of the writing requirement—namely, to ensure that the emergency rule permits only a narrow exception to the normal in-person requirement. The Advisory Committee was therefore opposed to such a change, which had not been requested by the DOJ and which was opposed by the defense bar.

Professor King reported that defense counsel members of the Advisory Committee had recounted pressure during the pandemic to get their clients to consent to proceed remotely. One noted that two judges in her district had expressed frustration regarding defendants who refused to proceed remotely. Another member reported that CJA members in her district themselves felt pressure to proceed remotely, and having a barrier between the court and the client was important. Another stressed the need for distance between the request in writing and the plea hearing, to give the attorney time to explain the choice to the defendant. It would not be fair to the defendant to be sent to a breakout room with everyone waiting in the main room for the defendant to come back with a "yes," after being asked to proceed remotely by the person with sentencing authority. Not a single member of the Advisory Committee was interested in advancing the proposal to revise the committee note (*i.e.*, to state that the requisite writing could be provided at the outset of the plea or sentencing).

Professor Beale added that to hold a felony plea or sentencing proceeding remotely under Rule 62(e)(3)(C), the court would need to find that "further delay … would cause serious harm to the interests of justice." This would happen only rarely, such as where the defendant faced only a very short sentence.

Judge Bates reiterated his concern that the meaning of "requests" was not entirely clear. Did it require the court to make a finding that the idea of proceeding remotely originated from the defendant and not, for example, some comment the court may have made at a prior proceeding?

Noting that the Standing Committee's membership did not include any criminal defense lawyers, a practitioner member stated that he found compelling the real-world concerns of the defense bar that were credited by the Advisory Committee and expressed by Judge Kethledge, Professor King, and Professor Beale. So he favored requiring that the request come from the defendant before the proceeding begins. But he did not think the rule as drafted was clear on this point, and he stressed the need for clarity so as to avoid future litigation.

Another attorney member agreed as to the timing question, and advocated adding the words "in advance" to reflect that. But, he argued, in the real world the idea will usually not come from the defendant, so he advocated saying "consents" instead of "requests." A judge member predicted that the term "requests" would generate litigation due to the dearth of caselaw on point; by contrast, he said, much caselaw addressed the meaning of "consent." He also suggested that promulgating a form would help to forestall litigation over what was required.

The judge member who had suggested that the committee note be revised to state that the writing could be provided at the outset of the proceeding acknowledged that judges had in the past advocated the use of remote proceedings for what the Advisory Committee had found to be insufficient reasons. He noted, however, that Rule 62 would be in effect only during an emergency—which diminished his concern over the possible misuse of remote proceedings under it. As a data point, this judge member stated he was more often rejecting requests from defendants to proceed remotely than approving them. The member clarified that his concern was not with scenarios in which the idea of holding the plea proceeding comes up midstream during another remote proceeding. Rather, the member's concern was with another possible scenario that was based on his own experiences early in the pandemic: A plea allocution is scheduled to take place remotely, but just prior to the hearing, counsel asks to go into a breakout room to speak with the defendant in order to get the not-yet-provided signature on the request to proceed remotely. The judge does not join the main hearing room until after defendant and counsel return from the breakout room. The member argued that the rule appears to permit the proceeding to go forward in this circumstance, and that this avoids the significant delay that could be entailed in scheduling a new proceeding.

Another judge member noted that defense counsel, not solely judges, may sometimes pressure a defendant to consent to a remote plea or sentencing hearing. Judges, this member suggested, should be alert to this risk. The member noted the difficulty of drafting rules to address emergencies, which may present strange circumstances.

A practitioner member said that the Standing Committee should not make changes that would not have made it through the Advisory Committee. If the Standing Committee wished to make such a change, it should consider remanding the proposal to the Advisory Committee—but that would prevent Rule 62 from proceeding in tandem with the other proposed emergency rules. Both for that procedural reason and on the substance, this member supported the position taken by the Advisory Committee. As to adding language to require that the request in writing occur "in advance," the practitioner member suggested that no such language could foreclose a judge from attempting to streamline the process. For example, a requirement of a request "in advance" could be met by making the request during a status conference in the morning, and reconvening later that day for the plea or sentencing.

A judge member emphasized that judges vary in their ability; in her circuit, there were sometimes even defects in plea colloquies. Given the critical nature of plea and sentencing proceedings, this member thought that the request needs to be in advance of the proceeding. If the request need not be made in advance, it will become routine. The rule should say "in advance," and possibly even state *how far* in advance, such as seven days. She acknowledged, however, that answering the how far question would likely require sending the rule back to the Advisory Committee, so she was not making that suggestion.

A practitioner member agreed with the proposal to insert "in advance." It is inherently important to the integrity of the criminal justice system that plea changes and sentencing hearings be done in-person. As a civil practitioner, this member periodically witnesses criminal sentencing proceedings that occur before the civil matters. The very best judges are those who take the most

care with sentencing proceedings. It gives dignity to the individuals involved in the process, including their families. This does not translate well to videoconferencing.

A judge member who had earlier stated that requiring the request in advance of the hearing could create logistical problems suggested that the rule should be clear about what it requires and that, in her view, it should permit bringing the document to the hearing itself. This member pointed out that efficiency is also important for defendants; a more cumbersome process (requiring a request in advance) may delay closure (and release) for defendants who will receive time-served sentences.

Judge Bates stated that he counted four proposed changes. First, to change "requests" to "consents." Second, to specify that the requisite writing must be signed by the defendant "in advance." Third, and contrary to the second suggestion, to revise the committee note to say that the writing could, if necessary, be provided at the outset of the proceeding. Fourth was the suggestion that the rule be clarified—a suggestion that might be addressed by the decision on the other proposed changes. Judge Bates suggested that it would be helpful to learn the sense of the committee on these proposals. He was not inclined to suggest remanding the proposal to the Advisory Committee unless the latter thought a remand was a good idea—and even then, he surmised, the Advisory Committee would want to know what the Standing Committee thought on each of these issues. Judge Kethledge said he believed the Advisory Committee would be fine with the second suggestion (inserting "in advance"). As to the first suggestion, the Advisory Committee's choice of "requests" would not foreclose situations where the idea itself came from someone other than the defendant, it simply required that the defendant come forward to trigger the remote proceeding—that is, the rule was meant to protect against situations where the decision to proceed remotely came after a discussion with the *judge*.

Professor Capra suggested that a compromise might be to insert "in advance" but also change "requests" to "consents." He urged the Standing Committee not to remand the entire proposal over this issue, and he suggested that his proposed compromise would not require republication. Professor Coquillette agreed with Professor Capra concerning the lack of need for republication.

A judge member noted that during the colloquy at the start of the hearing, the judge will make sure the defendant consents to proceeding remotely. Therefore, she recommended keeping the word "requests." The request would come in advance, and the consent would be confirmed via the colloquy at the hearing. Citing a recent example of a case in which the defendant challenged the voluntariness of his consent to proceed remotely, Judge Kethledge reiterated the importance of foreclosing the option of deciding midstream in a remote proceeding to convert the proceeding into a remote plea or sentencing proceeding.

Upon motion by a member, seconded by another: **The Standing Committee voted 10-3 to insert "before the proceeding and" in proposed new Criminal Rule 62(e)(3)(B)** on line 109 (page 154 in the agenda book). ("Before" and "proceeding" were substituted for "in advance of" and "hearing" for reasons of style and internal consistency.)

Upon motion by a member, seconded by another: **The Standing Committee voted 7-6 to change "requests" to "consents" in proposed new Criminal Rule 62(e)(3)(B) (p. 154, line 110), with conforming changes to be made to the committee note (p. 168).**

Judge Bates then invited the Standing Committee to vote on whether to give final approval to proposed new Criminal Rule 62, with the changes to Rule 62(e)(3)(B) that the Committee had just voted to make, conforming changes to the committee note (p.168), and the substitution of "comply with" for "be mindful of" in the Advisory Committee's revised note language concerning Rule 62(d)(1) (p.161).

Upon motion by a member, seconded by another: **The Standing Committee unanimously approved proposed new Criminal Rule 62.**

Judge Bates thanked the Standing Committee and the Advisory Committees, including the chairs and reporters, and specifically thanked Professor Capra and Professor Struve, for their work on all the emergency rules. He noted that the rules have now reached the Judicial Conference, and have done so particularly quickly.

Due to scheduling constraints, the Criminal Rules Advisory Committee provided its report (described infra p. 13) prior to the lunch break. After the lunch break, the Standing Committee resumed its discussion of joint committee business.

Juneteenth National Independence Day

Judge Bates introduced this agenda item, which concerned the proposal to add Juneteenth National Independence Day to the lists of specified legal holidays in Appellate Rules 26(a)(6)(A) and 45(a)(2), Bankruptcy Rule 9006(a)(6)(A), Civil Rule 6(a)(6)(A), and Criminal Rules 45(a)(6)(A) and 56(c).

A practitioner member suggested that the semi-colon in the proposed amendment to Bankruptcy Rule 9006 was a typo, and the Bankruptcy Rules Advisory Committee agreed to substitute a comma.

Professor Capra noted that the committee notes were not uniform between the rule sets. He suggested that the reporters confer after the meeting to achieve uniformity.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously gave final approval (as technical amendments) to the proposed amendments to Appellate Rules 26 and 45, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rules 45 and 56, subject to the committee notes being made uniform.**

Pro Se Electronic Filing Project

Professor Struve introduced this item. She thanked the Federal Judicial Center (FJC) for its superb research work and its report ("Federal Courts' Electronic Filing By Pro Se Litigants") which was available online. Judge Bates had asked Professor Struve to convene the reporters for

the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees, along with members from the FJC, to discuss suggestions relating to electronic filing by self-represented litigants, and this working group had met in December 2021 and March 2022. One issue is whether self-represented litigants have access to the court's case management / electronic case filing ("CM/ECF") system. Among the findings by the FJC is that such access varies by type of court, with the courts of appeals most willing to grant such access to self-represented litigants, the district courts less so, and the bankruptcy courts least of all. On the other hand, a number of bankruptcy courts are using an "electronic self-representation" system. This raises the question of whether the four Advisory Committees may select different approaches for differing levels of courts.

Another question is that of service on persons who receive notice through CM/ECF. When a non-CM/ECF user files a document, the clerk's office will subsequently enter it into CM/ECF; the system then sends a notice of electronic filing to parties that are CM/ECF users. Yet many courts continue to require the non-CM/ECF filer to nonetheless serve the filing on other parties, whether or not those parties are CM/ECF users.

Professor Struve noted that the working group was planning a further discussion sometime in the summer with the hope of teeing up topics for discussion by the four Advisory Committees at their fall meetings.

Dr. Reagan noted that in the civil context there are two different groups of self-represented people who file—prisoners and non-prisoners—and these groups represent significantly different concerns and challenges. Additionally, the concept of electronic filing does not necessarily mean using CM/ECF; other methods include email or electronic upload, but these methods can pose cybersecurity issues. CM/ECF is difficult even for attorneys to use, and at least one district requires attorneys to initiate cases via paper filings rather than via CM/ECF.

Electronic Filing Deadline Study

Judge Bates provided a brief introduction to this information item concerning electronic filing times in federal courts. He noted that an excerpt from the FJC's recently-completed report on this topic appeared in the agenda book starting at page 185. The report had not yet been reviewed by the subcommittee that had been formed to consider whether the time-computation rules' presumptive electronic-filing deadline of midnight should be altered.

Dr. Reagan noted that the FJC studied the frequency of filings at different times of day. While results varied from court to court, the FJC found that most filing occurred during business hours, but that a significant amount did occur outside of business hours. He noted that in the bankruptcy courts, there were a significant number of notices filed robotically overnight.

The FJC began a pilot survey of judges and attorneys, but it gathered limited data because it closed the survey due to the pandemic. Continuing the survey under current conditions would be unproductive because opinions and experiences during the pandemic would not be representative of future non-emergency practice. But the limited pilot-study data did show a distinction between the views of sole practitioners and those of big-firm lawyers. The latter were more likely to favor moving the presumptive deadline to a point earlier than midnight.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge provided the report of the Advisory Committee on Criminal Rules, which met in Washington, DC on April 28, 2022. For the sake of brevity, Judge Kethledge highlighted only the Juneteenth-related amendments to Criminal Rules 45 and 56 (pp. 11–12, supra) and one other technical amendment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 810.

Action Item

Final Approval

Rule 16(b)(1)(C)(v). Judge Kethledge introduced the only action item, which was a proposed technical amendment (p. 814) to fix a typographical error in a cross-reference in Rule 16(b)(1)(C)(v), addressing defense disclosures. The version of the rule with the typo is set to take effect on December 1, 2022, absent contrary action by Congress.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously gave final approval to the proposed amendment to Rule 16(b)(1)(C)(v) as a technical amendment.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Advisory Committee on Evidence Rules, which met in Washington, DC on May 6, 2022. The Advisory Committee presented nine action items: three rule amendments for which it was requesting final approval and six rule amendments for which it was requesting publication for public comment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 866.

Action Items

Final Approval

Rule 106. Judge Schiltz introduced the proposed amendment to Rule 106 shown on page 879 of the agenda book. Rule 106 is the rule of completeness. When a party introduces part of a statement at trial, and that partial statement may be misleading, another party can introduce other parts of the statement that in fairness ought to be considered. The proposed amendment would fix two problems with the existing rule.

First, suppose a prosecutor introduces part of a hearsay statement and the completing portion does not fall within a hearsay exception. There is a circuit split as to whether the completing portion can be excluded under the hearsay rules. This amendment would resolve the split by making explicit that the party that introduced the misleading statement could not object to

completion on grounds of hearsay. But the completing statement could still be excluded on other grounds.

Second, current Rule 106 only applies to "writings" and "recorded statements," not oral statements. This means that for an oral statement, the court needs to turn to the common law. Unlike other evidentiary questions, here the common law has only been partially superseded by the Federal Rules of Evidence. This is particularly problematic because completeness issues will generally arise during trial when there is no opportunity for research and briefing.

The Advisory Committee received a handful of comments, all but one of which were positive. One public comment spurred a change to the rule text. The proposal as published would have provided for the completion of "written or oral" statements, a phrase that the Advisory Committee had thought would cover the field. But as a public comment pointed out, that phrase failed to encompass statements made through conduct or through sign language. As a result, the Advisory Committee decided to delete the current rule's phrase "writing or recorded" so that the rule will refer simply to a "statement."

A judge member asked whether there would be Confrontation Clause issues if a criminal defendant introduced part of a statement and the government was allowed to introduce the completing portion over a hearsay objection. Professor Capra stated that for a Confrontation Clause issue to arise the completing portion would have to be *testimonial* hearsay, which would be quite rare. If the issue did arise, the Supreme Court in *Hemphill v. New York*, 142 S. Ct. 681, 693 (2022), left open the possibility a forfeiture might apply. The idea would be that the rule of completeness might be applicable as a common law rule incorporated into the Confrontation Clause's forfeiture doctrine. Judge Schiltz added that the proposed amendment did not purport to close off a potential Confrontation Clause objection.

Another judge member stated that the proposed amendment was helpful because a judge at trial should not have to look to the common law to resolve issues of completion.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 106.**

Rule 615. Judge Schiltz introduced the proposed amendment to Rule 615. Rule 615 requires that upon motion, the judge must exclude from the courtroom witnesses who have yet to testify, unless they are excepted from exclusion by current subdivisions (a) through (d). Rule 615 is designed to prevent witnesses who have not yet been called from listening to others' testimony and tailoring their own testimony accordingly. The current rule does not speak to instances where a witness learns of others' testimony from counsel, a party, or the witness's own inquiries. Thus, in some circuits, if the court enters a Rule 615 order without spelling out any additional limits, the sole effect is to physically exclude the witness from the courtroom. But other circuits have held that a Rule 615 order automatically forbids recounting others' testimony to the witness, even when the order is silent on this point. In those circuits, a person could be held in contempt for behavior not explicitly prohibited by either rule or court order. The proposed amendment would add a new subdivision (b) stating that the court's order can cover disclosure of or access to testimony, but it must do so explicitly (thus providing fair notice).

The proposed amendment also makes explicit that when a non-natural person is a party, that entity can have only one representative at a time excepted from Rule 615 exclusion under the provision that is now Rule 615(b) and would become Rule 615(a)(2). This would put natural and non-natural persons on an even footing. Under the current rule, some courts have allowed entity parties to have two or more witnesses excepted from exclusion under Rule 615(b). The amended rule would not prevent the court from finding these additional witnesses to be essential (see current Rule 615(c)), or statutorily authorized to be present (see current Rule 615(d)).

The Advisory Committee received only a handful of public comments on the proposal, all of which were positive.

Focusing on proposed Rule 615(b)(1)'s statement that "the court may … by order … prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom," a judge member asked whether there was any consideration of specifying whom the prohibition runs against? Judge Schiltz answered that trial testimony might be disclosed by a range of people, such as an attorney, a paralegal, or even the witness's spouse. It would be tricky to delineate in the rule. Professor Capra added that it would be a case-by-case issue, and the judge would specify in the Rule 615 order who was subject to any Rule 615(b)(1) prohibition.

A practitioner member noted that in longer trials, there may be situations where a corporate party needs to change who its designated representative is. Professor Capra responded that the committee note recognizes the court's discretion to allow an entity party to swap one representative for another during the trial.

The same practitioner member echoed the judge member's previous suggestion that Rule 615(b)(1) should explicitly state who is prohibited from disclosing information to the witness. Professor Capra stated that the rule does not need to say that; rather, that is an issue that the court should address in its order. Judge Schiltz added that the judge in a particular case is in the best position to determine in that case who must not disclose trial testimony to a witness.

The practitioner member turned to a different concern, focusing on the portion of the committee note (the last paragraph on page 888) that dealt with orders "prohibiting counsel from disclosing trial testimony to a sequestered witness." The committee note acknowledged that "an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions" of professional responsibility, assistance of counsel, and the right to confrontation in criminal cases. The member expressed concern that the proposed rule would permit such orders without setting standards or limits to govern them. The member acknowledged that this vagueness was a conscious choice, but argued that it gave the judge too much discretion. Judge Schiltz responded that such discretion already exists today under the current rule. And specifying standards for such orders in the rule would be nightmarishly complicated. Judge Bates added that all the proposed rule would do is tell judges that if they want to do anything more than exclude a witness from the courtroom, the order needs to explicitly spell that out.

Another practitioner member stated he supports the proposed rule change. The proposal gives clarity, while leaving discretion to the judge to tailor an order on a case-by-case basis.

However, he questioned whether the language in the committee note was too strong in stating that an order governing disclosure of trial testimony "raises" the listed issues. Based on suggestions from this member and the other practitioner member who had raised concerns about the passage, Professor Capra agreed to redraft the paragraph's second sentence to read: "To the extent that an order governing counsel's disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, the court should address those questions on a case-by-case basis."

Ms. Shapiro turned the Committee's attention to the committee note's discussion (page 889) of proposed Rule 615(a)(3). She suggested that the words "to try" be removed from the note's statement that an entity party seeking to have more than one witness excepted from exclusion at one time is "free to try to show" that a witness is essential under Rule 615(a)(3). "Free to try" suggests that the showing is a difficult one, when really it is routine for courts to allow the United States to except from exclusion additional necessary witnesses such as case agents. A judge member questioned whether "is free to show" is the correct phrase. Should the note say "must show" or "may show" instead? Discussion ensued concerning the relative merits of "must," "may," "should," and "needs to." Professor Capra and Judge Schiltz agreed to revise the note to say "needs to show."

Professor Bartell suggested that a committee note reference to "parties subject to the order" (page 888) be revised to say "those" instead of "parties" (since a Rule 615(b) order can also govern nonparties). Professor Capra agreed and thanked Professor Bartell.

The Advisory Committee renewed its request for final approval of Rule 615, with the three amendments to the committee note documented above.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 615.**

Rule 702. Judge Schiltz introduced this action item. Rule 702 deals with expert testimony and the proposed amendment would address two problems. The first relates to the standard the judge should apply when deciding whether to admit expert testimony. Current Rule 702 sets requirements that must be met before a witness may give expert testimony. It is clear under the caselaw and the current Rule 702 that the judge should not admit expert testimony until the judge—not the jury—finds by a preponderance of the evidence that the requirements of Rule 702 are met. However, there are a lot of decisions from numerous circuits that fail to follow that requirement, and the most common mistake is that the judge instead asks whether *a jury* could find by a preponderance of the evidence that the requirements of Rule 702 are met. As a result, very often jurors are hearing expert testimony that they should not be permitted to hear. Under a correct interpretation of current Rule 702, the proposed amendment does not change the law; it merely makes clear what the rule already says.

Second, the proposed amendment addresses the issue of overstatement, *i.e.*, where a qualified expert expresses conclusions that go beyond what a reliable application of the methods to the facts would allow. Overstatement issues typically arise with respect to forensic testimony in criminal cases. For example, the expert may say the fingerprint on the gun *was* the defendant's, or

the bullet *came from* the defendant's gun, when that level of certainty is not supported by the underlying science. For some time, the Advisory Committee has been debating and considering whether to address this issue via a rule amendment. Some members thought current Rule 702 gives attorneys all the tools they need to attack issues of overstatement, but that they were not using them. Other members thought that amending the rule would serve an educational goal and draw attention to this problem. After considerable debate, the Advisory Committee decided to amend Rule 702(d). Currently, the subdivision requires that "the expert has reliably applied the principles and methods to the facts of the case." The proposed amendment would require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The hope is that this change in rule language, alongside the guidance in the committee note, will shift the emphasis and encourage judges and parties to focus on the issue of overstatement, particularly concerning forensic evidence in criminal cases.

The Advisory Committee received over 500 public comments regarding the proposed amendments to Rule 702. Additionally, about two dozen witnesses spoke on the proposal at the Advisory Committee's hearing.

Professor Capra summarized the public comments. Viewed quantitatively, they were mostly negative. There was a perceptible difference of opinion between plaintiffs' and defendants' lawyers. Many comments used identical idiosyncratic language. If commenters were copying and pasting language from others' comments, that could explain some of the volume. A number of comments evinced a misunderstanding of current law. For example, many comments said the proposed amendment would shift the burden from the opponent to the proponent—an assertion premised on the incorrect idea that the burden is now on the opponent to show that proposed expert testimony is unreliable. Such misunderstandings support the need for the proposed amendment.

Additionally, many comments criticized the published proposal's use of the "preponderance of the evidence" standard. Particularly, parties were concerned that the standard meant that judges could only rely on *admissible* evidence. However, Rule 104(a) explicitly states that the court can consider inadmissible evidence. The Advisory Committee therefore did not think that these critiques had merit. Nonetheless, because the published language had proven to be a lightning rod, the Advisory Committee chose to change the language, but not the meaning, of the proposed rule text, which (as presented to the Standing Committee) requires that the "proponent demonstrates to the court that it is more likely than not" that the Rule's requirements are met.

The phrase "to the court" in that new language responded to another set of concerns voiced in the comments—namely, *who* needed to find that the preponderance of the evidence standard was met. The proposed Rule 702 as published for public comment did not specify who—whether the judge or the jury—was tasked with making this finding. Implicitly, the judge must make the finding, as all decisions of admissibility under the Federal Rules of Evidence are made by the judge. However, because of all the uncertainty in practice as to who has to make this finding, there was significant sentiment on the Advisory Committee to specify in the rule text that it is the court that must so find. The Advisory Committee explored various ways to phrase this before landing on "if the proponent demonstrates to the court that it is more likely than not" that the checklist in Rule 702 is met.

Judge Schiltz noted a change the Advisory Committee would like to make to the committee note (page 893). At the Advisory Committee meeting, a member expressed concern that the rule could be read as requiring that the judge make detailed findings on the record that each of the requirements of Rule 702 is met, even if no party objects to the expert's testimony. To alleviate that concern, the Advisory Committee added a statement in the note that "the rule [does not] require that the court make a finding of reliability in the absence of objection." Prior to the Standing Committee meeting, a judge member had expressed concern that this statement in the note was problematic. Judge Schiltz shared this concern. On the one hand, judges typically do not rule on admissibility questions unless a party objects. But on the other hand, judges are responsible for making sure that plain error does not occur. So it was not exactly right to say that "the rule" did not require a finding. Judge Schiltz accordingly proposed to change "rule" to "amendment" so that the note would say, "Nor does the amendment require that the court make a finding." Thus revised, the note would observe that the amendment was not intended to change current practice on this issue but would avoid taking a position on what Rule 702 already does or does not require. Professor Capra agreed that it was better to skirt the topic; if one were to state in Rule 702 that "there must be an objection, but even if not, there's always plain error review," then one might also need to add that caveat to all the other rules.

A judge member stated her appreciation for the changes: although they are somewhat minor, they help clarify perennial issues.

Judge Bates noted that the language regarding the preponderance of the evidence standard ("more likely than not") comes from the Supreme Court in *Bourjaily v. United States*, 483 U.S. 171 (1987). It therefore is already the law.

A practitioner member asked why the statement "if the proponent demonstrates to the court that it is more likely than not" was written in the passive tense, as opposed to active tense language, such as "if the court finds that it is more likely than not." Judge Schiltz stated that some members of the Advisory Committee were concerned that if the rule used the word "finding," that could be read as requiring the judge to make findings on the record even in the absence of an objection. The language may be awkward, but the Advisory Committee arrived at it as consensus language after years of debate.

A judge member raised a question from a case-management perspective: whether there is any difficulty combining a Rule 702 analysis with a Daubert hearing, and in what sequence these issues would arise. Professor Capra responded that the overall hearing should be thought of as a Rule 702 hearing. Rule 702 is broader than *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which only concerned methodology. Methodology falls under current Rule 702(c). The judge member thanked Professor Capra for his answer and emphasized the importance of educating the bar and bench about that fact. Citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), *as amended* (Jan. 16, 2009), Professor Marcus observed that Rule 702 issues can come up at junctures prior to trial, such as in connection with class certification.

A judge member applauded the Advisory Committee for drafting a very helpful amendment that does exactly what the Advisory Committee said it was trying to do: not change anything, but rather make clear what the law is.

Professor Capra thanked Judge Kuhl for formulating the language in proposed amended Rule 702(d). The Advisory Committee then renewed its request for final approval of Rule 702, with the one change to the committee note documented above.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 702.**

Judge Bates thanked—and members of the Standing Committee applauded – Professor Capra, Judge Schiltz, and the Advisory Committee for all their work on the proposed amendments to Rules 106, 615, and 702.

Publication for Public Comment

Judge Schiltz stated that the Advisory Committee had six proposed amendments that it was requesting approval to publish for public comment. Every few years, usually coinciding with the appointment of a new Advisory Committee chair, the Advisory Committee reviews circuit splits regarding the Federal Rules of Evidence. The Advisory Committee lets most of those splits lie, but it found that these six proposed amendments—which came as a result of that study—were worth pursuing.

Rule 611(d)—Illustrative Aids. Judge Schiltz introduced this action item. Illustrative aids are used in almost every jury trial. Nonetheless, there is a lot of confusion regarding their use, especially as to the difference between demonstrative evidence and illustrative aids; the latter are not evidence but are used to assist the jury in understanding the evidence. There also are significant procedural differences in how judges allow illustrative aids to be used, including (i) whether a party must give notice, (ii) whether the illustrative aid may go to the jury, and (iii) whether illustrative aids are part of the record. This proposed new rule, which would be Rule 611(d), was designed to clarify the distinction between illustrative aids and demonstrative evidence. The Advisory Committee is hoping that the public comments will assist it in refining the proposal. It is likely impossible to get a perfect dictionary definition of the distinction, but the Advisory Committee hoped to end up at a framework that would assist judges and lawyers in making the distinction.

The proposed new rule sets various procedural requirements for the use of illustrative aids. It would require a party to give notice prior to using an illustrative aid, which would allow the court to resolve any objections prior to the jury seeing the illustrative aid. It would prohibit jurors from using illustrative aids in their deliberations, unless the court explicitly permits it and properly instructs the jury regarding the jury's use of the illustrative aid. Finally, it would require that to the extent practicable, illustrative aids must be made part of the record. This would assist the resolution of any issues raised on appeal regarding use of an illustrative aid.

Professor Capra noted a few changes to the rule and committee note. First, Professor Kimble had pointed out that by definition notice is in advance. Therefore, the word "advance" was deleted from line 13 of the rule text (p. 1010). Second, Rule 611(d)(1)(A) sets out the balancing test the court is to use in determining whether to permit use of an illustrative aid. The provision is

intended to track Rule 403 but is tailored to the particularities of illustrative aids. In advance of the Standing Committee meeting, a judge member asked why the proposed rule in line 9 said "substantially outweighed," as opposed to just "outweighed." "Substantially outweighed" is the language in Rule 403, but the member questioned why there should be such a heavy presumption in favor of permitting use of illustrative aids. The Advisory Committee welcomes public comment on this question, and thus proposes to include the word "substantially" in brackets. Third, the same judge member had pointed out prior to the Standing Committee meeting that the committee note was incorrect in saying that illustrative aids "ordinarily are not to go to the jury room unless all parties agree" (p. 1014). Rather, he suggested "unless all parties agree" be changed to "over a party's objection." The Advisory Committee agreed to this change. Finally, Professor Capra stated that the "[s]ee" signal at the end of the carryover paragraph on page 1013 of the agenda book should be a "[c]f." signal. Rule 105 deals with evidence admitted for a limited purpose, and therefore is not directly applicable since illustrative aids are not evidence. A further change was made to the sentence immediately preceding the citation to Rule 105. Because Rule 105 does not apply, the statement that an "adverse party has a right to have the jury instructed about the limited purpose for which the illustrative aid may be used" is not correct. Rather, the adverse party "may ask to have the jury" so instructed. Professor Capra expressed agreement with this change. Later in the discussion, an academic member asked why a judge would refuse a request for such an instruction. Judge Schiltz suggested, for example, that if the judge has already given the jury many instructions on illustrative aids, she may feel that a further instruction is unnecessary. But he agreed that almost always the judge will give a limiting instruction.

Judge Bates asked about a comment in the Advisory Committee's report that it was "important to note" that the proposed rule "was not intended to regulate" PowerPoint slide presentations or other aids that counsel may use to help guide the jury in opening or closing arguments. This topic, Judge Bates noted, was a particular focus in the Advisory Committee's discussions, and he asked why it was not mentioned in the committee note. Judge Schiltz stated that the Advisory Committee was aware that likely more language would need to be added to the note, but that it wanted to receive public comments first. The debate at the Advisory Committee meeting centered around whether opening or closing slides even are illustrative aids. Participants asserted that such PowerPoints are just a summary of argument. But the rejoinder was, what if a party builds an illustrative aid into its slide presentation? Professor Capra added that the problem with adding a sentence that says that the rule does not regulate materials used during closing argument is that where an illustrative aid is built into the slide presentation, this would not be an accurate statement.

A judge member suggested that Rule 611(d)(2) should set a default rule as to whether the illustrative aid should go to the jury. As currently worded, that provision only addressed what would happen in the event of an objection. Judge Schiltz suggested setting as the default rule that it does not go to the jury. Based on this suggestion, Rule 611(d)(2) was revised to provide that "[a]n illustrative aid must not be provided to the jury during deliberations unless: (A) all parties consent; or (B) the court, for good cause, orders otherwise." Professor Capra undertook to make conforming changes to the relevant portion of the committee note.

A practitioner member stated that this proposal could turn out to be one of the most important rule changes during his time on the Standing Committee. Trials nowadays are as much

a PowerPoint show as anything else. If you are going to address the jury in opening or closing, you should be forced to share the PowerPoints in advance. Most judges require this because, otherwise, an inappropriate statement in a slide presentation could cause a serious problem. But also, slide presentations are being used in direct and cross-examination of witnesses, and with expert witnesses sometimes the entirety of the examination is guided by the slide presentation. In listing categories covered by the proposed rule, the note refers to blackboard drawings. Blackboard drawings are often created on the fly based on the answers the witness gives. There is no way to give the other party the opportunity to review such a drawing in advance. Taken literally, the member suggested, the proposed rule would basically require the judge to preview the trial testimony in advance of trial because the whole trial is being done with PowerPoints. Summing up, the member stressed the real-world importance of the proposed rule. He advised giving attention to the distinction between experts and fact witnesses. A requirement for notice would play out differently as applied to openings and closings, versus direct examination, versus cross-examination. If a lawyer must give opposing counsel the direct-examination PowerPoints in advance, opposing counsel can use those slides in preparing the cross-examination. The rulemakers should think about how that would change trials. The member advocated seeking comment from thoughtful practitioners such as members of the American College of Trial Lawyers.

Professor Capra agreed that these are important questions, and he hoped that practitioner input at the upcoming Advisory Committee meeting and hearings will provide guidance. He stated that the goal of the rule is not to touch on every issue that may come up but rather to create a framework for handling illustrative aids. How far to go into the details is still an open question. Judge Schiltz acknowledged that the proposal presents challenging issues, and observed that the Advisory Committee's upcoming fall symposium would provide helpful input. He noted that the notice requirement can be met by disclosing the illustrative aid minutes prior to presenting it to the jury. This allows the court to resolve any objections before the jury sees the aid. The same practitioner member reiterated that although opening and closing slides should be disclosed before use, he does not think that will work with illustrative aids used with witnesses. Judge Schiltz said the views of practitioner members of the Advisory Committee were the exact opposite: opening and closing slides are sacrosanct, but items to be shown to a witness can be disclosed prior to use.

Another practitioner member agreed with the description of current trial practice provided by the first practitioner member. He stated that the broader the scope of the rule, the more the word "substantially" needs to be retained. Additionally, when you use a slide presentation with a witness, you are trying to synthesize what you think the witness will say. When you use a slide presentation for opening or closing, it is in essence your argument. Disclosing that feels strategically harmful. Once the Advisory Committee receives the public comments, it will be critical to explain when the rule applies and when it does not. For example, the rule refers to using illustrative aids to help the factfinder "understand admitted evidence." Judges who think that PowerPoints are illustrative aids might bar their use in opening arguments because no evidence has yet been admitted.

The Advisory Committee requested approval to publish for public comment proposed new Rule 611(d), with the changes as noted above to both the rule and committee note.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 611.**

Rule 1006. Judge Schiltz introduced this action item as a companion item to the Rule 611(d) proposal. Rule 1006 provides that a summary of voluminous records can itself be admitted as evidence if the underlying records are admissible and too voluminous to be examined in court. Many courts fail to distinguish between summaries of evidence that are themselves evidence, which are covered by Rule 1006, and summaries of evidence that are merely illustrative aids. Judges often mis-instruct juries that Rule 1006 summaries are not evidence when they are in fact evidence. And some courts have refused to allow Rule 1006 summaries when any of the underlying records have been admitted as evidence, while other courts have refused to allow Rule 1006 summaries *unless* the underlying records are also admitted into evidence, neither of which is a correct application of the rule. Rather, Rule 1006 allows parties to use these summaries in lieu of the underlying records regardless of whether any of the underlying records have been admitted in their own right.

A practitioner member stated he thought this was a good rule. He queried whether the rule should mention "electronic" summaries, but he concluded that it was probably unnecessary because that would be covered by the general term "summary." Professor Capra noted that under Rule 101(b)(6), the Rule's reference to "writings" includes electronically stored information.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 1006.**

Rule 611(e)—Juror Questions. Judge Schiltz introduced this action item. This proposed new rule subdivision does not take a position on whether judges should permit jurors to ask questions. Instead, the rule sets a floor of protection that a judge must follow if the judge determines that juror questions are permissible in a given case. These protections were pulled together from a review of the caselaw regarding juror questions.

A practitioner member stated that he cannot recall ever having a jury trial where a judge permitted juror questioning. He asked whether there is a sense as to how prevalent the practice is. He noted that once this is in the rulebook, it has the potential to come in in every case, and that could transform the practice in the country. Judges who do not allow the practice may feel compelled to permit it. Judge Schiltz stated that he does not permit juror questions but another judge in his district does so in civil cases. Another district judge reported that some judges in the Northern District of Illinois permit the practice, though he does not, and it is controversial. Judge Bates reported similar variation in the District of Columbia, although he does not permit juror questions. Judge Schiltz acknowledged that having a rule in the rulebook would appear to give an imprimatur to the practice. But the practice is fairly widespread and is not going away.

A judge member stated that the practice is prevalent in her district, in part because many of the judges previously were state-court judges and Arizona allows juror questions. She did not take a position on whether to adopt the rule, but she offered some suggestions on its drafting. She

thought proposed Rule 611(e)(1) did an excellent job of covering instructions to the jurors. However, Rule 611(e)(1)(F)'s requirement of an instruction that "jurors are neutral factfinders, not advocates," gave her pause. Jurors may be confused as to how to incorporate that instruction into what they may or may not ask. She suggested that this might be explained in the committee note. Additionally, she suggested considering whether the rule should address soliciting the parties' consent to jurors asking questions. Finally, she noted that Rule 611(e)(3) uses two different verbs: the judge must *read* the question, or allow a party to *ask* the question. Professor Capra responded that "ask" is meant to reflect that one of the counsel may want to ask the question, that is, make it their own question. A judge would do nothing more than read it. Another judge member stated that though he did not permit juror questions himself, the practice was sufficiently prevalent that it made sense to have a rule on point. He pointed out a discrepancy between the rule text and note (the note said that the judge should not disclose which juror asked the question, but the rule itself did not so provide). He also questioned the read / ask distinction in Rule 611(e)(3). Responding to a suggestion by Judge Schiltz, this member agreed that this concern could be addressed by revising the provision to state, "the court must ask the question or permit one of the parties to do so." A bit later, discussion returned to the read / ask distinction, and it was suggested that "read" was a better choice than "ask" because the judge might wish to emphasize to jurors that questions should not be asked extemporaneously. Another judge member then used the term "pose," and Professor Capra agreed that "pose" was a better choice than "read" or "ask."

Professor Bartell noted that subsection (3) only mentions questions that are "asked," while other subsections distinguish "asked, rephrased, or not asked." While it seems subsection (3) is meant to apply both to questions that are asked and those that are first rephrased, it is ambiguous, and subsection (3) could be read as not applying to questions that are rephrased.

A practitioner member asked whether this rule was modeled after a particular judge's standing order, and whether such resources could be cited in the committee note to illustrate that the practice already exists. Professor Capra stated that he reviewed the caselaw and included all the requirements found in the caselaw that were appropriate to include in a rule. But he agreed that it would be useful to cite other resources, such as the Third Circuit's model civil jury instruction, in the committee note.

Another practitioner member reiterated his concern that by putting this out for public comment, the Standing Committee is in essence putting its imprimatur on this practice. This is a controversial practice, and there are a number of judges who do not allow it. This member suggested revising Rule 611(e)(1) to state that the court has discretion to refuse to allow jurors to ask questions. Professor Capra stated that this suggestion gave him pause. There may be requirements in some jurisdictions that courts must permit the practice, or there may be such requirements in the future. The Advisory Committee did not want to take a stand either way.

Judge Bates asked whether Judge Schiltz and Professor Capra would consider taking the Rule 611(e) proposal back to the Advisory Committee to consider the comments of the Standing Committee. Professor Capra stressed the value of sending proposals out for comment in one large package rather than seriatim. Judge Bates noted, however, that the Rule 611(d) and 611(e) amendments are both new subdivisions that deal with entirely different matters.

A judge member stated that although she herself is "allergic" to the practice of jurors asking questions, the practice exists and the rules should account for it. But this member expressed agreement with Judge Bates's suggestion that the Advisory Committee consider these issues further before putting the rule out for public comment.

An academic member stated that his instinct was not to delay publication. By contrast to the Bankruptcy Rules, which are frequently amended, the tradition with the Evidence Rules has always been to try to avoid constant changes and—instead—to make amendments only periodically, in a package. The comments from the Standing Committee were important, and it was possible the Advisory Committee would decide not to go forward with the proposal after public comment; but this member favored sending the proposal forward for public comment.

Another judge member stated she agreed with Judge Bates. She could not recall there ever being an appellate issue regarding juror questions, and she favored waiting for the issue to percolate before adopting a rule on the issue. Additionally, judges who do allow juror questioning are very careful already. The judge member also questioned whether the rule should distinguish between the practice in civil and criminal cases. Had the Advisory Committee received any feedback from the criminal defense bar? What about from the government? This member agreed with the prediction that if the rule were to go forward without a caveat up front, it would be a signal to judges that they should be permitting the practice. Professor Capra stated that there has been a case in every circuit so far. He added that the public defender on the Advisory Committee voted in favor of the rule.

A judge member stated that if and when the rule did go out for public comment, the Advisory Committee should ask for comment on whether the practice should be allowed, not allowed, or left to the judge's discretion. Judge Bates added that even if the Advisory Committee did not specifically ask for it, the public comments would likely state whether that commentator thought the practice should be permitted.

Another judge member suggested that the rulemakers should be open to regional variations. The practice arose in Arizona state court and was adopted in the California state courts, and then as the state judges have moved on to the federal bench, they have taken the practice with them. The practice, this member suggested, is not as rare as it might seem to those on the East coast. Another judge member pointed out that the Ninth Circuit's model jury instruction addressing juror questions is presented in a way that makes clear that the judge has the option to allow or not allow juror questions. This has the benefit of clarifying that it is discretionary while still providing guidance.

As a result of the comments and suggestions received from the Standing Committee, the Advisory Committee withdrew the request for publication for public comment.

Rule 613(b). Judge Schiltz introduced this action item as an item that would conform Rule 613(b) to the prevailing practice. At common law, prior to introduction of extrinsic evidence of a prior inconsistent statement for impeachment purposes, the witness must be given an opportunity to explain or deny the statement. By contrast, current Rule 613(b) allows this opportunity to be given at any time, whether prior or subsequent to introduction of extrinsic evidence of the

statement. However, judges tend to follow the old common law practice, and the Advisory Committee agrees with that practice as a policy matter. Most of the time, the witness will admit to making the statement, obviating the need to introduce the extrinsic evidence in the first place. The proposed amendment would still give the judge discretion in appropriate cases to allow the witness an opportunity to explain or deny the statement after introduction of extrinsic evidence, such as when the inconsistent statement is only discovered after the witness finishes testifying and has been excused.

Professor Capra noted one style change to the rule, which moves the phrase "unless the court orders otherwise" to the beginning of the rule.

A practitioner member stated that he thought this was an excellent proposal.

Professor Kimble suggested changing "may not" to "must not." The style consultants tend to prefer "must not" in most situations. Professor Capra thought this suggestion would substantively change the rule. A party may not introduce the evidence unless the court orders otherwise, but the judge could allow it. It is not a command to the judge to not admit the evidence. Judge Schiltz stated he did not feel strongly one way or another, but based on Professor Capra's objection would keep the language as "may not."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 613(b).**

Rule 801(d)(2). Judge Schiltz introduced this action item, which concerns an amendment to the hearsay exemption for statements by a party-opponent. There is a split of authority on how the rule applies to a successor in interest of a declarant. Suppose, for example, that the declarant dies after making the statement; is the statement admissible against the declarant's estate? The Advisory Committee was unanimous in thinking the answer should be yes.

A judge member highlighted the statement in the committee note that the exemption only applies to a successor in interest if the statement was made prior to the transfer of interest in the claim. The member observed that this was obvious as a matter of principle, but it was not obvious from the text of the rule itself. He suggested that this is a sufficiently important limitation that it ought to be in the rule itself. Professor Capra undertook to consider this suggestion further during the public comment period; he suggested that writing the limit explicitly into the rule text might be challenging and also that the idea might already be implicit in the rule text.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 801(d)(2).**

Rule 804(b)(3). Judge Schiltz introduced the proposed amendment to Rule 804(b)(3)(B) set out on page 1029 of the agenda book. Rule 804(b)(3) provides a hearsay exception for declarations against interest. Rule 804(b)(3)(B) deals with the situation in a criminal case when a statement exposes the declarant to criminal liability. This tends to come up when a criminal

defendant wants to introduce someone else's out-of-court statement admitting to committing the crime. Rule 804(b)(3)(B) requires that defendant to provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. The circuits are split concerning the meaning of "corroborating circumstances." Some circuits have said the court may only consider the guarantees of trustworthiness inherent in the statement itself. Other circuits allow the judge to additionally consider other evidence of trustworthiness, even if extrinsic to the statement. The proposed amendment would direct judges to consider all the evidence, both that inherent in the statement itself and any evidence independent of the statement.

A judge member noted that the rule only talks about corroborating evidence, not conflicting evidence, while the note speaks both to corroborating and conflicting evidence. Judge Schiltz stated that he made this point at the Advisory Committee meeting, but the response was that mentioning conflicting evidence in the text of Rule 804(b)(3) would necessitate a similar amendment to the corresponding language in Rule 807(a)(1). Professor Capra stated that courts applying Rule 807 do consider conflicting evidence, even though the rule text only says "corroborating." It is better to keep the two rules consistent than to have people wondering why Rule 804(b)(3) mentions conflicting evidence while Rule 807 does not. The judge member observed that one way to resolve the problem would be to make a similar amendment to Rule 807. Judge Bates noted that this could be considered during the public comment period.

A practitioner member asked why, in line 25, it says "the totality of the circumstances," but in the next line it does not say *the* "evidence." Should the word "the" be added on line 26? Professor Capra undertook to review this with the style consultants during the public comment period.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 804(b)(3).**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met in San Diego on March 30, 2022. The Advisory Committee presented an action item and briefly discussed one information item. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 199.

Action Item

Publication for Public Comment

Amendments to Appendix of Length Limits. Judge Bybee introduced this action item. The Standing Committee had already approved for publication for public comment proposed amendments to Rules 35 and 40 regarding petitions for panel rehearing and hearing and rehearing en banc, as well as conforming amendments to Rule 32 and the Appendix of Length Limits (Appendix). Subsequent to that approval, the Advisory Committee noticed an additional change that needed to be made in the Appendix. Namely, the third bullet point in the introductory portion

of the Appendix refers to Rule 35, but the proposed amendments to Rules 35 and 40 would transfer the contents of Rule 35 to Rule 40. As the amendment to the Appendix has not yet been published for public comment, the Advisory Committee would like to delete this reference to Rule 35 in the Appendix and to include that change along with the other changes approved in January for publication for public comment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to the Appendix of Length Limits.**

Information Items

Amicus Curiae Disclosures. Professor Hartnett introduced the information item concerning potential amendments to Rule 29's amicus curiae disclosure requirements. The Advisory Committee was seeking feedback from the Standing Committee regarding four questions. Due to time constraints, Professor Hartnett chose to ask just two of the questions at the meeting. The first question asked concerned the relationship between a party and an amicus. The Advisory Committee was trying to get a sense of whether disclosure of non-earmarked contributions by a party to an amicus should be disclosed, and, if so, at what percentage. The competing views ranged from those who say these should not be disclosed at all because a contributor does not control what an amicus says, to those who say significant contributors (*i.e.*, at least 25 or 30 percent of the amicus's revenue) have such a significant influence over an amicus that the court and the public should know about it. Second, regarding the relationship between an amicus and a non-party, the Advisory Committee sought feedback on whether an amended rule should retain the exception to disclosure for contributions by members of the amicus that are earmarked for a particular amicus brief. A point in support of retaining the exception was that an amicus speaks for its members, and therefore these contributions need not be disclosed. Points against retaining the exception were that there is a big difference between being a general contributor to an amicus and giving money for the purpose of preparing a specific brief, and it is easy to evade disclosure requirements by first becoming a member of the amicus and then giving money to fund a particular brief.

Judge Bates stated these are important questions and ones that the Standing Committee should focus on. He encouraged members to share any comments with Professor Hartnett and Judge Bybee after the meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow, Professor Gibson, and Professor Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on March 31, 2022. The Advisory Committee presented eleven action items: seven for final approval, and four for publication for public comment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 250.

Action Items

Final Approval

Restyled Rules for the 3000-6000 Series. Judge Dow introduced this action item, which presented for final approval the restyled Rules in the 3000 to 6000 series. The Standing Committee already gave final approval for the 1000 and 2000 series. The Advisory Committee received extensive public comments from the National Bankruptcy Conference on these rules, in addition to a few other public comments. Some of these comments led to changes. Professor Bartell noted that the Advisory Committee was not asking to send these rules to the Judicial Conference quite yet; rather, like the 1000 and 2000 series, they should be held until the remainder of the restyling project is completed.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed restyled Rules for the 3000-6000 series.**

Rule 3011. Judge Dow introduced this action item, which would add a subsection to Rule 3011 to require clerks to provide searchable access on each bankruptcy court's website to information about funds deposited under Section 347 of the Bankruptcy Code. This is part of a nationwide effort to reduce the amount of unclaimed funds. He noted that the Advisory Committee received one public comment, which led it to substitute the phrase "information about funds in a specific case" for the phrase "information in the data base for a specific case."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 3011.**

Rule 8003. Judge Dow introduced this action item to conform the rule to recent amendments to Appellate Rule 3. No public comments were received on this proposed rule amendment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 8003.**

Official Form 101. Judge Dow introduced this action item. Questions 2 and 4 of the individual debtor petition form, which concern other names used by the debtor over the past 8 years, would be amended to clarify that the only business names that should be reported are those the debtor actually used in conducting business, not the names of separate legal entities in which the debtor merely had an interest. This change would avoid confusion and make this form consistent with other petition forms. The Advisory Committee received one public comment; it made no changes based on this comment.

Judge Bates clarified for the Standing Committee that in contrast to some other forms, Official Bankruptcy forms must be approved by the Judicial Conference through the Rules Enabling Act process.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Form 101.**

Official Forms 309E1 and 309E2. Judge Dow introduced this action item regarding forms that are used to give notice to creditors after a bankruptcy filing. The Advisory Committee improved the formatting and edited the language of these forms in order to clarify the applicability of relevant deadlines. The Advisory Committee did not receive any comments, and its only post-publication change was to insert a couple of commas.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Forms 309E1 and 309E2.**

Official Form 417A. Judge Dow introduced this action item. This form amendment is to conform the form to the amendments to Rule 8003. There were no public comments on this proposed form amendment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Form 417A.**

Publication for Public Comment

Restyled Rules for the 7000-9000 Series. Judge Dow introduced this action item, which sought approval to publish for public comment the next portion of the proposed restyled rules. The Advisory Committee applied the same approach to these rules as it did when restyling the first six series.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed restyled Rules for the 7000 to 9000 series.**

Rule 1007(b)(7). Judge Dow introduced this action item. Under the current rule, debtors are required to complete an approved debtor education course and file a "statement" on an official form evidencing completion of that course before they can get a discharge in bankruptcy. As revised, the rule would instead require filing the certificate of completion from the course provider, as that is the best evidence of compliance. The amendment would also remove the requirement that those who are exempt must file a form noting their exemption. This requirement is redundant, as in order to get an exemption, the debtor would have to file a motion, and the docket will therefore already contain an order approving the exemption.

The Advisory Committee also sought approval to publish conforming amendments changing "statement" to "certificate" in another subsection of Rule 1007 and in Rules 4004, 5009, and 9006.

A judge member noted, and the Advisory Committee agreed to remedy, a typo on page 666, line 14 of the agenda book ("if" should be "is").

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 1007(b)(7) and conforming amendments to Rules 1007(c)(4), 4004, 5009, and 9006.**

New Rule 8023.1. Judge Dow introduced this action item, which concerned a proposed new rule dealing with substitution of parties. While Civil Rule 25 (Substitution of Parties) applies to adversary proceedings, the Part VIII rules (which govern appeals in bankruptcy cases) do not currently mention substitution. Proposed new Rule 8023.1 is based on, and is virtually identical in language to, Appellate Rule 43.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed new Rule 8023.1.**

Official Form 410A. Judge Dow introduced this action item to amend the attachment to the proof-of-claim form that a creditor with a mortgage claim must file. The amendment revises Part 3 of the attachment (regarding the calculation of the amount of arrearage at the time the bankruptcy proceeding is filed) to break out principal and interest separately.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Official Form 410A.**

Information Items

Judge Dow briefly noted that the Bankruptcy Threshold Adjustment and Technical Correction Act had not yet been enacted by Congress, but if and when it were to be enacted, the Advisory Committee would seek final approval of technical amendments to a couple of forms and would ask the Administrative Office to repost an interim version of Rule 1020 for adoption by bankruptcy courts as a local rule. He also mentioned, but did not discuss at length, three other information items in the agenda book.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow, Professor Cooper, and Professor Marcus provided the report of the Advisory Committee on Civil Rules, which last met in San Diego on March 29, 2022. The Advisory Committee presented two action items and five information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 722.

Action Items

Final Approval

Rule 15(a)(1). Judge Dow introduced this action item, a proposed amendment to Rule 15(a)(1) for which the Advisory Committee was requesting final approval. The proposed amendment would replace the word "within" with the phrase "no later than." This change clarifies that where a pleading is one to which a responsive pleading is required, the time to amend the pleading as of right continues to run until 21 days after the earlier of the events delineated in Rule 15(a)(1)(B). The Advisory Committee received a few comments, but it made no changes based on these comments. In the committee note, it deleted one sentence that had been published in brackets and that appeared unnecessary.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 15(a)(1).**

Rule 72(b)(1). Judge Dow introduced this action item, which presented for final approval a proposed amendment to Rule 72(b)(1) (concerning a recommended disposition by a magistrate judge). The proposed amendment would bring the rule into conformity with the prevailing practice of district clerks with respect to service of the recommended disposition. Most parties have CM/ECF access, so the current rule's requirement of mailing the magistrate judge's recommendations is unnecessary. The amendment permits service of the recommended disposition by any means provided in Rule 5(b). The Advisory Committee received very few public comments. In the committee note, it deleted as unnecessary one sentence that had been published in brackets.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 72(b)(1).**

Information Items

Rule 12(a)(4). Judge Dow introduced this information item, which concerned a proposed amendment to Rule 12(a)(4) that was initially suggested by the DOJ and had been published for comment in August 2020. The Advisory Committee received only a handful of public comments, but two major comments were negative. Rule 12(a)(4) sets a presumptive 14-day time limit for filing a responsive pleading after denial of a motion to dismiss. This means that the DOJ only has 14 days after denial of a motion to dismiss on immunity grounds in which to decide whether to appeal the immunity issue; but courts frequently grant it an extension. The proposed amendment would have flipped the presumption, giving the DOJ 60 days as opposed to 14 unless the court shortened the time. The Advisory Committee considered a number of options, including a compromise time between 14 and 60 days, as well as providing the longer 60-day period only for cases involving an immunity defense.

The DOJ was unable to collect quantitative data as to how often it sought and received extensions. As a result, and based on the comments received and the views of both the Standing

and Advisory Committees members, the Advisory Committee voted not to proceed further with the proposed amendment to Rule 12(a)(4).

Judge Bates clarified that because the proposed amendment had not emerged from the Advisory Committee, this was not an action item, and therefore no vote of the Standing Committee was required.

Rule 9(b). Judge Dow introduced this information item, which concerned a proposal to amend the second sentence of Rule 9(b) in light of the Supreme Court's interpretation of that provision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The Advisory Committee had appointed a subcommittee to study the proposal. However, the subcommittee found that there were not many cases coming up that indicated a problem. Moreover, a number of Advisory Committee members thought *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Iqbal* were working pretty well in their cases. Therefore, the Advisory Committee chose not to proceed further.

Rule 41. Judge Dow noted this project, which was prompted by a suggestion from Judge Furman to study Rule 41(a)(1)(A). The initial question is whether that provision authorizes voluntary dismissal only of an entire action, or whether it also authorizes voluntary dismissal as to fewer than all parties or claims. The Advisory Committee appointed a subcommittee, which will study this issue and probably also Rule 41 more generally.

Discovery Subcommittee. Judge Dow provided an update on the Discovery Subcommittee, which is focused primarily on privilege log issues. The subcommittee met with bar groups and attended a two-day conference. There seems to be some common ground between the plaintiff and defense bar for procedures for privilege logs. There may be some forthcoming proposals to amend Rules 16 and 26 to deal with these procedural issues, particularly to encourage parties to hash out privilege-log issues early on.

The Discovery Subcommittee has paused its research into sealing issues pending an Administrative Office study of filing under seal.

MDL Subcommittee. Judge Dow introduced this information item. About fifty percent of federal civil cases are part of an MDL. The subcommittee's thinking continues to evolve as it receives input from the bench, the bar, and academics. About a year ago, the subcommittee was looking at the possibility of proposing a new Rule 23.3 (addressing judicial appointment and oversight of leadership counsel). The subcommittee then shifted and thought about revising Rules 16 and 26 to set prompts concerning issues that MDL judges ought to think about. Now, the subcommittee has begun to consider a sketch of a proposed Rule 16.1, which would contain a list of topics on which parties in an MDL could be directed to confer. Flexibility is critical, and any rule will just offer the judge tools to use in appropriate instances.

At a March 2022 conference at Emory Law School, the subcommittee heard from experienced transferee judges that lawyers can do a great service to the transferee judge by explaining their views of the case early on. The judge could then decide which of the prompts in the proposed rule fits the case. The rule would list issues on which the judge could require the lawyers to give their input.

The subcommittee has been focusing closely on the importance of an initial census. The initial census is key because it can tell the judge and parties who has the cases and what kinds of cases there are, and can help the judge make decisions on leadership counsel.

The subcommittee will work over the summer on the sketch of Rule 16.1 so as to tee up the question of whether or not to advance it. Judge Dow expressed a hope that the subcommittee would complete its work in the coming year.

Jury Trials. Judge Bates highlighted the portion of the Advisory Committee's report (pages 751–72) concerning the procedures for demanding a jury trial. Though the Advisory Committee has deferred consideration of this issue for the moment, Judge Bates suggested that it may be important to deal with it at some point. Judge Dow and Professor Cooper explained that Congress enacted legislation directing the FJC to study what factors contribute to a higher incidence of jury trials in jurisdictions that have more of them. Dr. Lee has launched that study, and predicts that he will have a short report on the topic ready for the Advisory Committee's fall agenda book.

OTHER COMMITTEE BUSINESS

Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002. Professor Struve presented this item, which concerned a report required under the E-Government Act of 2002. She thanked all the Advisory Committee chairs and reporters, Judge Bates, and the Rules Office staff for their work on this report. The privacy rules, which impose certain redaction requirements, took effect in 2007. The idea of the report is to evaluate the adequacy of these rules to protect privacy and security. The report does so in three ways: it discusses amendments (relevant to the privacy rules) that have been adopted since 2011 (the date of the last report); it notes privacy-adjacent items that are pending on the rules committees' dockets; and it discusses other privacy-related concerns discussed since 2011 that did not give rise to rule amendments because the rules committees determined that rule amendments were not the way to address those concerns. A new report to Congress will be prepared every two years going forward.

Professor Struve noted that the Standing Committee was asked to approve the proposed Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, and to recommend that the Judicial Conference forward the report to Congress.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously voted to approve the proposed Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002 and to recommend that the Judicial Conference forward the report to Congress.**

Legislative Report. The Rules Law Clerk delivered a legislative report. The chart in the agenda book at page 1051 summarized legislation currently pending before Congress, as well as the Juneteenth National Independence Day Act, which passed and was signed into law by President Biden in 2021.

Judiciary Strategic Planning. Judge Bates addressed the Judiciary Strategic Planning item, which appeared in the agenda book at page 1061. The Judicial Conference requires the Standing Committee to submit a report on its strategic initiatives. He asked the Standing Committee for approval to submit the report.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the Judiciary Strategic Planning report for submission to the Judicial Conference.**

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their attention and insights. The Standing Committee will next meet on January 4, 2023. The location of the meeting had not yet been confirmed. Judge Bates expressed the hope that the meeting would take place somewhere warm.

TAB 2

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 4-6

2. a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date..... pp. 7-10

3. Approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 14-17

4. Approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 18-21

5. Approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 22-24

6. Approve the proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... pp. 28-29

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 7, 2022. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Allison Bruff, Bridget Healy, and Scott Myers, Rules Committee Staff Counsel; Burton S. DeWitt, Law Clerk to the Standing Committee; Dr. Tim Reagan and Dr. Emery Lee, Senior Research Associates, Federal Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives,

representing the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. Among other things, the advisory committee reports discussed two items that affect multiple rule sets: (1) recommendations from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees for final approval of rules addressing future emergencies; and (2) recommended technical amendments to those four rule sets addressing Juneteenth National Independence Day.

The Committee also received an update on two items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) consideration of suggestions to allow electronic filing by pro se litigants; and (2) consideration of suggestions to change the presumptive deadline for electronic filing. Finally, the Committee approved the proposed 2022 Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, was briefed on the judiciary's ongoing response to the COVID-19 pandemic, and approved a draft report regarding judiciary strategic planning.

PROPOSED EMERGENCY RULES

The proposals recommended for the Judicial Conference's approval include a package of rules for use in emergency situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure. These rules were developed in response to Congress's directive in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") that rules be considered, under the Rules Enabling Act, to address future emergencies. The set of proposed amendments and new rules developed in response to this charge includes an

amendment to Appellate Rule 2 (and a related amendment to Appellate Rule 4); new Bankruptcy Rule 9038; new Civil Rule 87; and new Criminal Rule 62. The proposed amendments and new rules were published for public comment in August 2021.

Although there are some differences in the four proposed emergency rules – the Appellate rule is much more flexible, and the Bankruptcy, Civil, and Criminal rules provide for different types of rule deviations in a declared emergency – they share some overarching, uniform features. Each rule places the authority to declare a rules emergency solely in the hands of the Judicial Conference. Each rule uses the same basic definition of a "rules emergency" – namely, when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules." The Bankruptcy, Civil, and Criminal rules take a roughly similar approach to the content of the emergency declaration, setting ground rules to make clear the scope of the declaration. Each emergency rule limits the duration of the declaration; provides for additional declarations; and accords the Judicial Conference discretion to terminate an emergency declaration before the declaration's stated termination date. The Bankruptcy, Civil, and Criminal rules each address what will happen when a proceeding that has been conducted under an emergency rule continues after the emergency has terminated, though each rule does so with provision(s) tailored to take account of the different contexts and subject matters addressed by the respective emergency provisions.

To the extent that public comments touched on uniform aspects of the emergency rules, those comments focused on the role of the Judicial Conference. Some commentators criticized the decision to place in the hands of the Judicial Conference the authority to declare or terminate a rules emergency, though another commentator specifically supported the decision to centralize authority in the Judicial Conference. One commentator argued that there should be a backup

plan in case the emergency prevents the Judicial Conference from acting. The Advisory Committees reviewed these comments and uniformly concluded that the Judicial Conference was fully capable of responding to rules emergencies, and that the uniform approach of the Judicial Conference was preferable to other approaches involving more decisionmakers. Accordingly, the Advisory Committees voted to retain, as published, the substance of all of the uniform features of the set of proposed emergency rules. A few post-publication changes to the Appellate Rule's text, the Civil Rule's text and note, and the Criminal Rule's text and note are discussed below in connection with the recommendations of the respective Advisory Committees.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 2, 4, 26, and 45.

Rule 2 (Suspension of Rules)

The proposed amendment to Appellate Rule 2 is part of the set of proposed rules, mentioned above, that resulted from the CARES Act directive that rules be considered to address future emergencies. The proposal adds a new subdivision (b) to Appellate Rule 2. Existing Rule 2, which would become Rule 2(a), empowers the courts of appeals to suspend the provisions in the Appellate Rules "in a particular case," except "as otherwise provided in Rule 26(b)." (Rule 26(b) provides that "the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a [petition to review an order of a federal administrative body], unless specifically authorized by law.") New Rule 2(b) would come into operation when the Judicial Conference declares an Appellate Rules emergency and would empower the court of appeals to "suspend in

all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2)."

In the event of a Judicial Conference declaration of an Appellate Rules emergency, a court of appeals' authority under Rule 2(b) would be broader in two ways than a court of appeals' everyday authority under Rule 2(a). First, the suspension power under Rule 2(b) reaches beyond a particular case. Second, the Rule 2(b) suspension power reaches time limits to appeal or petition for review, so long as those time limits are established only by rule. (Rule 2(b) does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.)

Rule 4 (Appeal as of Right—When Taken)

The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) (discussed below) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59." When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

Rule 26 (Computing and Extending Time) and Rule 45 (Clerk's Duties)

In response to the enactment of the Juneteenth National Independence Day Act (Juneteenth Act), Pub. L. No. 117-17 (2021), the Advisory Committee made technical amendments to Rules 26(a)(6)(A) and 45(a)(2) to insert "Juneteenth National Independence

Day" immediately following "Memorial Day" in the Rules' lists of legal holidays. Because of the technical and conforming nature of the amendments, the Advisory Committee recommended final approval without publication.

The Standing Committee unanimously approved the Advisory Committee's recommendations, after making a stylistic change to Appellate Rule 2(b)(4) to conform that Rule's language to the language used in the other Emergency Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to the Appendix of Length Limits Stated in the Federal Rules of Appellate Procedure with a recommendation that they be published for public comment in August 2022. The proposed amendments to the Appendix would conform with proposed amendments to Rules 35 and 40, which were approved for publication for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met on March 30, 2022. In addition to the matters noted above, the Advisory Committee discussed whether to propose an amendment to Rule 39 clarifying the process for challenging the allocation of costs on appeal and whether to propose amending Form 4 to simplify the disclosures required in connection with a request for in forma pauperis status. It referred to a subcommittee a new suggestion that Rule 29 be amended to require identification of any amicus or counsel whose involvement triggered the striking of an amicus brief. The Advisory Committee also continued its discussion of whether to propose amendments to Rule 29

with respect to disclosures concerning the relationship between an amicus and either parties or nonparties.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: Restyled Bankruptcy Rules for the 3000-6000 series; amendments to Bankruptcy Rules 3011, 8003, and 9006; new Bankruptcy Rule 9038; and amendments to Official Forms 101, 309E1, 309E2, and 417A. The Advisory Committee also recommended all of the foregoing for transmission to the Judicial Conference other than the restyled rules; the latter will be held for later transmission once all the bankruptcy rules have been restyled.

Restyled Rules Parts III, IV, V, and VI (the 3000-6000 series of Bankruptcy Rules)

The National Bankruptcy Conference submitted extensive comments on the restyled rules, and several others submitted comments as well. After discussion with the style consultants and consideration by the Restyling Subcommittee, the Advisory Committee incorporated some of those suggested changes into the revised rules and rejected others. (Some of the rejected suggestions were previously considered in connection with the 1000-2000 series of restyled rules, and the Advisory Committee adhered to its prior conclusions about those suggestions as noted at pages 10-11 in the Standing Committee's September 2021 report to the Judicial Conference.)

The Advisory Committee recommended final approval for this second set of restyled rules, but, as with the first set, suggested that the Standing Committee not submit the rules to the Judicial Conference until all remaining parts of the Bankruptcy Rules have been restyled, published, and given final approval, so that all restyled rules can go into effect at the same time.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System, redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) requiring the clerk of court to provide searchable access on the court's website to information about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). There was one comment on the proposed amendment, and the language of subdivision (b) was restyled and modified to reflect the comment. The Advisory Committee recommended final approval as amended.

Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal)

The proposed amendments to Rule 8003 conform to amendments recently made to Federal Rule of Appellate Procedure 3, which stress the simplicity of the Rule's requirements for the contents of the notice of appeal and which disapprove some courts' "expressio unius est exclusio alterius" approach to interpreting a notice of appeal. No comments were submitted, and the Advisory Committee gave its final approval to the rule as published.

Rule 9006 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee proposed a technical amendment to Rule 9006(a)(6)(A) to include Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 9038 (Bankruptcy Rules Emergency)

New Rule 9038 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of the rule are similar to the Appellate, Civil, and Criminal Emergency Rules in the way they define a rules emergency, provide authority to

the Judicial Conference to declare such an emergency, and prescribe the content and duration of a declaration.

Rule 9038(c) expands existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. Although many courts relied on Rule 9006(b) to grant extensions of time during the COVID-19 pandemic, the rule does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. Also, it arguably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases. There were no negative comments addressing Rule 9038, and the Advisory Committee recommended final approval as published.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

The amendments to Questions 2 and 4 in Part 1 of Form 101 clarify how and where to report business names used by the debtor. These changes clarify that the only names to be listed are names that were used by the debtor personally in conducting business, not names used by other legal entities. The changes also bring Form 101 into conformity with the approach taken in Forms 105, 201, and 205 in involuntary bankruptcy cases and in non-individual cases. A suggestion unrelated to the proposed change was rejected, and the Advisory Committee recommended final approval as published.[1]

[1] The version of Official Form 101 in Appendix B includes an unrelated technical conforming change to line 13 which went into effect on June 21, 2022, after the Standing Committee's meeting. The change was approved by the Advisory Committee on Bankruptcy Rules pursuant to its authority to make such changes subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. It conforms the form to the Bankruptcy Threshold Adjustment and Technical Corrections Act (the "BTATC" Act), Pub. L. No. 117-151, which went into effect on the same date. The Standing Committee will review the BTATC Act changes to Official Form 101 and another form at its January 2023 meeting, and will update the Judicial Conference on the changes in its report of that meeting.

Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V))

The amendments clarify the deadline for objecting to a debtor's discharge and distinguish it from the deadline to object to discharging a particular debt. There were no comments, and the Advisory Committee recommended final approval as published with minor changes to punctuation.

Official Form 417A (Notice of Appeal and Statement of Election)

The amendments conform the form to proposed changes to Rule 8003. No comments were submitted, and the Advisory Committee recommended final approval with a proposed effective date of December 1, 2023, to coincide with the Rule 8003 amendment.

The Standing Committee unanimously approved the Advisory Committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted the proposed restyled Bankruptcy Rules for the 7000-9000 Series; proposed amendments to Rules 1007, 4004, 5009, and 9006; proposed new Rule 8023.1; and a proposed amendment to Official Form 410A with a

recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Restyled Rules Parts VII, VIII, and IX

The Advisory Committee sought approval for publication of Restyled Rules Parts VII, VIII, and IX (the 7000-9000 series Bankruptcy Rules). This is the third and final set of restyled rules recommended for publication.

Rule 1007(b)(7) (Lists, Schedules, Statements, and Other Documents; Time Limits) and conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3), and 9006(c)(2)

The amendments to Rule 1007(b)(7) would eliminate the requirement that the debtor file a "statement" on Official Form 423 upon completion of an approved debtor education course, and instead require filing the certificate of completion provided by the approved course provider. The six other rules would be amended to replace references to a "statement" required by Rule 1007(b)(7) with references to a "certificate."

Rule 8023.1 (Substitution of Parties)

Proposed new Rule 8023.1, addressing the substitution of parties, is modeled on Appellate Rule 43, and would be applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel.

Official Form 410A (Mortgage Proof of Claim Attachment)

Amendments are made to Part 3 (Arrearage as of Date of the Petition) of the form, replacing the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." Because under 11 U.S.C. § 1322(e) the amount necessary to cure a default is "determined in accordance with the underlying agreement and applicable nonbankruptcy law," it may be necessary for a debtor who is curing arrearages to know which portion of the total arrearages is principal and which is interest.

Information Items

The Advisory Committee met on March 31, 2022. In addition to the recommendations discussed above, the Advisory Committee considered (among other matters) a proposed amendment to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and five related forms that were published for comment. It also considered a suggestion from the Court Administration and Case Management (CACM) Committee concerning electronic signatures.

Rule 3002.1

The proposed amendments to Rule 3002.1 were designed to encourage a greater degree of compliance with the rule and to provide a new midcase assessment of the mortgage claim's status in order to give a chapter 13 debtor an opportunity to cure any postpetition defaults that may have occurred.

Twenty-seven comments were submitted on the proposed amendments. Some of the comments were lengthy and detailed; others briefly stated an opinion in support of or opposition to the amendments. The comments generally fell into three categories: (1) comments opposing the amendments, or at least the midcase review, submitted by some chapter 13 trustees; (2) comments favoring the amendments, submitted by some consumer debtor attorneys; and (3) comments favoring the amendments but giving suggestions for improvement, submitted by trustees, debtors, judges, and an association of mortgage lenders.

The Consumer Subcommittee concluded that there is a need for amendments to Rule 3002.1, and that there is authority to promulgate them. The Advisory Committee agreed. The Consumer Subcommittee was sympathetic, however, with the desire expressed in several comments for simplification, and it has begun to sketch out revisions. It hopes to present a revised draft to the Advisory Committee at the fall meeting. The Forms Subcommittee will

await decisions about Rule 3002.1 before considering any changes to the proposed implementing forms.

Electronic Signatures

The Advisory Committee has been considering a suggestion by the CACM Committee regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account. At the fall 2021 meeting, the Technology Subcommittee presented for discussion a draft amendment to Rule 5005(a)(2)(C) that would have permitted a person other than the electronic filer of a document to authorize the person's signature on an electronically filed document. The discussion raised several questions and concerns. Among the issues raised were how the proposed rule would apply to documents, such as stipulations, that are filed by one attorney but bear the signature of other attorneys; how it would apply if a CM/ECF account includes several subaccounts; and whether there is really a perception among attorneys that the retention of wet signatures presents a problem that needs solving.

After the fall 2021 meeting, the Advisory Committee's Reporter followed up with the bankruptcy judge who had raised the issue of electronic signatures with the CACM Committee, and learned that this judge is working on a possible local rule for his district modeled on a state-court rule that allows for electronic signatures rather than requiring the retention of wet signatures. In its suggestion, the CACM Committee had questioned whether the lack of a provision in Rule 5005 addressing electronic signatures of individuals without CM/ECF accounts may make courts "hesitant to make such a change without clarification in the rules that use of electronic signature products is sufficient for evidentiary purposes." The Technology Subcommittee concluded that current Rule 5005 does not address the issue of the use of electronic signatures by individuals who are not registered users of CM/ECF and that it therefore does not preclude local rulemaking on the subject. The Bankruptcy Court for the District of

Nebraska already has such a rule (L.B.R. 9011-1). The Technology Subcommittee concluded that a period of experience under local rules allowing the use of e-signature products would help inform any later decision to promulgate a national rule. Electronic signature technology will also likely develop and improve in the interim. The Advisory Committee agreed with the Technology Subcommittee's recommendation and voted not to take further action on the suggestion.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 6, 15, and 72, and new Civil Rule 87.

Rule 6 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee made a technical amendment to Rule 6(a)(6)(A) to include the Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 15 (Amended and Supplemental Pleadings)

The amendment to Rule 15(a)(1) would substitute "no later than" for "within" to measure the time allowed to amend a pleading once as a matter of course. Paragraph (a)(1) currently provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier" (emphasis added).

A literal reading of the existing rule could suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion, creating an

unintended gap period (prior to service of the responsive pleading or pre-answer motion) during which amendment as of right is not permitted. The proposed amendment is intended to remove that possibility by replacing "within" with "no later than."

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 15(a)(1) as published. The Advisory Committee made one change to the committee note after publication, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 72 (Magistrate Judges: Pretrial Order)

Rule 72(b)(1) directs that the clerk "mail" a copy of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 72(b)(1) as published. The Advisory Committee made one change to the committee note, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 87 (Civil Rules Emergency)

Proposed Civil Rule 87 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of Rule 87 contain uniform provisions shared by the Appellate, Bankruptcy, and Criminal Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

In form, Civil Rule 87(b)(1) diverges from the Bankruptcy and Criminal Rules with regard to the Judicial Conference declaration of a rules emergency; but in function, Rule 87(b)(1) takes a similar approach to those other rules. While the Bankruptcy and Criminal Rules provide that the declaration must "state any restrictions on the authority granted in" their emergency provisions, Rule 87(b)(1)(B) provides that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The character of the different emergency rules provisions accounts for the difference. Rule 87 authorizes Emergency Rules 4(e), (h)(1), (i), (j)(2), and for serving a minor or incompetent person (referred to as "Emergency Rules 4"), each of which allows the court to order service of process by a means reasonably calculated to give notice. Rule 87 also authorizes Emergency Rule 6(b)(2), which displaces the prohibition on the extension of the deadlines for making post-judgment motions and instead permits extension of such deadlines. The Advisory Committee determined that, while it makes sense for the Judicial Conference to have the flexibility to decide not to adopt a particular Civil Emergency Rule when declaring a rules emergency, it would not make sense to invite other, undefined, "restrictions" on the Civil Emergency Rules. Accordingly, the Advisory Committee's proposed language in Civil Rule 87(b)(1)(B) stated that the Judicial Conference's emergency declaration "must … adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." (The inclusion of the word "must" was the result of a stylistic decision concerning the location of "must" within Rule 87(b)(1).)

At the Standing Committee's June 2022 meeting, a member suggested that it would be preferable to create a clear default rule that would provide for the adoption of all the Civil Emergency Rules in the event that a Judicial Conference declaration failed to specify whether it was adopting all or some of those rules. Accordingly, the Standing Committee voted to relocate the word "must" to Civil Rules 87(b)(1)(A) and (C), so that Civil Rule 87(b)(1)(B) provides

simply that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The resulting Rule will operate roughly the same way as the Bankruptcy and Criminal Emergency Rules – that is, a Judicial Conference declaration of a rules emergency will put into effect all of the authorities granted in the relevant emergency provisions, unless the Judicial Conference specifies otherwise.

After public comment, the Advisory Committee deleted from the committee note two unnecessary sentences that had been published in brackets, and augmented the committee note's discussion of considerations that pertain to service by an alternative means under Emergency Rules 4(e), (h)(1), (i), and (j)(2). Based on suggestions by a member of the Standing Committee, the committee note was further revised at the Standing Committee meeting to reflect the possibility of multiple extensions under Emergency Rule 6(b)(2) and to delete one sentence that had suggested that the court ensure that the parties understand the effect of a Rule 6(b)(2) extension on the time to appeal.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee met on March 29, 2022. In addition to the matters discussed above, the Advisory Committee considered various information items, including a possible rule on multidistrict litigation (MDL). The Advisory Committee's MDL Subcommittee is considering amendments to Rules 16(b) or Rule 26(f), or a new Rule 16.1, to address the court's role in managing the MDL pretrial process. The drafts developed for initial discussion would simply focus the court and parties' attention on relevant issues without greater direction or detail.

The MDL Subcommittee has collected extensive comments from interested bar groups on some possible approaches.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval proposed amendments to Criminal Rules 16, 45, and 56, and new Criminal Rule 62.

Rule 16 (Discovery and Inspection)

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would correct a typographical error in the Rule 16 amendments that are currently pending before Congress. Those amendments, expected to take effect on December 1, 2022, revise both the provisions governing expert witness disclosures by the government – contained in Rule 16(a)(1)(G) – and the provisions governing expert witness disclosures by the defense – contained in Rule 16(b)(1)(C). Subject to exceptions, both Rule 16(a)(1)(G)(v) and Rule 16(b)(1)(C)(v) require the disclosure to be signed by the expert witness. One exception applies if, under another subdivision of the rule (concerning reports of examinations and tests), the disclosing party has previously provided the required information in a report signed by the witness. This exception cross-references the subdivision concerning reports of examinations and tests.

In Rule 16(a)(1), the relevant subdivision is Rule 16(a)(1)(F), and Rule 16(a)(1)(G)(v) duly cross-references that subdivision (applying the exception if the government "has previously provided under (F) a report, signed by the witness, that contains" the required information). In Rule 16(b)(1), the relevant subdivision is Rule 16(b)(1)(B); however, Rule 16(b)(1)(C)(v) as reported to Congress cross-references not "(B)" (as it should) but "(F)" (applying the exception if the defendant "has previously provided under (F) a report, signed by the witness, that contains"

the required information). The proposed amendment would correct Rule 16(b)(1)(C)(v)'s cross-reference from (F) to (B). The Advisory Committee recommended this proposal for approval without publication because it is a technical amendment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 45 (Computing and Extending Time) and Rule 56 (When Court is Open)

In response to the enactment of the Juneteenth Act, the Advisory Committee made technical amendments to Rules 45 and 56 to include Juneteenth National Independence Day in the list of legal public holidays in those rules. The Advisory Committee recommended final approval without publication because these are technical and conforming amendments. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 62 (Criminal Rules Emergency)

New Rule 62 is part of the package of proposed emergency rules drafted in response to Congress's directive in the CARES Act. Subdivisions (a) and (b) of Rule 62 contain uniform provisions shared by the Appellate, Bankruptcy, and Civil Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations. Under the uniform provisions, the Judicial Conference has the sole authority to declare a rules emergency, which is defined as when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with" the relevant set of rules.

Rule 62 includes an additional requirement not present in the Appellate, Bankruptcy, or Civil Emergency Rules. That provision is (a)(2), which – for Criminal Rules emergencies – requires a determination that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." This provision ensures that the emergency provisions in

subdivisions (d) and (e) of Rule 62 would be invoked only as a last resort, and reflects the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

Subdivision (c) of Rule 62 addresses the effect of the termination of a rules emergency declaration. For proceedings that have been conducted under a declaration of emergency but that are not yet completed when the declaration terminates, the rule permits completion of the proceeding as if the declaration had not terminated if (1) resuming compliance with the ordinary rules would not be feasible or would work an injustice and (2) the defendant consents. This provision recognizes the need for some flexibility during the transition period at the end of an emergency declaration, while also recognizing the importance of returning promptly to compliance with the non-emergency rules.

Subdivisions (d) and (e) of Rule 62 address the court's authority to depart from the Criminal Rules once a Criminal Rules emergency is declared. These subdivisions would allow specified departures from the existing rules with respect to public access, a defendant's signature or consent, the number of alternate jurors, the time for acting under Rule 35, and the use of videoconferencing or teleconferencing in certain proceedings.

Paragraph (d)(1) specifically addresses the court's obligation to provide reasonable alternative access to public proceedings during a rules emergency if the emergency substantially impairs the public's in-person attendance. Following the public comment period, the Advisory Committee considered several submissions commenting on the reference to "victims" in the committee note discussing (d)(1). The Advisory Committee revised the committee note to direct courts' attention to the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771. The Standing Committee

made a minor wording change to this portion of the committee note (directing courts to "comply with" rather than merely "be mindful of" the applicable constitutional and statutory provisions).

As published, subparagraph (e)(3)(B) provided that a court may use videoconferencing for a felony plea or sentencing proceeding if, among other requirements, "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Public comments raised practical concerns about the requirement of an advance writing by the defendant requesting the use of videoconferencing. The Advisory Committee considered these comments as they pertained to the "request" language and the timing of the request, and ultimately elected to retain the language as published.

The Standing Committee made three changes relating to Rule 62(e)(3)(B). First, the Standing Committee voted (10 to 3) to insert "before the proceeding and" in subparagraph (e)(3)(B) to clarify the temporal requirement. Second, the Standing Committee voted (7 to 6) to substitute "consent" for "request" in subparagraph (e)(3)(B). The net result of these two changes is to require that the defendant, "before the proceeding and after consulting with counsel, consents in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Third, the Standing Committee authorized the Advisory Committee Chair and Reporters to draft conforming changes to the committee note. After these deliberations, the Standing Committee voted unanimously to recommend final approval of new Criminal Rule 62.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee on Criminal Rules met on April 28, 2022. In addition to the matters discussed above, the Advisory Committee considered several information items,

including proposals to amend Rule 49.1 to address a concern about the committee note's language regarding public access to certain financial affidavits and to amend Rule 17 to address the scope of and procedure for subpoenas.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 106, 615, and 702.

Rule 106 (Remainder of or Related Writings or Recorded Statements)

The proposed amendment to Rule 106 – the rule of completeness – would allow any completing statement to be admitted over a hearsay objection and would cover all statements, whether or not recorded. The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility. The amendment is intended to displace the common law, just as the common law has been displaced by all of the other Federal Rules of Evidence.

The Advisory Committee received only a few public comments on the proposed changes to Rule 106. As published, the amendment would have inserted the words "written or oral" before "statement" so as to address the rule's applicability to unrecorded oral statements. After public comment, the Advisory Committee deleted the phrase "written or oral" to make clear that Rule 106 applies to all statements, including statements – such as those made through conduct or through sign language – that are neither written nor oral.

Rule 615 (Excluding Witnesses)

The proposed amendments to Rule 615 would limit an exclusion order under the existing rule (which would be re-numbered Rule 615(a)) to exclusion of witnesses from the courtroom,

and would add a new subdivision (b) that would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Under the proposed amendments, if a court wants to do more than exclude witnesses from the courtroom, the court must so order. In addition, the proposed amendments would clarify that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee. The rationale is that the exemption is intended to put entities on par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale. In response to public comments, the Advisory Committee made two minor changes to the committee note (replacing the word "agent" with the word "representative" and deleting a case citation). The Standing Committee, in turn, revised three sentences in the committee note (including the sentence addressing orders governing counsel's disclosure of testimony for witness preparation).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendments to Rule 702's first paragraph and to Rule 702(d) are the product of Advisory Committee work dating back to 2016. As amended, Rule 702(d) would require the proponent to demonstrate to the court that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." This language would more clearly empower the court to pass judgment on the conclusion that the expert has drawn from the methodology. In addition, the proposed amendments as published would have required that "the proponent has demonstrated by a preponderance of the evidence" that the requirements in Rule 702(a) – (d) have been met. This language was designed to reject the view of some courts that the reliability requirements set forth in Rule 702(b) and (d) – that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology to the facts – are

questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. With this language, the Advisory Committee sought to explicitly weave the Rule 104(a) standard into the text of Rule 702.

More than 500 comments were received on the proposed amendments to Rule 702. In addition, a number of comments were received at a public hearing. Many of the comments opposed the amendment, and the opposition was especially directed toward the phrase "preponderance of the evidence." Another suggestion in the public comment was that the rule should clarify that it is the court and not the jury that must decide whether it is more likely than not that the reliability requirements of the rule have been met. The Advisory Committee carefully considered the public comments and determined to replace "the proponent has demonstrated by a preponderance of the evidence" with "the proponent demonstrates to the court that it is more likely than not" that the reliability requirements are met. The Advisory Committee also made a number of changes to the committee note, and the Standing Committee, in its turn, made one minor edit to the committee note.

After making the changes, noted above, to the committee notes for Rules 615 and 702, the Standing Committee unanimously approved the proposed amendments to Rules 106, 615, and 702.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 611, 613, 801, 804, and 1006 with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved for publication for

public comment the proposed new Rule 611(d) and the proposed amendments to Rules 613, 801, 804, and 1006, but did not approve for publication proposed new Rule 611(e). The Advisory Committee will further consider the proposed new Rule 611(e) in the light of the Standing Committee's discussion.

Rule 611(d) (Illustrative Aids)

The proposed amendment would amend Rule 611 ("Mode and Order of Examining Witnesses and Presenting Evidence") by adding a new Rule 611(d) to regulate the use of illustrative aids at trial. The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the jury in understanding the evidence) is sometimes a difficult one to draw and is a point of confusion in the courts. The proposed amendment would set forth uniform standards to regulate the use of illustrative aids, and in doing so, would clarify the distinction between illustrative aids and demonstrative evidence. In addition, because illustrative aids are not evidence and adverse parties do not receive pretrial discovery of such aids, the proposed amendment would require notice and an opportunity to object before an illustrative aid is used, unless the court for good cause orders otherwise.

Rule 611(e) (Juror Questions for Witnesses)

Proposed new Rule 611(e) was not approved for publication. That proposed rule would set forth a single set of safeguards that should be applied if the trial court decides to allow jurors to submit questions for witnesses. The proposed new Rule 611(e) requires the court to instruct jurors, among other things, that if they wish to ask a question, they must submit it in writing; that they are not to draw inferences if their question is rephrased or does not get asked; and that they must maintain their neutrality. The proposed rule also provides that the court must consult with counsel when jurors submit questions, and that counsel must be allowed to object to such

questions outside the jury's hearing. The committee note to proposed Rule 611(e) emphasizes that the rule is agnostic about whether a court decides to permit jurors to submit questions. During the Standing Committee meeting, members expressed differing views concerning this proposal, and the Advisory Committee has been asked to develop the proposal further in the light of that discussion.

Rule 613 (Witness's Prior Statement)

Current Rule 613(b) rejects the "prior presentation" requirement from the common law that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement, the adverse party was required to give the witness an opportunity to explain or deny the statement. The current rule provides that extrinsic evidence of the inconsistent statement is admissible so long as the witness is given an opportunity to explain or deny the statement at some point in the trial. The proposed amendment to Rule 613(b) would require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity. This would bring the rule into alignment with what the Advisory Committee believes to be the practice of most trial judges.

Rule 801(d)(2) (An Opposing Party's Statement)

Current Rule 801(d)(2) provides a hearsay exemption for statements of a party opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or potential liability has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent.

The proposed amendment to Rule 801(d)(2) would provide that such a statement is admissible against the successor-in-interest. The Advisory Committee reasoned that

admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

Current Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendment to Rule 804(b)(3) would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist.

Rule 1006 (Summaries to Prove Content)

The proposed amendment to Rule 1006 would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006. The proposed amendment to Rule 1006 fits together with proposed new Rule 611(d) on illustrative aids. Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. Courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006, and some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted, and would provide a cross-reference to Rule 611(d) on illustrative aids.

Information Items

The Advisory Committee on Evidence Rules met on May 6, 2022. The Advisory Committee discussed the matters listed above.

PROPOSED 2022 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed that rules be promulgated, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L. No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules" – Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 – took effect on December 1, 2007. Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." Pursuant to that directive, the Judicial Conference submitted reports to Congress in 2009 and 2011. The Committee recommends that the Judicial Conference approve this third report (the "2022 Report"), which covers the period from 2011 to date. Future reports will be submitted beginning in 2024 and every two years thereafter.

The 2022 Report discusses rule and form amendments relevant to privacy issues that were adopted since the 2011 report. There have been changes to then-Bankruptcy Forms 9 and 21 in 2012; Appellate Form 4 in 2013 and 2018; Bankruptcy Rule 9037 in 2019; and Appellate Rule 25(a)(5) (this amendment is on track to take effect on December 1, 2022, absent contrary action by Congress). In addition, privacy concerns also shaped the content of Rule 2 in the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g) (which is on track to take effect on December 1, 2022, absent contrary action by Congress).

The 2022 Report also discusses privacy-related topics currently pending on the Rules Committees' dockets, and deliberations in which the Rules Committees considered but rejected additional privacy-related rule amendments.

> **Recommendation:** That the Judicial Conference approve the proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to consider the Executive Committee's request for a report on the strategic initiatives that the Standing Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler, judiciary planning coordinator.

Respectfully submitted,

John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia Ann Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

* * * * *

TAB 3

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)

REA History:

- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which went into effect February 19, 2020.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Standing Committee, and the Judicial Conference, the proposed change to Form 101 (published in Aug. 2021) will go into effect December 1, 2022.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)

REA History:

- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 (published in Aug. 2021) will go into effect December 1, 2022.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of FRAP 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case. At its March 2022 meeting, the Bankruptcy Rules Committee remanded the Rule and Forms to the Consumer and Forms Subcommittee for further consideration in light of comments received. This action will delay the effective date of the proposed changes to no earlier than December 1, 2024.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication would add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	
BK Restyled Rules (Parts VII-IX)	The third and final set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
BK Form 410A	The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest."	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
	The amendments would put the burden on the claim holder to identify the elements of its claim.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 611(d)	The proposed new subdivision (d) would provide standards for the use of illustrative aids.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new subdivision (d) of Rule 611.	EV 611

TAB 4

Legislation That Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021–January 3, 2023)

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary:** Prohibits in class actions any allegation that an employee was misclassified as an independent contractor.	• 03/01/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 01/04/2021: Introduced in House; referred to Judiciary Committee
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ) *Cosponsor:* Rose (R-TN)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf **Summary:** Prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty unless the nonparty is represented by a party in a class action.	• 03/01/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 01/04/2021: Introduced in House; referred to Judiciary Committee
Mutual Fund Litigation Reform Act	**H.R. 699** *Sponsor:* Emmer (R-MN)	CV 8 & 9	**Bill Text:** https://www.congress.gov/117/bills/hr699/BILLS-117hr699ih.pdf **Summary:** Creates a heightened pleading standard for actions alleging breach of fiduciary duty under the Investment Company Act of 1940, requiring that "all facts establishing a breach of fiduciary duty" be "state[d] with particularity."	• 03/22/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 02/02/2021: Introduced in House; referred to Judiciary Committee
Providing Responsible Oversight of Trusts to Ensure Compensation and Transparency (PROTECT) Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Cosponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Amends 11 U.S.C. § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts]." Allows outside parties to demand information from administrators of such trusts regarding payment to claimants. Gives the U.S. Trustee investigative powers with respect to asbestosis trusts set up under § 524, even in the districts in North Carolina & Alabama where Bankruptcy Administrators or the federal courts currently take on U.S. Trustee functions in bankruptcy cases. May provide reason to amend BK 9035.	• 03/03/2021: Introduced in Senate; referred to Judiciary Committee

Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act of 2021	**H.R. 1693** *Sponsor:* Jeffries (D-NY) *Cosponsors:* 56 bipartisan cosponsors	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr1693/BILLS-117hr1693rfs.pdf **Summary:** Decreases penalties for certain cocaine-related crimes and allows those convicted under prior law to petition for a lower sentence. Provides that, notwithstanding CR 43, defendant not required to be present at hearing to reduce a sentence under this bill. **House Committee Report:** https://www.congress.gov/117/crpt/hrpt128/CRPT-117hrpt128.pdf	• 09/29/2021: Received in Senate; referred to Judiciary Committee • 09/28/2021: Passed in House on Yeas & Nays (361–66) • 03/09/2021: Introduced in House
Sunshine in the Courtroom Act of 2021	**S. 818** *Sponsor:* Grassley (R-IA) *Cosponsors*: Klobuchar (D-MN) Cornyn (R-TX) Durbin (D-IL) Leahy (D-VT) Blumenthal (D-CT) Markey (D-MA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** Allows presiding judges in district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides." Tasks Judicial Conference with promulgating guidelines. Expands statutory exception to prohibition on photography and broadcasting of criminal proceedings.	• 06/24/2021: Judiciary Committee ordered reported favorably (no amendments) • 06/24/2021: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees • 03/18/2021: Introduced in Senate; referred to Judiciary Committee
Litigation Funding Transparency Act of 2021	**S. 840** *Sponsor:* Grassley (R-IA) *Cosponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC) **H.R. 2025** *Sponsor:* Issa (R-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf [Senate] https://www.congress.gov/117/bills/hr2025/BILLS-117hr2025ih.pdf [House] **Summary:** Requires disclosure and oversight of third-party-litigation-funding agreements in MDLs and in "any class action."	• 10/19/2021: House Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 05/10/2021: Response letter sent from Judge Bates to Sen. Grassley and Rep. Issa • 05/03/2021: Letter received from Sen. Grassley and Rep. Issa • 03/18/2021: Introduced in House and Senate; referred to Judiciary Committees
Justice in Forensic Algorithms Act of 2021	**H.R. 2438** *Sponsor:* Takano (D-CA) *Cosponsor:* Evans (D-PA)	EV 702	**Bill Text:** https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf **Summary:** Precludes trade-secret evidentiary privilege and restricts admissibility of forensic computer evidence in criminal proceedings.	• 10/19/2021: Judiciary Committee referred to Crime, Terrorism & Homeland Security Subcommittee • 04/08/2021: Introduced in House; referred to Judiciary Committee and to Science, Space &

				Technology Committee, which referred to Research & Technology Subcommittee
Juneteenth National Independence Day Act	**S. 475** *Sponsor*: Markey (D-MA) *Cosponsors:* 60 bipartisan cosponsors	AP 26; BK 9006; CV 6; CR 45	**Bill Text:** https://www.congress.gov/117/plaws/publ17/PLAW-117publ17.pdf **Summary:** Establishes Juneteenth National Independence Day (June 19) as a federal public holiday.	• 6/17/2021: Became Public Law No. 117-17
Bankruptcy Venue Reform Act of 2021	**H.R. 4193** *Sponsor*: Lofgren (D-CA) *Cosponsors:* 15 bipartisan cosponsors **S. 2827** *Sponsor:* Cornyn (R-TX) *Cosponsor:* Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/117/bills/hr4193/BILLS-117hr4193ih.pdf [House] https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf [Senate] **Summary:** Modifies venue requirements relating to bankruptcy proceedings. Senate version includes a provision (absent from the House version) giving "no effect" in venue determinations to certain mergers, dissolutions, spinoffs, and divisive mergers of entities. Requires rulemaking under § 2075 to allow an attorney to appear on behalf of a governmental unit and intervene without charge or meeting local rule requirements in bankruptcy cases and arising under or related to proceedings before bankruptcy courts, district courts, and BAPs.	• 09/23/2021: S. 2827 introduced in Senate; referred to Judiciary Committee • 06/28/2021: H.R. 4193 introduced in House; referred to Judiciary Committee
Nondebtor Release Prohibition Act of 2021	**S. 2497** *Sponsor*: Warren (D-MA) *Cosponsors:* Durbin (D-IL) Blumenthal (D-CT) Booker (D-NJ) Sanders (I-VT)	BK	**Bill Text:** https://www.congress.gov/117/bills/s2497/BILLS-117s2497is.pdf **Summary:** Prevents individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by: • Prohibiting court from discharging, releasing, terminating, or modifying liability of or claim or cause of action against an entity other than the debtor or estate. • Prohibiting court from permanently enjoining commencement or continuation of any action with respect to an entity other than debtor or estate.	• 07/28/2021: Introduced in Senate; referred to Judiciary Committee

Protecting Our Democracy Act	**H.R. 5314** *Sponsor:* Schiff (D-CA) *Cosponsors:* 168 Democratic cosponsors **S. 2921** *Sponsor:* Klobuchar (D-MN) *Cosponsors:* 10 Democratic-caucusing co-sponsors	CR 6; CV	**Bill Text:** https://www.congress.gov/117/bills/hr5314/BILLS-117hr5314rds.pdf [House] https://www.congress.gov/117/bills/s2921/BILLS-117s2921is.pdf [Senate] **Summary:** Amends existing rules and directs Judicial Conference to promulgate additional rules to, for example: • Preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President. • "[E]nsure the expeditious treatment of" civil actions to enforce congressional subpoenas. Requires that the new rules be transmitted within 6 months of the effective date of the bill. **Committee Report:** https://www.congress.gov/117/cprt/HPRT46236/CPRT-117HPRT46236.pdf	• 12/13/2021: H.R. 5314 received in Senate • 12/09/2021: H.R. 5314 passed in House on Yeas & Nays (220–208) • 9/30/2021: S. 2921 introduced in Senate; referred to Homeland Security & Governmental Affairs Committee • 9/21/2021: H.R. 5314 introduced in House
Congressional Subpoena Compliance and Enforcement Act	**H.R. 6079** *Sponsor:* Dean (D-PA) *Cosponsors:* Nadler (D-NY) Schiff (D-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr6079/BILLS-117hr6079ih.pdf **Summary:** Requires Judicial Conference to promulgate rules "to ensure the expeditious treatment of" civil actions to enforce congressional subpoenas. Requires that the new rules be transmitted within 6 months of the effective date of the bill.	• 11/26/2021: Introduced in House; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States (AMICUS) Act	**S. 3385** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* Sanders (I-VT) Blumenthal (D-CT) Hirono (D-HI) Warren (D-MA) Lujan (D-NM)	AP 29	**Bill Text:** https://www.congress.gov/117/bills/s3385/BILLS-117s3385is.pdf **Summary:** Requires amici curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund preparation or submission of amicus brief.	• 12/14/2021: Introduced in Senate; referred to Judiciary Committee
Courtroom Video-conferencing Act of 2022	**H.R. 6472** *Sponsor:* Morelle (D-NY) *Cosponsors:* Fischbach (R-MN) Bacon (R-NE)	CR	**Bill Text:** https://www.congress.gov/117/bills/hr6472/BILLS-117hr6472ih.pdf **Summary:** Makes permanent (even in absence of emergency situations) certain CARES Act	• 01/21/2022: Introduced in House; referred to Judiciary Committee

	Tiffany (R-WI)		provisions, including allowing the chief judge of a district court to authorize teleconferencing for initial appearances, arraignments, and misdemeanor pleas or sentencing. Requires defendant's consent before proceeding via teleconferencing and ensures that defendants can utilize video or telephone conferencing to privately consult with counsel.	
Save Americans from the Fentanyl Emergency (SAFE) Act of 2022	**H.R. 6946** *Sponsor:* Pappas (D-NH) *Cosponsors:* 10 bipartisan cosponsors	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr6946/BILLS-117hr6946ih.pdf **Summary:** Decreases penalties for certain fentanyl-related crimes and allows those convicted under prior law to petition for a lower sentence. Provides that, notwithstanding CR 43, defendant not required to be present at hearing to reduce a sentence under this bill.	• 03/08/2022: Energy & Commerce Committee referred to Health Subcommittee • 03/07/2022: Introduced in House; referred to Energy & Commerce Committee and to Judiciary Committee
Bankruptcy Threshold Adjustment and Technical Corrections Act	**S. 3823** *Sponsor:* Grassley (R-IA) *Cosponsors:* Durbin (D-IL) Whitehouse (D-RI) Cornyn (R-TX)	BK 1020; BK Forms 101 & 201	**Bill Text:** https://www.congress.gov/117/plaws/publ151/PLAW-117publ151.pdf **Summary:** Retroactively reinstates for further 2 years from date of enactment the CARES Act definition of "debtor" in § 1182(1), with its $7.5 million subchapter V debt limit.	• 06/21/2022: Became Public Law No. 117-151
Government Surveillance Transparency Act of 2022	**S. 3888** *Sponsor:* Wyden (D-OR) *Cosponsors:* Daines (R-MT) Lee (R-UT) Booker (D-NJ) **H.R. 7214** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Bill Text:** https://www.congress.gov/117/bills/s3888/BILLS-117s3888is.pdf [Senate] https://www.congress.gov/117/bills/hr7214/BILLS-117hr7214ih.pdf [House] **Summary:** Adds a sentence and two subdivisions of text to CR 41(f)(1)(B) regarding what the government must disclose in an inventory taken under the Rule. (See page 25 of either PDF for full text.)	• 03/24/2022: H.R. 7214 introduced in House; referred to Judiciary Committee • 03/22/2022: S. 3888 introduced in Senate; referred to Judiciary Committee
21st Century Courts Act of 2022	**S. 4010** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* Blumenthal (D-CT) Hirono (D-HI) **H.R. 7426** *Sponsor:* Johnson (D-GA)	AP 29; CV; CR	**Bill Text:** https://www.congress.gov/117/bills/s4010/BILLS-117s4010is.pdf [Senate] https://www.congress.gov/117/bills/hr7426/BILLS-117hr7426ih.pdf [House] **Summary:** Requires amici curiae to disclose whether counsel for a party authored amicus brief in whole or in part and whether a party or a party's counsel made a monetary	• 04/06/2022: S. 4010 introduced in Senate; referred to Judiciary Committee • 04/06/2022: H.R. 7426 introduced in House; referred to Judiciary Committee, to Oversight & Reform Committee, and to House Administration

	Cosponsors: 8 Democratic cosponsors		contribution intended to fund preparation or submission of the brief. Also requires (within 1 year) promulgation of rules regarding procedures for the public to contest a motion to seal a judicial record.	
Supreme Court Ethics, Recusal, and Transparency Act of 2022	**H.R. 7647** *Sponsor:* Johnson (D-GA) *Cosponsors:* 60 Democratic cosponsors **S. 4188** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 12 Democratic cosponsors	AP 29; CV; CR; BK	**Bill Text:** https://www.congress.gov/117/bills/hr7647/BILLS-117hr7647ih.pdf [House] https://www.congress.gov/117/bills/s4188/BILLS-117s4188is.pdf [Senate] **Summary:** Directs rulemaking regarding party and amici disclosures in the Supreme Court. Also requires amici in any court to disclose whether counsel for a party authored amicus brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to preparation or submission of the brief. Directs rulemaking to prohibit filing or to strike an "amicus brief that would result in the disqualification of a justice, judge, or magistrate judge."	• 05/11/2022: S. 4188 introduced in Senate; referred to Judiciary Committee • 05/11/2022: House Judiciary Committee consideration & mark-up session; ordered to be reported (amended) (22–16) • 05/03/2022: H.R. 7647 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2022	**H.R. 8531** *Sponsor:* Johnson (D-GA) *Cosponsors:* Bowman (D-NY) Maloney (D-NY) Jayapal (D-WA) Thompson (D-MS) Bush (D-MO)	EV	**Bill Text:** https://www.congress.gov/117/bills/hr8531/BILLS-117hr8531ih.pdf **Summary:** Enacts new EV rule that would make inadmissible in criminal cases evidence of a defendant's creative or artistic expression unless the court finds by clear and convincing evidence that four factors are met.	• 07/27/2022: Introduced in House; referred to Judiciary Committee
Competitive Prices Act	**H.R. 8777** *Sponsor:* Porter (D-CA) *Cosponsors:* Nadler (D-NY) Cicilline (D-RI) Jaypal (D-WA) Jeffries (D-NY)	CV 8, 12(b)(6), 56	**Bill Text:** https://www.congress.gov/117/bills/hr8777/BILLS-117hr8777ih.pdf **Summary:** Abrogates *Twombly* pleading standard in antitrust actions; specifies standards necessary to state a plausible claim or demonstrate a genuine dispute of material fact. ("Consciously parallel conduct" could be enough to state a plausible claim.)	• 09/06/2022: Introduced in House; referred to Judiciary Committee
Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act of 2022	**S. 4822** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 49 Democratic-caucusing cosponsors	CV 5.1, 24	**Bill Text:** https://www.congress.gov/117/bills/s4822/BILLS-117s4822pcs.pdf **Summary:** Requires declaratory and injunctive challenges to constitutionality or lawfulness of bill to be brought in D.D.C. and appealed	• 09/22/2022: Cloture motion failed (49–49) • 09/19/2022: Motion made to proceed in Senate; cloture motion made on motion to proceed

			to CADC; copy of complaint must be delivered to Clerk of House and Secretary of Senate; D.D.C. and CADC must expedite dispositions; action must be transferred to D.D.C. if amendment/counterclaim/cross-claim/affirmative defense/other pleading or motion challenges Act; any member of House or Senate has right to bring such an action or intervene in such an action	• 09/13/2022: Placed on Senate Legislative Calendar under General Orders • 09/12/2022: Introduced in Senate
Protect Reporters from Exploitative State Spying (PRESS) Act	**H.R. 4330** *Sponsor:* Raskin (D-MD) *Cosponsors:* Lieu (D-CA) Yarmuth (D-KY) Norton (D-DC) Blumenauer (D-OR) Eshoo (D-CA) Demings (D-FL) Scanlon (D-PA)	CV 26–37, 45; BK 7026–37, 9016; CR 16, 17	**Bill Text:** https://www.congress.gov/117/bills/hr4330/BILLS-117hr4330eh.pdf **Summary:** Imposes notice-and-hearing requirements and substantive standards for subpoenas to issue against journalists and service providers holding journalists' records; limits scope of compelled testimony or document production. **Committee Report:** https://www.congress.gov/117/crpt/hrpt354/CRPT-117hrpt354.pdf	• 09/20/2022: Received in Senate; referred to Judiciary Committee • 09/19/2022: Passed in House by voice vote • 06/07/2022: Reported as amended by Judiciary Committee • 07/01/2021: Introduced in House; referred to Judiciary Committee
Strategic Lawsuits Against Public Participation (SLAPP) Protection Act of 2022	**H.R. 8864** *Sponsor:* Raskin (D-MD) *Cosponsors:* Cohen (D-TN)	CV 12; CV 56	**Bill Text:** https://www.congress.gov/117/bills/hr8864/BILLS-117hr8864ih.pdf **Summary:** Imposes special procedures for motions to dismiss SLAPPs. Special motion for dismissal must be made within 60 days of service or removal. Stays all other proceedings except remand proceedings. Movant must put forward evidence establishing that the claim "is based on, or in response to, the party's lawful exercise of the constitutional right of petition, freedom of the press, peaceful assembly, free speech on a matter of public concern, or other expressive conduct on a matter of public concern"; respondent has burden to show statutory exception and must put forward prima facie evidence as to each element of the claim "under the standard of [CV] 56"; and then movant still has opportunity to show no genuine issue of material fact and that movant is entitled to judgment as a matter of law under CV 56. Court must expedite ruling but may extend statutory deadline for docket delays, discovery, or good cause.	• 09/15/2022: Received in House; referred to Judiciary Committee

TAB 5

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE
MARCH 29, 2022

The Civil Rules Advisory Committee met in San Diego, California, on March 29, 2022. One member and consultants participated by remote means. The meeting was open to the public. Participants included Judge Robert Michael Dow, Jr., Committee Chair, and Committee members Judge Cathy Bissoon; Judge Jennifer C. Boal; David J. Burman, Esq.; Judge David C. Godbey; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi (by remote means); Judge R. David Proctor; Judge Robin L. Rosenberg; Joseph M. Sellers, Esq.; Dean A. Benjamin Spencer; Ariana Tadler, Esq.; and Helen E. Witt, Esq. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge John D. Bates, Chair (by remote means); Professor Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant (by remote means); and Peter D. Keisler, Esq., represented the Standing Committee. Professor Daniel J. Capra, Reporter for the Evidence Rules Committee, participated by remote means. Judge Catherine P. McEwen participated by remote means as liaison from the Bankruptcy Rules Committee. Carmelita Reeder Shinn, Esq., participated as Clerk Representative. The Department of Justice was represented by Joshua E. Gardner, Esq., who noted that Hon. Brian M. Boynton could not attend because of international travel. Bridget M. Healy, Esq., S. Scott Myers, Esq., and Burton DeWitt, Esq. (Rules Law Clerk), and Brittany Bunting represented the Administrative Office. Dr. Emery G. Lee represented the Federal Judicial Center.

Members of the public who joined the meeting by remote means are identified in the attached Teams attendance list.

Judge Dow opened the meeting with messages of thanks and welcome. He began with thanks to the staff at the Administrative Office who, although shorthanded, did flawless work in arranging meeting logistics and in assembling and disseminating the agenda materials.

Judge Dow further expressed great pleasure in having the first in-person meeting since October 2019, and the opportunity to renew acquaintances in the casual committee dinner before the meeting. The remote participants in today's meeting also were welcomed.

Four new members have joined the Committee since the most recent in-person meeting: Judges Bissoon, Godbey, and Proctor, and lawyer Burman. Clerk representative Shinn also is new. All have

participated in remote meetings, but it is good to welcome them in person.

Two members will be leaving the Committee. Judge Lioi has completed her appointed terms. She has contributed greatly to Committee work, including serving as chair of the subcommittee that generated the pending Supplemental Rules for Social Security cases and another that studied the proposal to amend Rule 9(b) to be discussed later in this meeting. Judge Lioi responded: "It's been a pleasure. I miss you. Keep up the good work." Justice Lee will soon retire from the Utah Supreme Court. He has contributed valuable perspectives on many issues.

Another departure was noted. Julie Wilson has left the Rules Committee Support Office to join a firm in private practice. Her unflagging work with the Committee made it seem that she had no other committees to work with.

Judge Dow also noted extensive public attendance at this meeting, and welcomed it. "Transparency is our hallmark, and we much appreciate your interest and observation, as well as those who have offered advice and even created programs for the Committee in between meetings."

Judge Dow reported on the January 22 Standing Committee meeting. The proposal to publish an amendment of Rule 12(a)(1), (2), and (3) was approved. Most of the discussion focused on the work of the MDL Subcommittee. Standing Committee members, both judges and lawyers, have a lot of MDL experience, and provided valuable feedback. Other parts of this Committee's work were summarized and covered quickly.

The Civil Rules "were not high on the agenda" of the March meeting of the Judicial Conference. There were other pressing topics that absorbed their attention.

Judge Dow also reviewed the prospective effective dates for Civil Rules amendments that may take effect on December 1 in 2022, 2023, and 2024.

Legislative Update

Burton DeWitt provided a legislative update on pending legislation. Among other topics, he noted that the House has passed a bill that would require the Judicial Conference to promulgate rules to ensure the expeditious treatment of actions to enforce Congressional subpoenas. The amendments would have to be transmitted within 6 months of the effective date of the bill.

October 2021 Minutes

The draft Minutes for the October 5, 2021 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Rule 87

Prompted in part by the CARES Act call for consideration of rules that might apply during an emergency declared by the President, all five advisory committees considered the prospect that special emergency rules provisions might be important. The Evidence Rules Committee decided that all of the Evidence Rules are fully adaptable to any emergency circumstances that might be imagined. The Appellate, Bankruptcy, Civil, and Criminal Rules Committees all appointed subcommittees and devoted great effort through the spring and summer of 2020 to begin the process. Recognizing that it is important to achieve as much uniformity as possible among these four sets of rules, Professor Capra, Reporter for the Evidence Rules Committee, and Professor Struve, Reporter for the Standing Committee, undertook active work to coordinate deliberations by the four subcommittees and committees. Much uniformity was achieved in the initial stages, and still greater uniformity was hammered out in refining the proposals that were published for comment in August 2021.

The CARES Act Subcommittee began by reviewing all of the Civil Rules to determine which might work to impede the effective administration of civil litigation during an emergency. Early experience during the Covid-19 pandemic showed that the Civil Rules were working well. The rules have been drafted over the years with a purpose to avoid detailed mandates, relying instead on general provisions that set outer limits, identify purpose and direction, and depend on flexible administration by parties and the courts.

That guiding purpose has been tested by the pandemic and the rules have succeeded in almost surprising ways. The Subcommittee eventually hammered out a proposal that depended not on experience of rules failures but on identifying potential roadblocks that appear on the face of the rules. Judge Dow noted special thanks to member Sellers for painstakingly reading through all the rules to identify potential obstacles and then reduce the number by careful analysis.

Rule 87 was published with many provisions common to all four sets of rules. It authorizes the Judicial Conference to declare a Civil Rules Emergency and, in the declaration, to adopt all of the emergency rules identified in Rule 87(c) unless the declaration excepts one or more of them. The declaration must designate the court or courts affected, must be limited to a stated period of no more than 90 days, and may be terminated before the stated period expires. Additional declarations may be made.

The Emergency Rules included in Rule 87(c) supplement five provisions in Rule 4 and one provision in Rule 6. The Emergency Rules 4 all provide that the court may order service of process by any method that is reasonably calculated to give notice. Emergency Rule 6(b)(2) supersedes the provision in Rule 6(b)(2) that absolutely forbids any extension of the times to make post-judgment rules set by Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). Somewhat different provisions are made for completing an act authorized under Emergency Rules 4 and 6 after the declaration of a rules emergency ends. The provisions of Rule 6(b)(2) are carefully drafted to integrate with the time-to-appeal limits set by Appellate Rule 4.

Judge Jordan introduced the report of the CARES Act Subcommittee by thanking Professors Capra and Struve for their valuable work in enhancing uniformity among the different sets of rules, both before publication and during the period that led up to the present consideration of recommendations to adopt the proposed rules.

Some of the comments, although supporting the published proposal, suggest that emergency provisions should be added either by way of more Emergency Rules incorporated in Rule 87(c) or by amending the regular rules. These suggestions draw from fear that the regular rules may not prove adequate to the challenges that

could arise from future emergencies unlike the present pandemic. The Subcommittee, however, remains persuaded that the rules are sufficiently flexible to provide all appropriate authority. This view is clearly expressed in the Committee Note.

Professor Capra observed that "We're in a good place on uniformity." The differences that remain among the several emergency rules "are easily explained." Professor Struve added to the expressions of thanks for Professor Capra's leadership in the efforts to achieve uniformity.

Professor Marcus noted that the Subcommittee had considered the prospect that the provision for court-ordered alternative methods of service in the Emergency Rules 4 might instead be added to the corresponding provisions of Rule 4. When the Committee comes to review Rule 4 some day, this provision will be among the possible amendments.

A member asked whether the definition of a rules emergency is too narrow because it focuses on the court's ability to perform its functions without considering the emergency's impact on the parties. If the parties cannot function, the court cannot function. This problem was discussed among the several subcommittees while hammering out the uniform definition. The decision was to exclude it from rule text. But the second paragraph of the Committee Note says that the definition of an emergency is flexible, adding: "The ability of the court to perform its functions in compliance with these rules may be affected by the ability of the parties to comply with a rule in a particular emergency." An example is offered -- a court may remain open for business, but an emergency may prevent the parties from coming to it. Another example would be an emergency that disables the parties from complying with a scheduling order.

A second question asked whether Rule 87(b)(1)(B) is too confining. It provides that a declaration of a civil rules emergency must adopt all of the Emergency Rules in Rule 87(c) "unless it excepts one or more of them." Why not provide authority to adopt one of them with restrictions? The Subcommittee concluded that the Judicial Conference could not fairly be charged with a responsibility to engage in such fine-grained analysis during an emergency. As the rule stands, the Conference can, for example, decide to adopt the Emergency Rule 4(h)(1) that allows the court

to order a different method of service on a corporation, partnership, or unincorporated association, while not adopting Emergency Rule 4(e) that would allow an order for a different method of serving an individual. Attempting to further narrow the range of methods of service that a court might order under an Emergency Rule would not be feasible. Beyond the difficulty of identifying the impact of the emergency on any particular court included in the definition, too much would depend on the nature of the lawsuit, the character of the parties, the availability of different potential means of service, and perhaps other variables. The prospect of adding "restrictions" to Emergency Rule 6(b)(2) is still less persuasive. The court would retain broad discretion to refuse any extension of time for any post-judgment motion and to define the time for any motion that might be permitted. This provision, further, is tightly integrated with the provisions that govern appeal time under Appellate Rule 4.

The remaining discussion addressed several aspects of the Committee Note. The Committee approved an addition to the part that addresses Emergency Rules 4, advising that the court "should explore the opportunities to make effective service under the traditional methods provided by Rule 4, along with the difficulties that may impede effective service under Rule 4. Any means of service authorized by the court must be calculated to fulfill" the fundamental role of service in providing notice of the action.

Three other issues involved portions of the Note published in brackets. The brackets were designed to invite comments on these portions, but no comments were received. (1) The final long sentence at the end of the paragraph that explains integration of Emergency Rule 6(b)(2) with Rule 6(b)(1)(A) at page 135 of the agenda materials discusses the circumstances in which Rule 6(b)(2) might authorize an extension of time to make a Rule 60(b) motion. The sentence is intended to explain a complicated issue at the interface of Rule 60(b), Emergency Rule 6(b)(2), and Appellate Rule 4. But it seems better removed. A party confronting such a question cannot be spared the work of careful analysis of these rules. And a party not familiar with these intricacies could easily be confused by this attempt to help. The Committee voted to delete this sentence. (2) The paragraph on item 6(b)(2)(B)(i) at page 136 of the agenda materials includes a second sentence advising that a court should act as promptly as possible on a motion to extend the time for a post-judgment motion. This sentence is gratuitous

advice to courts that will understand the competing needs for careful deliberation and prompt disposition. The Committee voted to delete it. (3) The final sentence of the paragraph on the provisions for resetting appeal time that runs from pages 136 to 137 notes that under the parallel amendment of Appellate Rule 4(a)(4)(A)(vi), a timely motion for relief under Rule 60(b) that is made after the time allowed for a motion under Rule 59 "supports an appeal from disposition of the Rule 60(b) motion, but does not support an appeal from the [original] final judgment." "Original" is meant to remind the parties that complete disposition of a Rule 60(b) motion is appealable as a final decision, but does not of itself support appeal from the judgment challenged by the motion. The Committee concluded that this reminder of this distinction may be helpful and voted to delete the brackets.

The Committee voted without dissent to recommend Rule 87 for adoption. Judge Dow was joined by Judge Bates in offering thanks and appreciation to Judge Jordan, the CARES Act Subcommittee, Professors Capra and Struve, and the Reporters for their hard and careful work and achievement of as much uniformity as possible with the parallel rules proposed by other advisory committees.

Rule 12(a)(4)(A)

Judge Dow reminded the Committee that the proposal to amend Rule 12(a)(4) came from the Department of Justice. Rule 12(a)(4)(A) sets the time to serve a responsive pleading at 14 days after the court denies a motion under Rule 12 or postpones its disposition until trial. The court can set a different time. The proposal would extend the time to 60 days "if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf."

The Committee unanimously recommended publication for comment. Only three comments were received after publication in August 2020. Two of the comments protested that the proposal would further delay the progress of actions by victims of unlawful law enforcement behavior, actions already burdened by official immunity defenses. Committee discussion in April 2021 took these issues seriously. Motions were made to shorten the time to some interval less than 60 days, or to limit whatever extended time might be allowed to actions that include an official immunity

defense. Each motion won significant support, but failed. A motion to recommend adoption was approved by a vote of ten for and five against.

The questions raised in the Committee's discussion were explored at length in the Standing Committee in June 2021. The outcome was agreement that this Committee should press for further empirical information to illuminate the arguments that have been made to support the proposal.

The empirical questions were renewed and expanded at the Committee meeting in October 2021. They surround the reasons advanced to support the proposal. The Department reports that the complexities of the decision whether to represent a federal agent sued in an individual capacity, coupled with the Department's many other obligations and the inherent complexity of the questions raised by many individual-capacity actions, make it inherently more difficult to prepare a responsive pleading within the general 14-day period. These general problems are aggravated in the many cases that include an official immunity defense. An order denying a motion to dismiss that raises an official immunity defense is eligible for immediate appeal under the collateral-order doctrine. The decision whether to appeal, however, is more complicated for the Department than it might be for a private attorney. The Department should authorize an appeal only when there are good reasons to hope for reversal, recognizing that a motion to dismiss on the pleadings may provide an unsatisfactory basis for resolving immunity issues that might better be resolved by motion for summary judgment. An appeal on the pleadings might lead to questionable rulings on the law because the "record" provided by the pleadings is uncertain, and to rulings -- and the delays of appeals -- that are unnecessary because the facts are not as they appear in the pleadings. Any appeal, moreover, must be approved by the Solicitor General, a process that requires all of the 60-day appeal period provided by Appellate Rule 4(a)(1)(B)(iv).

These concerns were amplified by observing that the Department routinely asks for an extension of the time to file a responsive pleading in these cases, and regularly wins an extension. An extension to sixty days is common. The Department, however, must proceed to prepare a responsive pleading until it knows whether an extension will be granted. The Department suggests that a pleading prepared within 14 days will not be as useful as

one prepared with greater time. And if the motion to extend has not been resolved and the answer has been filed within 14 days, it may become necessary to launch other pretrial proceedings, even at times to begin discovery. These activities defeat the purpose of the doctrine that permits appeal from denial of the motion to dismiss.

These explanations were focused in Committee discussion as a choice between competing "presumptions" that might be embodied in the rule. Given the court's authority to set a longer period than 14 days under the rule, or to set a shorter period than 60 days under the proposed amendment, which is better? If indeed courts regularly recognize the need for more time than 14 days, adopting the 60-day period could avoid the burden motions to extend impose on the court and parties. But if practice suggests that extensions are not routinely justified, the 14-day period may be appropriate still. So too it would be good to know how many cases involve official immunity defenses and how often appeals are taken from denials of motions to dismiss.

The empirical questions raised by these uncertainties were distilled through the successive discussions in this Committee and the Standing Committee. How frequently does the Department seek an extension of the time to respond? How frequently are extensions granted? How long are the extensions that are granted? How many individual-capacity actions raise official immunity defenses? What is the rate of orders denying the defense? How often are appeals taken from denial of an immunity defense on the pleadings?

The Department of Justice has worked diligently to develop empirical information to answer these questions. It has been able to identify the number of individual-capacity actions in which it has provided a defense. Over the period from 2017 to 2021 the number has ranged from a low of 1,226 in 2017 to a high of 2,028 in 2021. But it has not been able to move beyond strong anecdotal evidence to more precise empirical answers to the questions raised by the Committees. Given the Department's structure, moreover, it would be at best truly difficult to devise a program for generating the necessary information for future years.

In response to a question about what had seemed to be a Department suggestion that the proposal should be withdrawn, the Department continues to believe that the reasons that supported

its initial proposal are sound. It would welcome a Committee decision to recommend adoption of the proposal as published. But it respects the Committee's desire for better empirical information that cannot be obtained. The Department believes that it would be better not to recommend adoption of any revised version that would provide fewer than 60 days to respond, or limit an extended period to cases that include some nature of official immunity defenses.

Discussion began with the observation that extending the period to any of the times less than 60 days that were suggested in earlier discussions, ranging from 30 to 35 to 45 days, could make it more difficult to get an extension running beyond the stated time.

Another observation was that the proposal has been resisted on grounds beyond the lack of clear answers to the empirical questions. There is some measure of resentment about rules that give the United States advantages compared to other parties -- why should state governments not enjoy comparable treatment to alleviate comparable difficulties? Why exacerbate the difficulties and delays encountered by plaintiffs who confront official immunity defenses?

The direction of the discussion led a committee member to ask whether there is a difference between tabling a proposal and removing it from the agenda? A first response was that if the reason for tabling would be to afford the Department more time to develop more precise empirical information, tabling makes sense if there is a prospect that the information can be developed in the reasonably near future.

A motion was made to remove the proposal from the agenda without prejudice. The Department knows the Committee's concerns and can renew the proposal when it believes it can present better information to address those concerns. The motion was adopted without dissent.

The Committee will recommend that the Standing Committee not approve the published proposal for adoption.

Judge Dow thanked the Department for its diligent efforts to develop information to address the Committee's concerns.

Rule 15(a)(1)

The proposal to amend Rule 15(a)(1) published in August 2021 addressed an infelicitous choice of words that was not caught in the Style Project. The rule allows amendment of a pleading once as a matter of course "within" (A) 21 days after serving the pleading or, (B) if a responsive pleading is required, 21 days after service of a responsive pleading or service of a motion under Rule 12(b), (e), or (f), whichever is earlier. Read literally, "within" creates a gap that may defeat an amendment as a matter of course during a dead period between 21 days after serving the pleading and 21 days after service of a responsive pleading or one of the designated Rule 12 motions. An easy illustration is provided by an action in which a responsive pleading is due 60 days after service, see Rule 12(a)(2) and (3). The time for calculating a period that begins "within" a stated time after an event begins with the event. So the pleading cannot be amended as a matter of course between 21 days after serving the initial pleading until service of a responsive pleading or Rule 12 motion starts the additional 21-day period. This result makes no sense. It might be hoped that no one would pause to take it seriously. But litigants who read the rule carefully have been troubled.

The published proposal offers a simple correction. "Within" is deleted and replaced by "no later than."

There were few public comments. They offered either support or unpersuasive additional suggestions.

Brief discussion agreed to simplify the Committee Note by deleting a sentence that was published in brackets, as it appears at lines 702-703 of the agenda materials: "The amendment could not come 'within' 21 days after the event until the event happened." This sentence offers an unnecessary elaboration of the explanation offered by the Note.

The Committee voted without dissent to recommend the proposal for adoption, with deletion of the designated sentence in the Committee Note.

Rule 72(b)(1)

The proposal to amend Rule 72(b)(1) was published in August 2021. The rule now directs the clerk to "promptly mail" a copy of a magistrate judge's recommended disposition to each party. The amendment would direct the clerk to "immediately serve a copy on each party as provided in Rule 5(b)." Rule 5(b) includes provisions for electronic service that are more convenient and usually more effective than mail.

The proposal was presented for a recommendation to adopt as published after deleting the second sentence in the Committee Note. This sentence observed that service of notice of entry of an order or judgment under Rule 5(b) is permitted by Rule 77(d)(1) and works as well. This sentence was designed as a guide for public comment, but it was not needed to explain the amendment.

Discussion began with one of the small number of public comments. This comment observed that often mail is the only means of providing notice to a party who is in prison. Rule 5(b) allows mail service. Court clerks are familiar with the need for care in selecting means of notice to prisoners, and will recognize the circumstances that require service by mail. And it does not make sense to make mail the exclusive means of service on prisoners. Parallel questions are being explored in the all-committees project to consider possible expansions of the opportunities for electronic filing by pro se litigants. So here, some courts are eagerly exploring development of systems that will facilitate electronic methods of communicating with parties in prison, recognizing the special problem that a party may be moved from one prison to another and may prove difficult to track.

A motion to recommend the proposal for adoption as published, after striking the second sentence from the Committee Note, was adopted without dissent.

Rule 6(a)(6)(A)

The Appellate, Bankruptcy, and Criminal Rules Committees are acting in parallel with this proposal to amend the definitions of statutory legal holidays in the time computation rules to include Juneteenth National Independence Day. This amendment reflects the Juneteenth National Independence Act of 2021.

The Committee adopted without dissent a motion to recommend adoption of this amendment without publication. It is a more nearly automatic revision than some "technical" amendments. Publication will be warranted only if some other advisory committee recommends publication, an event that does not seem likely. No committee yet has recommended adoption.

Rule 9(b) Subcommittee Report

Judge Lioi presented the report of the Rule 9(b) Subcommittee. The Subcommittee was formed to study a proposal by Committee Member Dean Spencer that Rule 9(b) should be amended to revise the Supreme Court's interpretation of the rule's second sentence in Ashcroft v. Iqbal, 556 U.S. 662, 686-687 (2009). The first sentence requires that a party alleging fraud or mistake "state with particularity the circumstances constituting fraud or mistake." The second sentence adds: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The Court ruled that "generally" does not mean that it suffices simply to plead the words "malice," "intent" "knowledge," or other words such as "purpose." Instead such allegations must satisfy the general pleading standard of Rule 8(a)(2), which requires a short and plain statement of the claim showing that the pleader is entitled to relief. The Court's understanding of the Rule 8(a)(2) standard was itself restated in terms that began with the Twombly decision in 2007 and have come to be described by many in a shorthand reference to "plausibility."

The proposal would amend the second sentence:

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

One part of the proposal draws from the original 1937 Committee Note that explained Rule 9(b). The second sentence was modeled on a British rule, indeed is a nearly verbatim version of the British rule. That rule allows conditions of mind to be pleaded as a fact, without more. It is enough to say a party intended a result, or knew something, and so on. Nineteenth Century British cases are explored to show the rule was applied as intended. The

Supreme Court's interpretation in the *Iqbal* case is challenged as a departure from the original intent.

The rules law clerk was charged with reviewing cases interpreting the second sentence between the time Rule 9(b) was adopted in 1938 and the *Iqbal* decision. Fewer than 20 cases were found. They do not reflect deliberate consideration of the question as framed in the *Iqbal* opinion. Instead they focus on denying the need for particularity, the obvious contrast with the first sentence. At the same time, some of the cases seem to assume that general Rule 8(a)(2) pleading standards apply. Those standards, however, fluctuated uncertainly around a mean that was raised by the *Twombly* decision in 2007.

Professor Marcus added that the agenda materials thoroughly explore the issues, including pre-*Iqbal* decisions that clearly demanded that facts be pleaded to support an inference of intent. It may be significant that in the 1993 decision in the *Leatherman* case the Supreme Court rejected any heightened pleading requirement for cases involving official immunity as inconsistent with the negative implications of the first sentence of Rule 9(b), but at the same time suggested that if heightened pleading requirements are appropriate for some claims they should be adopted through the Rules Enabling Act process. Other opinions in other areas have at times suggested that an interpretation of the Civil Rules might be reconsidered in the Enabling Act process. No such suggestion appears in the *Iqbal* opinion. More generally, the *Twombly* and *Iqbal* opinions caused great perturbation in the academy, and even prompted introduction of legislation designed to restore the pleading standards that had prevailed before 2007. An earlier rules law clerk produced a memorandum reviewing pleading decisions under the new standards that eventually reached more than 700 pages without identifying any clear occasion for rules amendments. The present proposal "is back to the pleading wars."

Discussion began with a more general description of the arguments for the proposed amendment.

One range of arguments draws from the structure of Rules 8 and 9. The various provisions point away from relying on the general direction of Rule 8(a)(2) for pleading claims and toward the more focused provisions that focus on pleading elements of claims. Rule 9(b) is one of those, and the structure does not

support the interpretation of "generally" that invokes Rule 8(a)(2).

The more fundamental range of arguments, going beyond the original intent and structure of the pleading rules, draw from lower court decisions that apply the plausibility standard in addressing pleadings of such conditions of mind as an intent to discriminate. These decisions are seen to impose unfair obstacles that thwart valid claims, with employment discrimination claims as a leading example. A plaintiff should not lose by dismissal on the pleadings for failure to plead facts supporting an inference of discriminatory intent without an opportunity to discover information available only from the defendant or unfriendly third parties. And there is a risk that reliance on the pleading standard that looks to "judicial experience and common sense" will defeat claims solely because of the necessarily limited experience of any single judge.

These functional arguments lend weight to the argument built on original intent. But whatever the original intent may have been, the worlds of law and litigation have changed. Law has proliferated, providing many new and often complex claims that invoke state of mind as a critical ingredient that is not easily inferred even from masses of surrounding circumstances. The Court may well have been right in its apparent intuition that it is not wise to allow simple assertion, as a fact and without more, of such elements as actual malice in defaming a public figure, or intent to discriminate in an RLUIPA claim, or more straightforward discrimination on the basis of race, ethnicity, gender, religion, or other characteristics. So for intent to discriminate on the basis of disability or -- still more complex -- a perception of a disability that does not in fact exist.

Dean Spencer said that the Subcommittee had considered the proposal thoroughly. The cases resolved before the *Iqbal* decision are less relevant to the question than the cases decided under its direction. But clearly these are complex questions. It might be better to take them on. But it is understandable that the Committee is not comfortable with the proposal to address them, recognizing that it is too much to ask it to take on the Supreme Court without the kind of invitation the Court has occasionally extended to apply the Enabling Act process to reexamine a procedure rule.

Judge Lioi thanked the Subcommittee for its work.

Judge Dow observed that every Committee member recognizes the strength of the proposal. But it seems wiser not to pursue it further. He echoed Judge Lioi's thanks to the Subcommittee members, Dean Spencer, and the Reporters for their work, adding that the Committee relies heavily on the lawyer members, there are only four of them, and all contribute many hours to the work of the several subcommittees.

Multidistrict Litigation Subcommittee Report

Judge Rosenberg delivered the report of the Multidistrict Litigation Subcommittee. She began by thanking Subcommittee members for their incredibly hard work and invaluable input. Subcommittee thinking about possible MDL rules has evolved. It has begun to probe what a rule might look like, although there is no consensus whether an evaluation of possible rule approaches may culminate in a conclusion that no rule should be recommended. That question remains open, although the Subcommittee is receptive to the possibility.

A variety of reasons may support adopting MDL rules. MDLs comprise a large part of the federal docket, although estimates of the fraction vary. The Judicial Panel on Multidistrict litigation is making a concerted effort to expand the pool of potential MDL judges -- as more new judges are drawn into these proceedings, they may benefit from rules that distill the practices that have developed in the cooperation of experienced MDL lawyers with experienced MDL judges. And some MDL judges are working to diversify leadership teams in several dimensions, especially on the plaintiff side. Rules could provide useful guidance that will help newcomers function effectively. Existing guides to best practices, while providing more detail about best practices than a court rule can provide, are mostly outdated. The Manual for Complex Litigation, for example, dates back to 2004 and the next edition is not likely to appear for at least a few years. A rule could not embrace as many details, but rule text combined with a robust Committee Note might prove useful.

Some of the resistance to adopting an express rule focuses on the wide variety of MDLs. Many include a number of cases, parties, and attorneys that can be managed without any separate MDL rule,

and indeed might be impeded by a need to work through a separate rule. This concern is readily met by a flexible rule that is to be invoked only in the MDL judge's discretion. Any rule will have to maintain maximum flexibility even within the provisions that are available for use in a particular proceeding.

Recent events that have advanced Subcommittee knowledge include conferences sponsored by Lawyers for Civil Justice, the American Association for Justice, and Emory Law School with Professor Jaime Dodge. "We listen carefully to lawyers." That is why Subcommittee members travel to meet with them. The comments offered at these meetings were rather general. The Emory conference included plaintiff lawyers, defense lawyers, and judges managing small and large MDLs. The most recent Subcommittee meeting followed these conferences, too recently to be reported in the agenda materials for today's meeting.

The Subcommittee has come to focus on Rules 16 and 26 as potential focuses for rulemaking. The "high impact" approach of an early Rule "23.3" sketch that drew from analogies to class-action practices is off the table. The Discovery Subcommittee is also considering amendments to Rules 16 and 26 that may need to be integrated with deliberations on possible MDL rules.

One question is what can lawyers accomplish in a Rule 26(f) conference before going to the judge? Lawyers at the Emory conference reported that they really do not do Rule 26(f) conferences in MDLs, while others said that Rule 26(f) conferences do occur. It is clear that there are many informal discussions. But who is to represent the plaintiff side in these discussions or conferences? Who the defense side? Rough drafts of possible rules were considered at the conference and then redlined in separate breakout groups. The defense redlines at the conference accepted a Rule 26(f) approach, while the plaintiff redlines deleted it.

The focus of the current approach is on what should happen before the lawyers first get to the judge. How far can the lawyers go in helping the judge to develop approaches to designating leadership, schedules, sequencing of issues and discovery, common benefit funds, and other matters that may be addressed in scheduling orders?

Professor Marcus emphasized the reports at the Emory conference that it cannot be assumed that a Rule 26(f) conference will be held before the first scheduling conference in an MDL that includes thousands of cases. What interactions among the lawyers should occur before the judge has to start addressing the proceedings?

A related question asked whether it is useful to designate "coordinating counsel" for the first steps, being careful to avoid any presumption that initial coordinating counsel designations will mature into appointments to a leadership team? Judge Dow noted that two judges at the Emory conference emphasized the importance of such steps to enable the MDL judge to create an effective structure for the proceeding. The Judicial Panel on Multidistrict Litigation does not know, when it orders a transfer, what the lawyers will learn about developments after the transfer order but before the MDL judge can begin organizing the proceeding.

A committee member observed that the Subcommittee has engaged in a long process, in which he participated as ambassador from the JPML to the Subcommittee. There have been important divisions of thought. Interlocutory appeal opportunities were studied carefully and put aside. A rule for disclosing third party litigation funding was studied and also put aside. Discussions about early examination of individual claims by devices such as plaintiff disclosure forms or an "initial census" continue, reflecting defendant concerns about "inventory" lawyers whose portfolios may include many clients with unfounded claims. Continued focus on those questions is useful. If there is to be an MDL rule, it should emphasize how to get the MDL judge to move the proceedings along promptly. It remains to determine whether these and other questions should be addressed by an MDL rule or by other means. The Emory conference was helpful. The pressure is generated by the big MDLs that include thousands of cases. Can a rule be drafted that will lead to an organized presentation of the proceedings to the judge at the outset? One example is sequencing issues to focus on such potentially dispositive matters as preemption of state law claims or the admissibility of expert testimony on a controlling question such as causation. If we can do it, it will be useful to support a rule that enables the MDL judge to get an early understanding of what procedures will fit the particular proceeding. MDL judges can be heard to lament that "I did not know what I did not know." A rule that identifies and prompts consideration of important

opportunities to manage the proceeding from the beginning will reduce the occasions for concluding that the proceeding would have been managed differently "if I knew then what I know now."

A Committee member suggested that it is important to "be particularly mindful of what we're talking about." Is the goal a rule that will provide prompts to the judge without imposing mandates? Or is it a rule that judges will read as directing them to get things done at certain points? "It should not be a rule that a judge reads to require all of a list of things to be done at the first conference." And there is a danger that as we seek to encourage new routes to leadership the old timers will seize an early role under a rule that seems to set progress goals and become the leaders. And more and more, new MDL judges reach out to other MDL judges to learn what works, how and when. "Practices have evolved, and continue to evolve."

Another committee member began as "a skeptic whether rules are possible." But as we learn about the broadening circles of MDL judges and lawyers, "I'm moving toward rules drafted in broad contours." We must be careful not to constrain discretion. The three big issues are directing general identification of the issues in the proceedings; early organization, including defining the roles of lead lawyers; and common fund compensation. A rule focusing on a few areas can be workable. Probably it will be located in Rule 16, but we continue to load Rule 16 with more and more distinctive issues -- perhaps it would be better to frame a new MDL rule.

Professor Marcus observed that the Subcommittee has begun to think about the possibility of a separate MDL rule, perhaps framed as Rule 16.1, disengaged from the Rule 16(b) and 26(f) sketches that have been prepared but drawing from those sketches. The Subcommittee has not yet seen even a preliminary sketch of this approach. Judge Dow concurred that framing a new rule as Rule 16.1 "is just a device" to separate the new rule from the Rule 26(f) discovery conference provisions and Rule 16(b). The purpose is to avoid overloading those rules.

Another committee member observed that there was not a huge separation between the plaintiff lawyers and the defense lawyers at the Emory conference. The consensus was that "these are things we deal with all the time." The Rule 16 and 26 drafts include

things they agree are important matters to focus on. Using a rule as a prompt, not directions, could be useful. There is enough here to justify continuing work to draft a potential rule. An analogy may be found in the recent amendments of Rule 30(b)(6) for deposing an entity. The rule that was adopted was pared back from more ambitious and detailed drafts. Some observers thought it would have little effect. But it has had a huge and good effect in practice. And there may not be much reason to be deterred by the prospect of further expanding Rule 16.

Another committee member observed that discussion at the Emory conference "was consistent with prompts." It might be worthwhile to consider adding a provision to Rule 26(f) that encourages lawyers to discuss the question whether a particular case that has not yet been transferred for MDL proceedings should become part of an MDL.

Judge Dow noted that a recent class-action conference focused on the "front loading" amendment of Rule 23 in 2018. It involved simple rule text and a ton of information in the Committee Note. "We have to be careful with words. We can do that." Rule 23 was amended to help judges and to enable lawyers to help judges. The prospect here is that something similarly useful can be done for MDLs. A flexible rule that relies on discretion can help judges. The MDL bar is experienced -- "even the lower ranks have a pretty good idea of what they're in for." There are good reasons why the Subcommittee has worked for a long time, and will need still more time to consider and develop a possible MDL rule.

A judge asked whether these practices are better addressed by court rules or instead by other means of education? The JPML holds an annual conference for all MDL judges, an event all recognize as extremely helpful. Other educational tools are available. It is questionable to adopt a model of "rules that are precatory, a means of encouragement only." When is it appropriate to adopt rules that say only that something "should" be done? The drafts also incorporate "may" as it appears in Rule 16(b)(3)(B). "Rules do not always have to command, but 'should' rules remain a problem." Rules emerge from practice -- the e-discovery rules were informed by developing practice and efforts by the Sedona Conference to identify evolving best practices. "The rules are not to educate people. They are to tell people how to do things."

Another judge observed that there may be a place in a rule for a list of things to be considered broadly in context.

Yet another judge said that "may" is a grant of discretionary authority, and is useful when the existence of the authority may not have been apparent. So it is troubling to have practices that judges have had to make up out of whole cloth, such as common benefit funds. "It is properly within a rule to say a judge *can* do this in appropriate circumstances." The judge who questioned "should" rules agreed that rules to clarify authority are appropriate.

This observation was supplemented by noting that the Committee has talked about common benefit funds. Judge Chhabria has observed that in the Roundup MDL no one told him how to do it. "I wish I had known to deal with this at the outset." Still, it is possible that some means other than rules can provide effective guidance. "We're not yet convinced one way or the other."

The same question was framed by observing that it is useful to hear from people who have not been engaged in MDL proceedings. "What generally works should not become a mandate." The question still is whether there are better approaches than adopting a court rule.

A judge added that the Civil Rules do not specifically prescribe many things that are found in other sources of best practices. Another judge agreed that a book like the FJC book of best practices for patent cases may be all that is needed for MDL proceedings, "but it isn't going to happen soon."

Judge Rosenberg focused the discussion by asking whether the Subcommittee should continue to deliberate whether there should be an MDL rule, and what might it look like?

A judge answered that the rule question should be kept alive, but the Subcommittee should also consider whether there are better means for what is intended to be an educational function. A rule might be a stronger response than what is called for.

Professor Marcus noted that part of the recent drafts say that lawyers "must" do something. That sounds like a rule. The judge agreed that "must" is a rule.

Judge Dow returned to the recurring question of scope. MDLs vary in many dimensions. They may include only a small number of cases, or thousands of cases. An MDL rule should be drawn so that it need not be applied at all in the many proceedings that do not need the "prompts" that can be enormously useful in mega-MDL proceedings. "We do want 'must' for lawyers in all MDLs." And we also should consider the prospect that practices appropriate for more complex MDLs may also be useful in sprawling litigation that comes to a single court without a § 1407 transfer. Judge Rosenberg responded by asking whether "should" is enough for rules like this?

The Subcommittee will carry on its work.

Discovery Subcommittee Report

Judge Godbey delivered the Discovery Subcommittee Report, beginning with appreciation for the work of Subcommittee members, particularly those in practice.

The questions raised by a proposal to develop a new rule that would establish standards and procedures for sealing matters in court files have been deferred while a new Administrative Office project on sealing procedures continues.

The focus of this report is on questions that have been raised by "privilege log" practices under Rule 26(b)(5)(A). The Subcommittee has had a lot of robust input from the requester side and the producer side. "We're in a good position to decide on approaches."

A starting point is clear. No one thinks it is good to wait until the end of the discovery period to talk about privilege logs. All agree to focus on bringing these discussions up front.

The Subcommittee will discuss these issues by developing the rules sketches included in the agenda materials. It may be ready to recommend a proposal for publication by the spring 2023 meeting.

Professor Marcus added that the Subcommittee thinks it has a direction in mind. There is something of a divide between plaintiff lawyers and defense lawyers, but they agree that lawyers can frame better solutions for their cases than can be dictated by rule.

The Subcommittee has made great progress, and will carry on with its work.

Joint Subcommittee on Appeal Finality After Consolidation Report

Judge Rosenberg reported that the Joint Subcommittee on Appeal Finality After Consolidation -- more familiarly known as the "Hall v. Hall" Subcommittee -- has kept alive the question whether amended rules could, responding to the invitation in the Supreme Court opinion, provide a better integration of appeal finality with the management of proceedings framed by consolidation of initially independent actions. It has been greatly helped by two research projects undertaken by Emery Lee at the FJC.

Dr. Lee said that a formal report will soon be available to describe the second project to examine experience with appeals after consolidation of initially independent actions. "It is difficult to find an issue empirically." The work begins with an estimate that perhaps 2% or 3% of actions are consolidated. The consolidated actions are then examined to find an "original case final judgment." Appeal experiences in those cases are then studied.

A rough summary of the remaining questions was then offered. The FJC studies show convincingly that it would be difficult to argue for a new finality approach because litigants are losing any opportunity to appeal for want of understanding that appeal time starts to run with a judgment that settles all claims among all parties to what began as an independent action. But the studies have not attempted to explore much more intricate questions that cannot be answered by looking at docket entries. Even far-ranging interviews with many judges across many cases might prove inadequate. The fundamental question is whether the partial final-judgment approach of Rule 54(b) that has proved valuable in individual actions could profitably be extended to consolidated actions. As a simple example, two plaintiffs might join in a single action against two defendants arising out of an automobile accident. If the court finally resolves all claims of one plaintiff against both defendants, the court is authorized to determine whether to enter a partial final judgment to support (and require) an immediate appeal, or instead, by refusing to enter a Rule 54(b)

judgment, to defer the opportunity to appeal. Many complex calculations bear on identifying the better appeal time, and Rule 54(b) leaves them to the trial judge as "dispatcher." The very same litigation might instead be framed by consolidating two actions, each brought by one plaintiff against the same two defendants and arising out of the same accident. Why should the final-judgment rule have a mandatory and simple answer when the same array of parties and claims is accomplished by consolidation?

Drafts that would amend Rules 42 and 54(b) were prepared promptly after the decision in Hall v. Hall, 138 S.Ct. 1118 (2018). The Subcommittee will consider them and decide whether further consideration might be useful.

Defining the End of the Last Day for e-Filing

Rule 6(a)(4)(A) defines the end of the last day for filing by electronic means as midnight in the court's time zone. This definition can be changed by statute, local rule, or order. Dr. Lee reported that the FJC examination of local rules will be finished soon. Responding to a question whether the study will pursue other inquiries that were part of the original design, he said that they hope to have a report ready for the June meeting of the Standing Committee.

Clerk Representative Shinn reported that her court adopted a local rule setting the deadline at 6:00 p.m. "Then we heard from the lawyers and changed it." A judge said that some lawyers say that a deadline when the clerk's office closes would simply shift their late-night work to the day before the last day.

A judge said that midnight filing has seemed inhumane. Other lawyers have preferred the midnight deadline because it enables them to dine at home and put the children to bed before turning to completing the remote filing. But the quality of the work is no better than it would be with a 6:00 p.m. deadline. "We managed for a long time with a close-of-office deadline."

Another judge noted an informal practice that prevailed in the Seventh Circuit, at least some years back. If a paper was presented when the clerk's office opened at 9:00 a.m., it would be stamped as filed at 5:00 p.m. the evening before.

Rules 38, 39, 81(c)

Questions about the procedures for demanding jury trial began with a proposal that asserted an ambiguity was introduced into Rule 81(c) when the Style Project changed one word in the provision for demanding a jury trial in an action removed from state court "if the state law ~~does~~ did not require an express demand for jury trial * * *." "Does not" meant that a jury demand after removal is excused only if state law does not require a demand at any point. The proposal argued that "did not" also excuses a demand requirement when state law requires a demand but allows the demand to be made at a point in the action that had not yet been reached at the time of removal. The Committee reported to the June 2016 meeting of the Standing Committee that it was considering a simplification of Rule 81(c) that would require a demand after removal in every case except when a demand was made in state court before removal. Immediately after that meeting then-Judge Gorsuch and Judge Graber, members of the Standing Committee, suggested that the demand requirement should be deleted. A jury trial would be held in every case with a right to jury trial unless all parties agree to waive a jury. This procedure was urged to increase the number of jury trials and further supported as simple, avoiding the trap for the unwary found in the present rules. Some state courts do not require a demand, and there is nothing in their experience to suggest that anything is lost by this procedure.

Elaborate drafts of potential amendments of Rules 38, 39, and 81(c) were considered at the April 2017 meeting of this Committee. Many questions were suggested for further research. The Administrative Office undertook to begin the research process. Competing demands on limited resources, however, stalled any further work. The topic has remained dormant.

These questions remain important. Experience with the Covid-19 pandemic and its impact on jury trials may provide new reasons for careful study.

The next steps will be affected by part of the recent Omnibus Budget bill that directs a study of jurisdictions where local rules and litigation practices have the effect of producing a "high number" of jury trials. The apparent purpose is to encourage practices that will increase the number of jury trials.

Dr. Lee reported that the FJC has abundant data that describe the frequency of jury trials and identify cases in which a jury is demanded by a plaintiff, by a defendant, by both plaintiff and defendant, or by neither. Beyond that starting point, however it will be very tricky to attempt to identify what practices have what effect on the frequency of jury trials and whether the effect is to increase or decrease jury trials. It is important, further, to remember that the absolute number of jury trials is higher in large districts with many trials than in small districts with fewer trials. The "rate" of jury trials in comparison to total trials, or total filings, is what counts. So high numbers of jury trials in courts such as the Southern District of California and the Northern District of Illinois reflect the high case load. The District of Wyoming, for example, has a higher "rate" of jury trials than those courts, with 9 jury trials in the most recent year. Initial research will identify districts with more jury trials than would be expected from the case load. Work will begin with organizing the available data.

These questions will be developed further after the FJC concludes its study.

Rule 41(a)(1)

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

> (1) *By the Plaintiff.*
>
> **(A)** *Without a Court order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without court order by filing:
>
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
>
> (ii) a stipulation of dismissal signed by all parties who have appeared.

Rule 41(a)(1)(B) provides that the dismissal is without prejudice unless the notice or stipulation states otherwise.

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

Burton DeWitt provided a detailed research memorandum showing that although courts are divided on how to answer the central questions, and although some courts have not yet even weighed in, there is a clear majority answer to each question.

The question that seems to be encountered more often than the others can be identified by a simple example. One plaintiff sues one defendant on two claims. Can the plaintiff dismiss one of the claims without prejudice, while continuing the action on the other? Most courts say no. The opinions seem to rely on the meaning of "an action" without further policy analysis. Part of an action is not the action. The balance of policy considerations may well support this interpretation of the rule text, but there are competing considerations to be weighed.

The next most common question also can be identified by a simple example. One plaintiff sues two defendants on the same claim. Can the plaintiff dismiss one defendant without prejudice, while continuing the action against the other? Here, most courts say yes. There is little apparent sign that they recognize and explain the difficulty that this seems no more dismissal of the "action" than the dismissal of one of multiple claims against a single defendant. Here too, the balance of policy considerations may well support this distinction, but again there are competing considerations to be weighed.

The third question has not been faced by many courts. The simple example is two plaintiffs join in an action to assert identical claims against a single defendant. Can one of the plaintiffs abandon the field by dismissing without prejudice? The research memorandum reports that when courts face this question, they "have been unanimous in applying the same law to plaintiffs and claimants as they do to voluntary dismissal of a defendant."

Some measure of confusion is added to these issues by frequent observations in the opinions that alternatives are available under Rule 15 and Rule 21. Rule 15 allows amendment of a complaint once

as a matter of course within defined limits; within those limits, it is suggested that the plaintiff can drop a claim or a defendant simply by amending the complaint. The res judicata-preclusion consequences are not apparent. Rule 21 allows the court to drop a party "on just terms." By analogy to Rule 41(a)(2), the terms can specify whether the dismissal is "with prejudice," establishing the preclusion consequences.

If these questions are to be reexamined, a variety of approaches are available. The rule text could be amplified to adopt the majority approaches to each question, relying simply on the majority view. Or the underlying policy questions could be reexamined, seeking to identify the better answers. The difficulty with taking on the policy questions is that they are hard to articulate and evaluate. Whichever of those approaches is taken, it will be appropriate to ask whether a project to amend Rule 41 should take on other questions that appear on the face of the rule. It is puzzling that the plaintiff's right to dismiss without prejudice is cut off by an answer or motion for summary judgment, but not by a Rule 12 motion to dismiss that may involve as much or more work as an answer. It is not clear how far "plaintiff" should be read to include others who claim by counterclaim, cross-claim, or third-party claim (a third-party plaintiff).

Judge Dow framed the question for the Committee: the question is how ambitious the Committee should be. Are these nuances worth a lot of effort?

Professor Marcus suggested that these questions may connect to the decision in *Hall v. Hall* about the effects of consolidation on appeal finality. In addition, in some cases there may be extensive proceedings and consequential judicial rulings before either an answer or a motion for summary judgment is filed. Sixty years ago the Second Circuit went beyond the rule text to rule that the right to dismiss is cut off without an answer or motion for summary judgment by extensive hearings on a motion for a preliminary injunction. The decision is attractive, but has not commanded a following. "It is unnerving to see these things all over the place."

A committee member suggested that "a rule that means different things to different people should be fixed." Its meaning should be made apparent.

Another committee member suggested that this topic merits consideration by a subcommittee that can decide how far down the path to go.

Yet another member noted that it is difficult to understand the apparent contradiction that dismissing one claim among several is not dismissal of "an action," while dismissing one defendant among several is.

The conclusion was that a subcommittee will be appointed as soon as the overall burden of all subcommittee work tapers down to a level that makes membership resources available.

Rule 55

Rule 55(a) directs that the clerk "must" enter a default when a defendant has failed to appear or otherwise defend. Rule 55(b) directs that the clerk "must" enter a default judgment when the claim is for a sum certain or a sum that can be made certain by computation if the defendant has been defaulted for not appearing. "Must" was chosen in the Style Project to replace "shall" as the word of command.

These provisions came to the agenda as some judges observed that practice in their courts does not seem to comply with the rule text. A lopsided majority of judges from a small random number of districts reported that in their courts a default judgment can be entered only by a judge. Apparently there are at least a few courts where even a default must be entered by a judge.

These deviations from what seems to be clear rule text suggest that there may be reasons to reconsider. "[O]therwise defend," for example, may run into problems when a defendant fails to file an answer or formal appearance because of ongoing settlement negotiations that are not known to the clerk or court. What is a sum certain or a sum that can be made certain by computation may depend on questions of law, including difficult questions of law, or facts that do not appear in the complaint or the plaintiff's affidavit. Examination and decision by the court may be a good idea.

A good way to open an inquiry into these questions will be an examination by the FJC to identify actual practices in many districts, looking to find deviations from the apparent meaning of Rule 55 and the circumstances that prompt occasional or routine deviations. A full understanding of present practices and the underlying reasons will go a long way toward determining whether Rule 55 should be amended, and how it might be amended.

Dr. Lee reported that he will begin the FJC study by collecting some data, talking to some people, and will report.

Judge Dow noted that there is a lot of variety, sometimes within a single district. The FJC "will help us understand what people do." It is a fair guess that practice is a bit uncoupled from the rule.

Rule 63

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

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

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

Judge Dow noted that a wide range of discretion is built into Rule 63, beginning with the finding that enables a successor judge to proceed on determining that the case may be completed without prejudice to the parties. But the second sentence seems to exert a strong pressure for recall. Video depositions have become common, and experience during the Covid-19 pandemic has expanded reliance on video testimony during a hearing or trial. There are crucial differences among different types of witnesses. Rehearing an eyewitness to an unplanned event, for example, may be more important than rehearing a witness offering routine expert testimony on fingerprint identification. A memorandum on the case

law is being prepared to help frame possible approaches. It seems likely that the universe of reported cases will be small, but the extent to which judges feel restrained by the rule text may remain uncertain.

A committee member suggested that if a video transcript of testimony at a hearing or trial is available, the burden should be on the party who wants the witness to be recalled. But that does not seem to be a problem under the present rule text.

Amicus Curiae Briefs

Three lawyers with a major national law firm have proposed a new rule to regulate briefs amicus curiae. They report that they file amicus briefs in courts around the country and find many courts that have no clear practice to guide them. They also report an estimate that amicus briefs are far less common in district courts than in the courts of appeals, perhaps appearing in about one civil action in a thousand. The relative dearth of amicus filings may explain the lack of identifiable procedures in many courts. District court experience, moreover, may be disparate, with a few districts accounting for a preponderant share of all amicus filings. Their proposal includes a draft rule, modeled in part on Appellate Rule 29 and the local rule in the District for the District of Columbia, that would provide a good start if the Committee determines to explore the question by considering a draft that might be developed into a recommendation for publication.

Discussion began with the question whether any rule for district courts should depart in significant ways from Appellate Rule 29. The role played by an amicus on appeal is pretty much defined by the record and decision of the district court. The risk of disrupting party control of their case is relatively low. In the district court, however, the parties have primary responsibility for framing the issues for decision and developing the fact record to support decision. An amicus might well be useful to supplement their efforts, particularly by identifying interests outside and perhaps more important than more narrow adversary interests. But an amicus might instead confuse and distort the basis for decision. Identifying a proper role for an amicus in a trial procedure that remains fundamentally adversary is difficult, either in general abstract terms or in application to a particular case.

These distinctions between trial courts and appellate courts are conveniently illuminated by current efforts in the Appellate Rules Committee to study Appellate Rule 29. The focus is primarily on the possibility of expanding disclosure requirements to provide ever greater identification of the interests that may lie behind an entity that appears as an amicus. Going beyond contributions to fund a specific brief, for example, it might be required that the amicus disclose the identity of anyone that has contributed more than some stated fraction of its overall budget. Or it might be required that the amicus disclose its membership, although that approach would raise sensitive First Amendment issues. Greater disclosure could help in several ways. Simple identification of the interests behind an amicus brief may be important. It may be useful to know that what appear to be a dozen independent amicus briefs are in fact sponsored by one or only a few sources. And it may be important to ensure that an amicus filing does not generate recusal issues. The concern about recusal problems may be heightened in district courts.

As a separate issue, the proposed rule addresses issues of brief length and timing. Unless all of these issues are simply deferred to local practice for briefing in general -- a tactic that may not work very well -- there are serious issues about interfering with local briefing practices, matters that the national rules have not addressed.

Discussion of Appellate Rule 29 in the Standing Committee lapped over into discussion of the preliminary report on the possibility of framing a rule for the district courts. The risk of filings that lead to recusal was emphasized. It was noted that an amicus may attempt to add materials to the trial record, perhaps directly or perhaps by suggesting that the court take judicial notice. The value of amicus briefs in contributing to well-informed decisions was noted, but there also was a sense of wariness about attempting to make a rule for the relatively rare events of district court amicus filings. There was speculation that amicus filings tend to be concentrated in a few districts; it may be better to rely for now on those districts to develop their own practices, based on their greater experience and integrated with their general briefing practices. The local rule for the District of Columbia is a good example.

It was noted that the Department of Justice routinely encounters amicus briefs. They are not a problem. 28 U.S.C. § 517 provides that the Attorney General may send any officer of the Department of Justice to any state or district "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State * * *." So the Department often files a statement of interest rather than intervene in actions that support a right to intervene under Rule 5.1 because an action challenges the constitutionality of a federal statute. A uniform rule should take care to ensure that it does not interfere with the Department's right to file amicus briefs.

Judge Dow reported that discussion in the Standing Committee suggests that "the appeal world is a lot different." District courts do get amicus filings, as illustrated by a recent redistricting case in which an ambiguous filing was treated as an amicus brief and was not allowed to add to the record.

A committee member suggested that a rule could make amicus practice more difficult for the district court. It would be difficult for a rule to prescribe the time for filing the amicus briefs and the time for responses. Briefing schedules in district courts are not defined in the way that times are defined for appeals. And it is difficult to see a need for a systemic national response. But caution should be taken in approaching the argument that amicus participation may be less important in a district court because a district court decision does not have formal precedential effect. A nationwide injunction can have an impact far greater than the precedential effect of a single appellate decision.

A district judge observed that an amicus may be a friend of the court, or may be a friend of a party's position. "I don't know when it's going to come."

Discussion concluded by voting without dissent to remove this topic from the agenda.

In Forma Pauperis Status

Judge Dow introduced the forma pauperis item by observing that there are "huge issues." Other committees as well need to think about the issues. And the Administrative Office has a working group. If work to develop possible rules proceeds, the Committee

will have to coordinate with them and also with the Committee on Court Administration and Case Management. It may well be that geographical differences make it impossible to establish uniform national standards for i.f.p. status.

Professors Hammond and Clopton are working with the Administrative Office working group.

This is an important topic. The Committee should hesitate about removing it from the agenda just yet.

Judge McEwen asked whether a joint study group might be established to include the Appellate, Bankruptcy, and Civil Rules Committees. Brief discussion noted that it may be best to begin by discussion among the reporters, who can consider whether it would be useful to create a joint subcommittee. If the work proceeds that far, means can be found to coordinate with the Committee on Court Administration and Court Management.

Rule 4

Suggestions to revise Rule 4 are submitted with some regularity. The CARES Act Subcommittee carefully deliberated the question whether the Emergency Rules opportunity for court-ordered service by means not specified in Rule 4 should be added to Rule 4 instead of the Emergency Rules 4, but concluded that this possibility should be deferred for a broader consideration of other possible changes.

Some of the wide variety of suggestions seem simple and attractive. Allowing a request to waive service to be delivered electronically seems in keeping with the pragmatic purposes of the waiver provision. A more ambitious but still carefully focused proposal is to streamline the multiple service and notice requirements of Rule 4(i), perhaps to require only service on the United States Attorney or agency. There may be good reasons to maintain the present system, but inquiry is possible.

The careful provisions adopted for the Emergency Rules 4 included in proposed Rule 87(c) might well be studied for more general adoption. Allowing the court to order service by a means reasonably calculated to give notice could be as important when service under general Rule 4 provisions is thwarted by

circumstances as difficult as a declared civil rules emergency as when there is a rules emergency.

Expanded opportunities for service by electronic means will inevitably be considered at some point in the future. A modest beginning is made in the pending supplemental rules for social security review actions. This model might be expanded to provide for electronic service at an address established by the Department of Justice for actions against the United States, or its agency, or its officer. It even might be useful to create an opportunity for frequently sued parties to establish addresses for electronic service that would facilitate prompt and efficient attention to all of the actions they face.

More general provisions for electronic service will be obvious candidates for the agenda as technology continues to develop and as reliable access to technology becomes nearly universal. That prospect, however, seems likely to lie years away.

Discussion began with the observation that email service may be allowed now in action involving real property. More generally, Rule 4(f)(3) allows service outside the United States "by other means not prohibited by international agreement, as the court orders." If that is appropriate for defendants in other countries, why should it not be equally available to serve defendants in the United States? We may be approaching that point.

A committee member observed that practitioners are encountering more and more entities that have no physical presence. The plaintiff cannot show whether a potential defendant is in the United States or another country. They are present only in the ether. In one case the court authorized service by electronic means; clear proof of actual receipt was provided when the defendant promptly used a report about the suit in a funding appeal.

Judge Dow asked whether these questions raise an urgent need for present consideration. They will require extensive work by a new subcommittee. Our resource of members' time is limited, and we have several subcommittees already. A committee member suggested that the questions are important, but immediate consideration is not urgent. We will, however, have to begin consideration rather soon of the problems of serving etherial entities. The member who

described electronic service on such an entity agreed -- the court acted within the present rules to authorize electronic service, even though the lack of any identifiable physical presence impeded direct reliance on Rule 4(f)(3).

Pro se e-Filing

Professor Struve led discussion of the work of the Reporters' group studying e-filing by pro se litigants, beginning with thanks to all the reporters and to the FJC for its intrepid work. Dr. Reagan has collected an impressive set of data, which will provide the basis for a public report. Several first impressions can be noted. The courts of appeals seem to be in the vanguard of permitting e-filing by pro se litigants. Some districts find difficulties and are reluctant to expand the opportunities for e-filing available to pro se litigants. Districts that have provided expanded opportunities find fewer problems. One issue that may be easily addressed is the apparent requirement of Rule 5 that paper service is required for a paper filing even when the clerk's office translates it into the CM/ECF system and provides a notice of electronic filing.

Broader questions of expanded e-filing should be unpacked. Apart from access to direct filing with the court's CM/ECF system, a pro se litigant may be allowed -- as several courts do now -- to file by email. Notice issues can be considered. Eventually direct access to CM/ECF may prove workable. Filing in criminal prosecutions presents obviously distinct questions. Prisoner litigation is a separate problem. The work continues.

Professor Marcus noted that the most troubling problems seem to arise with allowing a pro se litigant to open a new file in the CM/ECF system, a "case-initiating" act. Some districts report that not even lawyers are allowed to do this.

It was noted that no interest in these questions has yet been expressed by the Committee on Court Administration and Case Management. It may be better to inquire into their interest now, and to coordinate with them if they are interested. These questions are intertwined with CM/ECF and its "next gen" embodiment. Indeed one problem has emerged from the need to open a PACER account before a party can become a registered user of a court's system.

It also may be that these questions will prove of interest to the technology committee because of security concerns.

Dismissal of Unfounded Actions

Agenda proposal 20-CV-G suggests that the court-review provisions in the forma pauperis statute, 28 U.S.C. § 1915(e)(2)(B)(ii) be generalized into a civil rule that applies to all actions, including fee-paid actions. The statute provides that the court shall dismiss an action seeking i.f.p. status if the action "fails to state a claim on which relief may be granted." The core argument is that it is unfair, indeed unconstitutional, to provide automatic review for i.f.p. actions but not fee-paid actions.

The draft rule submitted with the proposal is direct. If the court determines that an action is frivolous or malicious, or fails to state a claim on which relief can be granted, the court shall dismiss the case, with or without prejudice, or order that summons not be issued until the matter is resolved. The purpose is stated in broader terms -- it is to provide pre-filing review of all actions. An alternative approach also is suggested: the FJC should survey meritless litigation and identify the nature of suit categories that have the highest proportion or severity of meritless actions. Pre-filing review could be limited to cases in those categories.

The same proposal was made to the Appellate Rules Committee, framing it as a new Appellate Rule 25.1. That committee has rejected it.

Brief discussion noted that the Committee should not take it on itself to assert that a federal statute is unconstitutional. Or that the Constitution requires that the legitimacy of the rules of civil procedure be salvaged by expanding the statutory procedure.

This proposal was removed from the agenda without dissent.

Rule 7.1

Proposal 20-CV-CC suggested that Rule 7.1 be amended to delete the requirement that two copies of the disclosure statement be filed. The suggestion was prescient: the requirement was deleted

by the amendment proposed for adoption this December 1. Electronic docket practices have obviated the purpose of ensuring that a paper disclosure statement is provided for the judge in every case.

Rule 73(b)(1)

A second item in proposal 20-CV-CC protests that CM/ECF systems routinely send notices to chambers when a party consents to assignment of a case to a magistrate judge, automatically violating the mandate of Rule 73(b)(1) that a district judge or magistrate judge may be informed of a party's response to the clerk's notice of the opportunity to proceed before a magistrate judge only if all parties consent to the referral. This rule is anchored in 28 U.S.C. § 636(c)(2), which directs that rules of courts for reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

Discussion began with the observation that the statute makes it important to comply with the means chosen by Rule 73 to protect the voluntariness of consent. There is a risk that a party who prefers not to consent may feel a pressure to consent if the judges know that another party has already consented.

Further discussion described procedures in several districts that are designed to protect against automatic but inadvertent notice to the judges. A consent filed by one party may be held aside and not filed until all parties consent. Or the plaintiff may be given a consent form and told to file it only if it consents and wins the consent of all other parties.

These procedures can work well when all parties are represented by lawyers. It is not easy to be confident that they can work as well with a pro se litigant.

Further discussion suggested that this may be a matter for local practice. Some courts automatically assign all pretrial matters to a magistrate judge; a party has to object. The procedure that informs the judge only when all parties consent does not work with pro se litigants.

Another participant observed that some courts automatically put magistrate judges "on the wheel," assigning cases for trial,

notifying the parties that they can object. Even if anonymity is preserved, this practice may exert a pressure to consent when the parties are concerned that a random reassignment might assign the case to a district judge considered less favorable than the assigned magistrate judge.

A committee member suggested that the decision whether to retain this matter on the agenda depends on whether it reflects problems deeper than the need to manage consents in a way that prevents the CM/ECF system from subverting the rule. A suggested answer was that the problems do run deeper. A judge raised the question whether practice in one district was inconsistent with the statute; a local rule was adopted to address the problem.

Another judge noted that the concern is that a party who prefers to withhold consent may fear that a judge will learn which party does not like the judge.

The question remains whether any problems that exist should be resolved by amending Rule 73. The problem may lie in local practices or rules. A judge observed that the direction in § 636 that "rules of court" should protect the voluntariness of the parties' consent can include local rules in addition to the national rules. Another judge suggested that Rule 73 says consents are not to be disclosed unless all parties consent. The problem is not with the rule. The problem is with failures to observe the rule.

A response was that Rule 73 might be amended by adding an explicit direction that the clerk not accept a consent for filing until all parties have consented.

Still another judge agreed that this is not a national rule problem, "but we may not know enough." Rule 73 in its present form is consistent with the statute. Perhaps we need a rule that makes sure local practices are consistent with Rule 73 and the statute. But it was suggested that the Committee should be cautious about adopting rule text designed only to doubly ensure local compliance with the rule.

Yet another suggestion returned to the original proposal: the problem lies with the CM/ECF system.

A judge suggested that this problem has generated a lot of Committee discussion. It should remain on the table. If it proves to be a widespread problem, the Committee should try to find a rule that brings practice into better compliance with § 636.

A judge suggested that her court has a local rule like the D.D.C. rule, "but parties find a way to tell you. They put it in pretrial submissions even though we tell them not to. We see that with attorneys -- they want you to have that information."

Another committee member offered two observations: (1) Is this problem susceptible to solution by a national court rule? "Probably not." (2) But it should remain on the agenda so the Committee can reach out to those who may be able to improve the technology. Another member agreed that this topic should remain on the agenda for further assessment, but asked who should undertake the task?

A judge suggested that it is a question of gathering information. "If it's considered a problem, we probably can find rule language to increase compliance."

Another judge suggested that it may be possible to come up with rule language that helps court clerks to keep pro se litigants from violating the anonymity requirement. But a rule cannot stop lawyers from deliberate disclosures by other means.

Further inquiries were encouraged. Committee members were encouraged to talk with their own district clerks to see what they do. Local rules may be assembled. And Judge Boal will reach out to the Federal Magistrate Judges Association.

Actual Knowledge, not Service

Proposal 21-CV-K suggests adding a new Rule 4(c)(4) to provide that service need not be made on a party that has actual knowledge of the suit and either possesses a copy of the complaint or has PACER access to it. The proposal rests on the proposition that the goal of service is to provide knowledge of the action, and actual knowledge gained by other means serves that purpose. Confidence is expressed that courts have ample means to resolve disputes about actual knowledge. A potential problem of integrating this approach

with the Rule 4(m) provisions that require service within 90 days is noted, but not resolved.

Brief discussion reflected deep doubts about the task of resolving disputes about actual knowledge. And a fine point was noted -- the time to remove is set by 28 U.S.C. § 1446(b)(1) at "30 days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading," etc. In Murphy Brothers, Inc.v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999), the Court ruled that delivering a copy of the file-stamped complaint by fax was not a substitute for formal service in triggering the time to remove, because relying on this informal trigger contradicts "a bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under the court's authority, by formal process." That does not seem to fit comfortably with the proposal that PACER access can substitute for actual receipt.

The Committee voted without dissent to remove this item from the agenda.

Set Time to Decide

Proposal 21-CV-M, submitted by a dissatisfied litigant, suggests adoption of Civil and Appellate Rules that require that all potentially dispositive motions be decided within a set period after final submissions are due. The proposal would be satisfied by a particular period, whether it be 30 days, 60 days, 90 days, or something else. The Appellate Rules Committee has already rejected this proposal.

Brief discussion noted that a few statutes set time limits for decisions. They have created genuine problems. Courts believe that competing docket priorities are far too complex, and that it is impossible to adjust for the regular but individually unpredictable emergence of matters that require urgent immediate attention.

The Committee voted without dissent to remove this item from the agenda.

Rule 26(a)(1): Expanded Initial Disclosures

Proposal 21-CV-X suggests expansion of the information that must be provided by initial disclosures under Rule 26(a)(1)(A)(i). The rule now requires a party to disclose "the name * * * of each individual likely to have discoverable information -- along with the subjects of that information -- that the disclosing party may use to support its claims or defenses." The proposal suggests that the rule provides an incentive, taken up in practice, to name as many individuals as possible while providing as little meaningful information as possible, forcing opposing counsel to guess which witnesses should be deposed. The rule should be amended to require a summary of the facts and lay opinions that the witness will provide. Rule 26(g) would be amended in parallel to require reasonable inquiries be made about a witness before disclosing the witness.

This proposal would dramatically expand current initial disclosure practice. Timing it to the progress of an action from initiation on could be difficult, particularly for defendants who may have no opportunity to search out witnesses until served with process. If this topic is to be taken up, it should be as part of the Committee's study of results from the Mandatory Initial Discovery pilot projects.

The Committee voted without dissent to remove this proposal from the agenda.

Mandatory Initial Discovery Pilots

Dr. Lee reported that the attorney surveys of experiences with the mandatory initial discovery pilot projects continue. The final survey will be launched soon. Not all cases will have closed by now, but the project will proceed to put together what information has been gathered.

"There will be a lot of information. We have nearly 3,000 attorney evaluations." And there are extensive data on time to disposition; in the Northern District of Illinois, where some judges did not participate in the pilot project, comparisons can be made between cases in the project and cases not in the project. All judges participated in Arizona, but before-and-after

comparisons can be made. And there is a lot of docket information that describes what the cases look like.

Judge Dow concluded the meeting by noting that the next meeting is scheduled for October 12 at the Administrative Office in Washington, D.C., and expressing the hope that the pandemic will have receded to a point that permits another in-person meeting.

Respectfully submitted,

Edward H. Cooper
Reporter

TAB 6

6. Proposed Amendments to Rules 16(b)(3) and 26(f)(3) (privilege logs)

The Discovery Subcommittee (David Godbey, Chair, Jennifer Boal, Ariana Tadler, Helen Witt, Joseph Sellers, David Burman, and Carmelita Shinn) recommends forwarding the proposed amendments to Rules 26(f) and 16(b) presented below to the Standing Committee for publication for public comment in August 2023.

These amendment proposals deal with what is called the "privilege log" problem. 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 the "privilege log" idea that had originally developed in litigation under the Freedom of Information Act for practice under Rule 26(b)(5)(A). 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.

In 2020, proposals were submitted to the Advisory Committee supporting re-examination of Rule 26(b)(5)(A). One idea was 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.

After these issues were introduced at the October 2020 meeting of the Advisory Committee, a new Discovery Subcommittee (members identified above) was formed and it began intense work on this project. In June 2021, it issued an informal invitation for comment on the pertinent issues and received more than 100 comments. Summaries of these comments were included at pp. 213-46 of the agenda book for the Committee's October 2021 meeting.

In addition, the Subcommittee received presentations from members of the National Employment Lawyers' Association, the American Association for Justice, and 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.

Another point that became clear was the great variety in the cases governed by Rule 26(b)(5)(A). The original proposals for amendment came from those principally 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 an 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, what emerged was a consensus that the most beneficial rule amendment would be one that would make the parties focus carefully at the outset of litigation on the best method for compliance for their case and also that they apprise the court of their proposed method for complying with the rule, and also focus on the timing of that activity. None of this interaction will solve all problems that claims of privilege present, but the Subcommittee is 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).

By the time the whole Committee met in March, this Subcommittee had come close to agreement on rule language, but because the MDL Subcommittee was then considering possible amendments to the same rules it seemed wiser to defer presentation of the privilege log package. Since then, as explored elsewhere in this agenda book, the MDL Subcommittee has shifted its focus to a possible new Rule 16.1.

Accordingly, by consensus the Subcommittee now proposes that the Advisory Committee recommend publication for public comment of the preliminary draft of the rule amendments set out below.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

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

* * * * *

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

* * * * *

(D) any issues about claims of privilege or of protection as trial-preparation materials, including <u>the timing for and method to be used to comply 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.

* * * * *

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 in their discovery plan the question how they will comply with Rule 26(b)(5)(A), 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

* * * * *

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

* * * * *

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

* * * * *

(B) *Permitted Contents.*

* * * * *

(iv) include the timing for and method to be used to comply 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;

COMMITTEE NOTE

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

TAB 7

7. Rule 42 Subcommittee (Hall v. Hall)

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 inter-committee 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 on Aug. 8, 2022, 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 decision was to recommend that the topic be dropped from the Advisory Committee agenda.

Included in this agenda book as background are (1) the notes of the Subcommittee's Aug. 8 Zoom meeting, and (2) the FJC May 2022 report Federal Rule of Civil Procedure 42(a) Consolidation, Appellate Finality, and *Hall v. Hall*.

Notes of Zoom Meeting
Rule 42(a) Subcommittee
Aug. 8, 2022

The Rule 42(a) Subcommittee met via Zoom on Aug. 8, 2022. Participating were Judge Robin Rosenberg (Chair, Subcommittee); Judge Kent Jordan, Judge Catherine McEwen, Dean Benjamin Spencer, Emery Lee (FJC), Prof. Edward Hartnett (Reporter, Appellate Rules Committee), Prof. Richard Marcus (Assoc. Reporter, Civil Rules Committee), and H. Thomas Byron and Allison Bruff of the Administrative Office.

The meeting was introduced as the final meeting before the fall Advisory Committee meetings. This Subcommittee's work has fallen mainly to the FJC, which undertook a two-phase project. That project was a challenge because the courts do not customarily track consolidation in civil cases. The FJC work involved a first phase that sought out examples of consolidated cases among district court files and proved very challenging. Then a second phase focused on cases in which an appeal was filed, and then sought to identify those which had been consolidated.

The bottom line on the FJC research is that there are very few instances of appeals in consolidated cases -- some 3.5% of civil case appeals in 2019-20. Among those, "original action final judgments" (OAFJs), the source of the problem addressed in Hall v. Hall, appeared in about 6% of consolidated cases identified in the appellate docket search. Put another way, they constituted some 6% of the 3.5% of civil case appeals identified in phase two of the FJC research -- or 0.2% (1 in 500). This small collection of cases was examined, and several were found to be in an "odd procedural posture."

For purposes of this Subcommittee's work, the practical conclusion is that appeals in consolidated cases are rare, and entry of an OAFJ (the Hall v. Hall situation) is a rare event among those cases. (Note that MDL proceedings were not included in this research effort.)

Additionally, it seemed as though litigants were adhering to the rule announced in Hall v. Hall even in circuits that had taken a different view before the Supreme Court ruling. In those circuits, a "premature" appeal could lead to dismissal of the appeal, but there were no instances of dismissal of an appeal on the ground that review should have been sought after entry of an OAFJ but was instead deferred until final judgment was entered in all consolidated cases. "Nobody lost any appeal rights due to the Hall v. Hall rule."

It was suggested that good lawyers were quite alert to guard against losing appeal rights by waiting too long to seek review. Indeed, Hall v. Hall itself illustrated that point. There the existing Third Circuit caselaw led to the conclusion the appeal was premature, but that did not deter counsel from seeking review. Another example was what happens in bankruptcy courts. Lawyers in those proceedings are cautious, and not shy about seeking review. This was not a problem before Hall v. Hall. Indeed, at least in the Sixth Circuit it was noted that some district courts flag the running of review time in orders that trigger a right to appeal.

The topic of disseminating information about the rule in Hall v. Hall was discussed. One suggestion was to include some sort of flag in the next edition of the Manual for Complex

Litigation. It was noted that in the Seventh Circuit there is an online set of pointers for appellate attorneys that includes an alert about this situation.

A note of caution was raised -- though this seems a small number of cases, it's useful to keep in mind that it may be a higher number than the number of civil cases that actually go to trial. This discussion called to mind a possible clarification of Rule 42(a)(2) included in the agenda book for the Nov. 2018 Civil Rules meeting:

> (2) consolidate the actions, but the actions remain separate for purposes of [final judgment] appeal;

An immediate reaction to this idea was that including the bracketed "final judgment" qualification might invite difficulties for those who want to seek appellate review. Another point was that the FJC report shows that "consolidation" can take many flavors -- "consolidated for all purposes," "consolidated for purposes of discovery," "consolidated only for trial," etc. Such an addition to Rule 42(a) might be incomplete unless it specified which Rule 42(a) consolidations end the separateness of the cases. In its *Gelboim* ruling regarding immediate appeal from a final judgment in one action included in an MDL proceeding, the Supreme Court did include a footnote suggesting that an "all-purpose consolidation" would change the timing of appeal under § 1291. So merely saying "consolidated" could invite confusion.

One member of the Subcommittee reacted that there seemed no reason to try to change the rule adopted in Hall v. Hall, but also no reason to amend Rule 42(a) to insert that point into the rules. There was brief discussion about whether a Committee Note could be promulgated to make the point without any rule change, but the rule is that Committee Notes are only permitted when rules are amended.

The question was called, and the unanimous view was that the Subcommittee recommend that no change be made to Rule 42(a) and that the matter be dropped from the Advisory Committees' agendas.

Federal Rule of Civil Procedure 42(a) Consolidation, Appellate Finality, and *Hall v. Hall*

Prepared for the Judicial Conference Advisory Committees on Appellate and Civil Rules

Emery G. Lee III

May 2022

Table of Contents

Executive Summary

A joint subcommittee of the Judicial Conference Advisory Committees on Appellate and Civil Rules requested a study on potential problems arising from the Supreme Court's 2018 decision in *Hall v. Hall*.[1] *Hall* held that consolidation of civil cases pursuant to Fed. R. Civ. P. 42(a) does not alter the independent nature of the actions for purposes of appellate finality. Under *Hall*, a case in a consolidation may become immediately appealable even when other cases in the consolidation remain pending in district court. The study examines the incidence of consolidated cases in the district courts with a focus on how often "original action final judgments" (OAFJs) create scenarios in which litigants may lose their appeal rights because of confusion about when to file a notice of appeal.

Two separate phases of the study were conducted. The first phase searched the dockets of all civil filings in 2015–2017 for Rule 42 consolidations to identify potential OAFJs. The key findings of the first phase:

- Rule 42 consolidation was ordered in 2.5% of civil case filings during the study period.
- OAFJs potentially raising *Hall* concerns occurred in about 2% of sampled consolidations.
- In none of the OAFJs examined did a litigant file an untimely appeal.

The second phase searched the dockets of civil filings in which an appeal was filed in 2019–2020 to identify additional potential OAFJs. It found:

- 3.5% of civil cases appealed in 2019–20 had been consolidated pursuant to Rule 42(a) in the district court.
- That estimate of 3.5% should be interpreted as a kind of upper bound, as it excludes criminal appeals and multiple appeals from a single district-court case.
- OAFJs occurred in about 6% of sampled consolidated cases identified in the appellate search.
- There was some confusion about timeliness of the notice of appeal in two cases in the sample, although neither instance unambiguously presents a *Hall* problem.

Practical problems related to confusion over when to file a notice of appeal are difficult to identify empirically, as they occur only when two relatively rare events to arise in the same case—a Rule 42(a) consolidation followed by an OAFJ—as well as the filing of an appeal (which is also relatively rare in civil cases). Neither phase of the research provides support for the view that the *Hall* immediate-appeals rule has resulted in widespread losses of appeal rights

1. Hall v. Hall, -- U.S. --, 138 Sup. Ct. 1118 (2018).

Background

In *Hall v. Hall*,[2] the Supreme Court held that consolidation of cases in district court pursuant to Fed. R. Civ. P. 42(a) does not affect the cases' independent nature for purposes of the final judgment rule regarding the timing of appeals. Regardless of what claims remain in other cases in the consolidation, any judgment in the district court wholly terminating one of the consolidated cases is final and appealable in that case.[3] Professor Bryan Lammon has described this as the "immediate-appeals rule."[4] Prior to the Court's *Hall* decision, the immediate-appeals rule governed the timing for filing of appeals in only the First and Sixth Circuits.[5] The other circuits followed a variety of approaches to appellate finality in consolidated cases, including the "deferred-appeals rule," the opposite of the immediate-appeals rule: a judgment in a consolidated case was not appealable until all cases in the consolidation were resolved in the district court (without a Rule 54(b) certification by the district court).[6]

The effect of the immediate-appeals rule is that any "original action final judgment" (OAFJ) in a Rule 42(a) consolidation starts the clock for the filing of a timely notice of appeal, no matter how long the remaining cases in consolidated action take to resolve. In some instances, then, *Hall* could result in litigants losing their opportunity to appeal because of confusion over when to file a notice of appeal. The Court's unanimous opinion states that any potential difficulties arising from the decision should be taken up by the rulemaking committees: "If . . . our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly."[7]

A joint subcommittee of the Advisory Committee on Civil Rules and the Advisory Committee on Appellate Rules requested this Federal Judicial Center study to inform its *Hall v. Hall* discussions.[8] The study's goal was to identify examples of OAFJs and to estimate the incidence of any *Hall v. Hall* problems in practice. For purposes of this study, an OAFJ is defined in terms of the immediate-appeals rule. An OAFJ occurs when a court order effectively resolves all claims raised in a civil action consolidated with one or more other civil actions pursuant to Rule 42(a), prior to resolution of all claims raised in all the consolidated cases. Such an order likely represents a final, appealable judgment in the original action and may create a situation in which an unwary litigant loses the right to appeal by waiting to file the notice of appeal until the resolution of the entire consolidation.

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2. Hall v. Hall, -- U.S. --, 138 Sup. Ct. 1118 (2018).

3. In the typical civil case involving private parties, the notice of appeal must be filed within 30 days after entry of the judgment. Fed. R. App. P. 4(a)(1).

4. Bryan Lammon, *Hall v. Hall*: A Lose-Lose Case for Appellate Jurisdiction, 68 Emory L.J. Online 1001, 1004 (2018–2019).

5. *See id*. n.16 (citing 1st and 6th Circuit cases).

6. *See id*. n.17 (citing 9th and 10th Circuit cases).

7. *Hall*, 138 Sup. Ct. at 1131.

8. My Center colleagues George Cort, Tim Lau, and Jason Cantone provided invaluable assistance in conducting this research. The study design also benefited from input from members of the subcommittee and, especially, the reporters.

First Phase

Identifying Rule 42 Consolidations

To study the potential impact of *Hall* on consolidated civil actions, it was first necessary to identify the universe of consolidated civil actions. At the outset of this study, little was known about the incidence of Rule 42(a) consolidation in the district courts. The federal judiciary does not collect or report data about Rule 42(a) consolidations in a systematic fashion. For this reason, computerized searches of district court dockets were conducted for terms related to Rule 42(a) consolidations and for case events and subtypes related to consolidation. The results of these two searches were collated and then manually, and painstakingly, reviewed to identify cases in which a Rule 42(a) consolidation was ordered. This process excluded cases that were subject to multidistrict litigation consolidations, which are consolidated pursuant to 28 U.S.C. § 1407 instead of Rule 42(a). Multidistrict consolidation is related but legally distinct from Rule 42(a) consolidation, as it is governed by an earlier finality decision of the Supreme Court.[9]

This phase of the study included civil cases filed in 2015–2017 in all 94 districts. One caveat: not all cases in these filing cohorts had terminated in the district court at the time of the computerized searches in 2019–2020, so some of the cases filed in this period may have been consolidated at some point after the computerized searches were conducted. This affects not only the study's estimates of the numbers of consolidated cases but also its findings on disposition types and times.

For the search period, 20,730 civil cases were classified as part of Rule 42 consolidations (including lead and member cases). This estimate includes member cases filed in 2015–2017 consolidated with an earlier-filed or later-filed lead case. In terms of the incidence of consolidated cases, the estimate translates to 2.5% of civil filings having been part of a Rule 42(a) consolidation. This percentage was calculated using the overall figures from Table C-3, "U.S. District Courts—Civil Cases Commenced," for years ending December 31, 2015–2017, as the denominator.[10] For those three years there were 843,996 civil filings total.

For purposes of this phase of the study, each consolidation was assigned a lead case, which is typically the case assigned as lead by the court or the first-filed case; the number of consolidations is equal to the number of lead cases. The research identified 5,953 lead cases (and consolidations) in the 2015–2017 study period.

Basic Information on Consolidated Cases

Districts with the largest numbers of Rule 42(a) consolidations: In general, the number of consolidations in a district is largely a function of the district's civil caseload. The 20 districts with the largest number of consolidations (accounting for 62% of all consolidations) in the study period are: Texas Eastern, New Jersey, California Central, New York Southern, Texas Southern, New York Eastern, Illinois Northern, Louisiana Eastern, Pennsylvania Eastern, Texas Northern, Cali-

9. *See* Gelboim v. Bank of Am. Corp., 574 U.S. 405 (2015).

10. The data tables used may be retrieved at https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables using the search function (Table C-3, reporting period terminating December 31).

fornia Northern, Maryland, Florida Southern, Delaware, Texas Western, Nevada, Florida Middle, Massachusetts, Georgia Northern, and Washington Western. The two districts at the top of the list, Texas Eastern and New Jersey, have large numbers of consolidated patent actions, which explains their prominence on the list.

Case types: Ten nature-of-suit codes accounted for more than half (58%) of all consolidated lead cases: patent, 13%; civil rights (other), 7%; other contract actions, 6%; prisoner civil rights, 6%; securities, 6%; bankruptcy appeals, 6%; motor vehicle personal injury, 4%; habeas corpus, 4%; insurance, 4%; and consumer credit, 3%.

Some of these nature-of-suit codes are among the most common for all filings. For example, the civil rights (other) code encompasses 28 U.S.C. § 1983 actions alleging violations of federal rights under color of state law, one of the most common types of federal cases (7% of consolidations versus 5% of all cases). But, clearly, patent cases are much more common among consolidated cases than among civil cases in general (13% of consolidations versus less than 2% of all civil cases).

Disposition of lead cases: 84% of lead cases had terminated in the district court as of the time of the analysis. About a third of terminated lead consolidated cases were coded as having settled in the district court (32%). The next most common disposition types were other dismissal, 22%, dismissed on motion, 13%, and voluntary dismissal, 10%. Other and voluntary dismissals are often really settlements; the three dispositions added together account for 64% of dispositions. Unsurprisingly, trial dispositions (jury and bench trials) accounted for only 2% of lead case dispositions.

Disposition times: For lead cases only, the average time from filing to termination in the district court was 517 days (17 months). Give that about one lead case in six was still pending as of the search date, however, the average disposition times are probably longer than this estimate. For all consolidated cases, the average time from filing to termination was considerably shorter, 379 days (12.5 months). The shorter time for member cases reflects the common district-court practice of closing the docket of member cases at the time of consolidation.

Incidence of OAFJs Among a Sample of Rule 42 Consolidations

This universe of 5,953 consolidations (consisting of 20,730 lead and member cases) was then used as the sampling frame for the next part of the analysis. The sample was initially 400 consolidations, randomly selected from a three-year termination cohort of lead consolidated cases, terminated October 1, 2016–September 30, 2019. The sample includes 12% of the consolidations terminating during this period. The *Hall* decision falls almost in the exact middle of that period, so there are roughly 18 months of case filings pre-*Hall* and 18 months of case filings post-*Hall*. A small number of sampled cases were excluded from the analysis because they were not, in fact, consolidations or because the lead case in the consolidation was still pending in district court (most of the loss of cases). That left 385 consolidations for analysis.

Table 1 shows the purpose of the consolidations, the average number of actions consolidated, average times from filing of the lead case to entry of the first order for consolidation (few consoli-

dations have more than one such order), and average disposition times of the lead cases in the consolidations.

Table 1: Summary statistics for the sample of Rule 42 consolidations

Purpose of consolidation	N	Percentage of sampled consolidations	Average number of actions	Mean from filing to consolidation order (days)	Mean disposition time (days)
All purposes	107	28%	2.7	200.5	609.8
Discovery only	22	6%	2.5	230.2	692.9
Pretrial generally	66	17%	4.8	153.5	498.5
Trial only	2	1%	2.0	492.5	792.5
Very limited purposes	3	1%	2.3	536.3	835.3
Unclear from order	185	48%	2.2	214.6	584.9
All	**385**	**100%**	**2.8**	**205.0**	**586.2**

It appears to be relatively common for courts to order consolidation of cases without stating the purposes (or scope) of the consolidation in the order. Almost half of the consolidation orders in the sampled cases did not clearly indicate the purposes of the consolidation but simply ordered "consolidation." Rule 42(a)(2) authorizes district courts to "consolidate the actions," and that is how many of these orders were worded. When the order simply granted the motion, the motion was checked to clarify the purpose of the consolidation. But the motions were also not specific in many cases. These ambiguous instances may best be considered consolidations "for all purposes," especially when the court orders the member case closed (another common practice).

The average number of actions included in a consolidation was 2.8. The modal number of actions included in a consolidation was two, observed in 75% of consolidations. The observed increase in the average number of actions in a consolidation for "pretrial generally" (4.8) is because this is the standard language used in Texas Eastern patent actions, which account for a relatively large chunk of that row in the table.

On average, the lead case was consolidated with one (or more) member case(s) about 205 days (6.7 months) after its filing date. The average disposition time for a lead case in a sampled consolidated action was 586.2 days (19.3 months). The estimate from the sampled cases is longer, by about two months (about 13% longer), than the average disposition time for all identified, terminated consolidated lead cases (17 months).

Dispositions of lead consolidated cases. Table 2 summarizes the ultimate disposition of lead cases in the consolidations. About 20% of lead cases are resolved by dispositive motion or trial; the rest are resolved primarily by settlement. The settlement rate is 48%; if one includes the voluntary dismissals as likely settlements, then the settlement rate is about 67%. Settlements here includes class settlements and Fair Labor Standards Act collective settlements. The "other" category includes orders affirming the bankruptcy court, remands to state court, and interdistrict transfers.

If one were to compare these results to the disposition types reported for all lead consolidated cases identified by the searches, settlements were still the most common disposition type, followed by voluntary dismissals, which often are, in fact, private settlements in which settlement is not reported to the court. The estimated settlement rate, combining the two, would be almost 70%. Dispositions by motion (Rule 12 or summary judgment) accounted for 17% of the sampled lead case dispositions, which is similar to the 13% rate for all identified lead cases. Trials accounted for 3% of dispositions in the sample. Note that, in general, the manual classification process yields better information on case disposition types than the categories reported by the courts. The courts' use of catch-all "other" disposition codes, in particular, creates interpretative uncertainty when using the courts' disposition data.

Table 2: Dispositions of Lead Cases in the Sample

Disposition type	N	Percentage of sampled consolidations	Average number of actions	Mean from filing to consolidation order (days)	Mean disposition time (days)
Settlement	183	48%	3.0	216.9	623.0
Voluntary dismissal	72	19%	2.8	178.7	517.8
Rule 12 dismissal	32	8%	2.5	212.7	555.0
Summary judgment	35	9%	2.4	190.1	651.3
Trial	12	3%	2.3	283.9	924.8
Other	51	13%	2.5	186.6	446.1
All	**385**	**100%**	**2.8**	**205.0**	**586.2**

Amended pleadings. An amended complaint was filed in 110, or in about 29%, of the consolidations after the consolidation order. It seems to be a relatively common practice to order an amended complaint after consolidation; this seems to be especially true in class actions. But amended pleadings are also a relatively common occurrence separate from the consolidation issue.

Number of consolidation orders. In almost all consolidations, there is just one consolidation order. This makes sense given that the modal number of actions in a consolidation is two. A second consolidation order can change the purpose of the consolidation (actions consolidated for discovery only may be ordered consolidated for trial, for example) or may add later-filed actions to the consolidation. There was more than one consolidation order in 27 (7%) of the sampled lead cases.

Deconsolidation/severance of actions. Deconsolidation orders or orders to sever consolidated cases were relatively uncommon, observed in 11 (3%) of the sampled consolidations. The *Can Do Air* case described in the next section of the report is an example of a consolidated action ordered to proceed on a deconsolidated basis.

Information on the OAFJs in the Sample

Nine OAFJs were identified in this sample of 385 consolidations, which translates to a rate of 2.3%. Of course, there are many more consolidated cases than consolidations. In this sample of 385 consolidations, there was a total of 1,078 actions. To provide a very rough estimate, the percentage of consolidated cases that resulted in an OAFJ was 0.8% (9/1,078).

In three of these nine instances, which are described first, no appeal followed the OAFJ; in six instances, there was a timely appeal of the OAFJ. In the six consolidations in the sample that presented potential *Hall* issues, then, no party lost its right to appeal through confusion over when to file the notice of appeal. Five of these OAFJs occurred before *Hall* was decided on March 27, 2018, and one after. (Strangely enough, the dates of the *Indian Harbor* case described *infra* sandwich the date on which *Hall* was decided—the granting of summary judgment ordered just before *Hall* was decided and the notice of appeal filed just after *Hall* was handed down.) Although it is unwise to generalize from just six instances, it appears that litigants acted as though *Hall*'s immediate-appeals rule governed prior to the decision, even in circuits that applied different finality rules in consolidated cases prior to *Hall*.[11]

No Appeal Filed (3 instances)

3d Circuit (1)

Wojak v. Borough of Glen Ridge (D.N.J. 2:16-cv-1605, filed Mar. 23, 2016) consolidated with *Sanders v. Borough of Glen Ridge* (D.N.J. 2:16-cv-8106, filed Nov. 1, 2016). Regulatory takings actions (regarding the drawing of school district boundaries) consolidated "for discovery and trial" on March 31, 2017. The district court dismissed all the claims in the *Sanders* action on February 15, 2018. No notice of appeal was filed. The *Wojak* action settled on April 5, 2019.

4th Circuit (1)

Kafka v. Hess (D. Md. 1:16-cv-1757, filed May 31, 2016) consolidated with *Hess v. Kafka* (D. Md. 1:16-cv-2789, filed Aug. 8, 2016). In this family dispute, Kafka filed a one-count declaratory judgment action against Hess in district court. Hess later filed against Kafka in state court; that case was removed to federal court and consolidated with the earlier filed case on November 11, 2016. The district court granted summary judgment in *Kafka* on June 6, 2017. No notice of appeal was filed. The *Hess* action was dismissed (by stipulation) in September 2017.

6th Circuit (1)

Browning v. University of Findlay (N.D. Ohio 3:15-cv-2687, filed Dec. 23, 2015) consolidated with *Allstate Indemnity Co. v. Browning* (N.D. Ohio 3:18-cv-1097, filed May 14, 2018). Students expelled from the university sued it and other defendants for defamation. In a separate action, one of

11. The sampled cases did not include any OAFJ examples from the First, Seventh, Eighth, Ninth, Tenth, Eleventh, or D.C. Circuits. This means only that there were none in the sampled cases, not that there were none in these circuits during the study period.

the defendants' insurers filed a lawsuit in state court seeking a declaratory judgment that it was not obligated to defend or indemnify the defendant in the defamation action. The two actions were consolidated on July 24, 2018, after the insurer's case was removed to federal court. The insurer moved for summary judgment, which was granted on February 21, 2019. No notice of appeal was filed. The *Browning* action settled and was closed on April 2, 2019. Interestingly, another insurer, State Farm, intervened in the lead case and obtained summary judgment on September 25, 2018; *that* judgment was certified for appeal pursuant to Rule 54(b), although it does not appear to have been appealed.

Appeal Filed (6 instances)

2d Circuit (2)

Document Technologies, Inc. v. West (S.D.N.Y. 1:17-cv-02405, filed Apr. 3, 2017) consolidated with *Document Technologies, Inc. v. LDiscovery, LLC* (S.D.N.Y. 1:17-cv-03433, filed May 9, 2017), and *Document Technologies, Inc. v. Hosford* (S.D.N.Y. 1:17-cv-03917, filed May 4, 2017). These cases stem from dispute over trade secrets and employment agreements; the three lawsuits were originally filed in different districts. After the cases were transferred to the Southern District of New York and consolidated, the district court dismissed *LDiscovery*, the action originally filed in the Eastern District of Virginia (judgment entered July 24, 2017), and the plaintiffs appealed (notice of appeal filed Aug. 23, 2017). The court of appeals affirmed on May 15, 2018. The other actions were stayed pending arbitration and later voluntarily dismissed on October 15, 2018.

Galanova v. Roberts (E.D.N.Y. 1:17-cv-03179, filed May 25, 2017) consolidated with *Galanova v. Portnoy* (E.D.N.Y. 1:17-cv-3212, filed June 1, 2018). *Roberts* is a pro se civil rights action; the court sua sponte consolidated it with the similar *Portnoy* case on June 6, 2018. The court granted the defendants' motion to dismiss the federal claims in *Portnoy* on August 13, 2018; the court declined to exercise supplemental jurisdiction over the remaining state claims and entered judgment. The plaintiff filed a notice of appeal of this order on September 10, 2018. The district court dismissed the other case and subsequently entered judgment on October 26, 2018; a notice of appeal of that order was filed on the same date. (The court of appeals consolidated these appeals, which were later (on June 21, 2019) dismissed because the appellant failed to file a brief.)

3d Circuit (1)

Kamal v. J. Crew Group, Inc. (D.N.J. 2:15-cv-190, filed Jan. 1, 2015) consolidated with *Parker v. J. Crew Group, Inc.* (D.N.J. 2:17-cv-1214, filed Feb. 22, 2017). *Kamal*, a Fair and Accurate Credit Transactions Act action, was filed in federal district court. A similar case, *Parker* was filed in Illinois state court, removed to federal court, and then transferred to the District of New Jersey. The two cases were consolidated on May 1, 2017. By the time *Parker* arrived in New Jersey, the district court was preparing to dismiss the *Kamal* case on a Rule 12(b)(1) motion (lack of Article III standing), which it did on June 6, 2017. *Parker* was ordered deconsolidated on the same day and later remanded to state court on January 11, 2018. The *Kamal* plaintiffs filed a notice of appeal within 30 days on June 20, 2017. The court of appeals (per Scirica, J.) affirmed the dismissal but remanded to the district court to amend its dismissal from "with prejudice" to "without prejudice."

Walking through the door opened by the Third Circuit, the *Kamal* plaintiffs filed a third amended complaint on May 14, 2019, long after the *Parker* case had been remanded. That complaint was again dismissed by the district court on September 10, 2019, and an appeal of that order was filed November 6, 2019 (after a motion for reconsideration had been denied). These events are noted only because the *Kamal* case appears in the sampled appellate cases discussed *infra*.

5th Circuit (3)

Aggreko, LLC v. Chartis Specialty Insurance Co. (E.D. Tex. 1:16-cv-297, filed July 21, 2016) consolidated *with Indian Harbor Insurance Co. v. Gray Insurance Co.* (E.D. Tex. 1:17-cv-80, filed Feb. 28, 2017). These insurance coverage actions involving an accident on an offshore oil rig were consolidated on June 8, 2017. In *Indian Harbor*, the later-filed case, the insurer-defendant moved for and received summary judgment on March 3, 2018, because its policy limits had been exceeded in the underlying incident. This order was appealed (notice of appeal filed Apr. 4, 2018), and the court of appeals affirmed (Dec. 2019). The remaining action was stayed pending the result of the appeal but had not been reopened as of this writing.

Villarreal vs. Horn (S.D. Tex. 1:15-cv-111, filed June 18, 2015) consolidated with *Villarreal vs. Horn* (S.D. Tex. 1:16-cv-267, filed Oct. 14, 2016). Plaintiffs filed two very similar immigration actions seeking the same relief under alternate theories; there were some factual differences between the cases. The district court consolidated the actions on November 8, 2016. Defendants moved to dismiss *Villarreal II*, and the court dismissed the second action as duplicative on September 23, 2017, concluding that the factual differences between the cases were not important. The plaintiffs filed a notice of appeal on September 24, 2017. That appeal was dismissed on January 3, 2018. Final judgment was entered in *Villarreal I* on June 18, 2018, and a notice of appeal was filed July 18, 2018 (amended July 19, 2018). The court of appeals affirmed in part and dismissed for lack of jurisdiction in part on March 31, 2020. (Because this is an immigration case, not all of the appellate documents were available on PACER.)

Wachob Leasing Co., Inc. v. Gulfport Aviation Partners, LLC (S.D. Miss. 1:15-cv-237, filed July 21, 2015) consolidated with *Allianz Global Risks U.S. Insurance Co. v. United States* (S.D. Miss. 1:16-cv-55, filed Feb. 19, 2016) and *Can Do Air, LLC v. Gulfport Aviation Partners, LLC* (S.D. Miss. 1:16-cv-60, filed Feb. 23, 2016). A National Guard helicopter struck a light pole with its rotors on the tarmac of the Gulfport-Biloxi airport. The light pole disintegrated and the debris damaged private planes; three suits were filed and subsequently consolidated. The *Allianz* case was voluntarily dismissed, probably because of a settlement, on November 29, 2016. The *Wachob Leasing* case was tried on both liability and damages, resulting in verdict for plaintiff. The court had ordered that the issue of liability in the consolidated actions was to be decided in the first trial. After the jury returned its verdict on liability and damages, the court entered final judgment in the lead case on March 15, 2017, and, on March 20, 2017, severed the member case, *Can Do Air*, in which only the issue of damages remained (after the finding of liability). The *Wachob Leasing* plaintiffs filed a notice of appeal (Apr. 13, 2017) of an earlier ruling on calculation of damages. The court of appeals affirmed the district court in July 2018. On a separate track, the *Can Do Air* case settled on November 17, 2017.

Second Phase

After consideration of the results of the first phase of the study, the joint subcommittee requested additional research into the incidence of OAFJs. Instead of extending the first phase of the study to cover filing years 2018 and 2019, using the same computerized docket searches conducted for all civil filings, 2015–2017, a different strategy using existing information from the appellate database was taken. Extending the first approach promised to be a great deal of effort for minimal reward.

In summer of 2021, the dockets of all district-court cases in which an appeal was filed in 2019 or 2020 were searched for Rule 42(a) consolidations. An important factor in the change of strategy was speculation that a search starting with appellate cases might uncover additional *Hall* issues (which generally arise only in cases in which appeals are filed). The deduplicated list of civil cases in which appeals were filed in 2019 or 2020 included 22,436 district-court cases. (The list was deduplicated because multiple appeals can be filed in a single district-court case; the same district-court case information can occur in the appellate database many times.) In conducting the computerized searches of the dockets of these district-court cases, the same search parameters were used as in the first phase of the study.

Manual review of the computerized search results identified 779 cases that had been consolidated in the district court and in which an appeal had been filed in 2019 or 2020. That translates into a consolidations-as-percentage-of-appeals rate of 3.5% (779 / 22,436). But this rate should be interpreted carefully. It represents the rate for deduplicated civil appeals; there are obviously more appeals, both in terms of cross-appeals and, of course, criminal appeals, that could be included in the denominator. Increasing the size of the denominator would mean, of course, a reduced rate of consolidations among appealed cases. However one calculates the rate, cases that were part of Rule 42(a) consolidations make up a relatively small part of the appellate docket.

Using these 779 cases as a sampling frame, a sample of 203 cases was examined for potential OAFJs. After this examination, seven cases were excluded from the analysis, primarily because the sampled case was not, after closer scrutiny, part of a Rule 42(a) consolidation. In two instances, however, the sampled case was excluded because the district court proceedings were too lengthy and complex to determine with any confidence whether OAFJs had occurred.

Eleven examples of OAFJs were identified among the sampled cases, as well as three ambiguous cases, described *infra* for the subcommittee's information. There were more ambiguous instances that might have been included, but the three examples provided give a sense for what was found in the searches. Note that the count of eleven includes the *Kamal* case discussed *supra*. There was some confusion on the part of parties over the timeliness of appeals in two of the cases, namely the *Center for Biological Diversity* (9th Circuit) and *Capshaw* (5th Circuit) entries *infra*. The *Cruz-Aponte* case may provide an example of an untimely appeal in a consolidated case, but it is a rather unusual example involving an incarcerated plaintiff whose appeal was dismissed for failure to comply with a show-cause order.

Examples of OAFJs

1st Circuit (1)

Cruz-Aponte v. Caribbean Petroleum Corp. (D.P.R. 3:09cv2092, filed Oct. 23, 2009) consolidated with, among others, *Garcia-Parra v. Caribbean Petroleum Corp.* (D.P.R. 3:09cv2148, filed Nov. 11, 2009). This consolidation involved claims arising from a fuel-tank explosion. Judgment was entered in the *Garcia-Parra* case on January 14, 2010, because the plaintiff, a prisoner, failed to comply with a court order regarding his prison account. A notice of appeal of that order was filed on May 5, 2010, but this appeal was dismissed by the court of appeals as untimely, on September 13, 2010. This appears to be an example of an untimely appeal of an OAFJ dismissed by the court of appeals. The notice of appeal was filed almost four months after judgment in the member case, and the First Circuit followed the immediate-appeals rule prior to *Hall*. However, the appellate record in this case indicates the appeal was dismissed for failure to comply with a show-cause order. This is an unusual case for inclusion in this report, as the First Circuit dismissed the appeal of the OAFJ in 2010. But the *Garcia-Parra* plaintiff, still incarcerated, filed a handwritten notice of appeal on July 27, 2020, which explains why the searches turned up this rather old case (originally filed in 2009). The lead case was rather complex, separate from the facts of the *Garcia-Parra* matter; final judgment in the lead case was entered February 18, 2016, although there was docket activity in the lead case after that date.

2d Circuit (1)

King v. Wang (S.D.N.Y. 1:14cv7694, filed Sept. 23, 2014) consolidated with *Wang v. King* (S.D.N.Y. 1:18cv8948, filed Sept. 30, 2018) on October 15, 2018. The *Wang* amended complaint raising Racketeer Influenced and Corrupt Organization (RICO) claims was dismissed on April 22, 2019; when a second amended complaint was not filed, the court ordered the case closed on January 27, 2020 (with prejudice). The notice of appeal was filed within 30 days, on February 26, 2020, but that appeal was voluntarily dismissed in June 2020. The *King* case was still pending in the district court as of this writing, although it appears that it may soon settle.

5th Circuit (1)

Harness v. Hosemann (S.D. Miss. 3:17cv791, filed Sept. 28, 2017) consolidated with *Hopkins v. Hosemann* (S.D. Miss. 3:18cv188, filed Mar. 27, 2018) on June 28, 2018. These actions are civil-rights challenges to felon disenfranchisement under Mississippi state law. The court granted summary judgment in the *Harness* case on August 7, 2019, severing the two actions; a notice of appeal of that order was filed within 30 days, on August 28, 2019. The court denied defendant's motion for summary judgment in the *Hopkins* case, which was stayed on the same date (Aug. 7, 2019); both sides in that case also filed appeals of that order. These appeals (consolidated) were argued en banc in the Fifth Circuit on September 22, 2021.

6th Circuit (1)

S.C. v. Metropolitan Government of Nashville & Davidson County (M.D. Tenn. 3:17-cv-01098, filed July 31, 2017), a civil rights (education) case, consolidated with three related actions, "for discovery and trial," on August 28, 2018. The court granted summary judgment for defendants in two of the consolidated actions on September 25, 2020. The docket entry for the order clearly states that these are final, appealable orders: "Nothing about the consolidation of these cases for discovery and trial shall be viewed as affecting the immediate appealability of those judgments." Judgment was entered in these cases on September 29, 2020, and notices of appeal were filed within 30 days, on October 19, 2020.

8th Circuit (1)

Residential Funding Co., LLC v. Home Loan Center, Inc. (D. Minn. 0:14cv01716, filed May 30, 2014) consolidated for pretrial purposes with *In Re: RFC and RESCAP Liquidating Trust Litigation* (D. Minn. 0:13cv3451, filed Dec. 12, 2013). Judgment was entered for plaintiffs in the *Home Loan* case on June 21, 2019. A notice of appeal was filed within 30 days on July 19, 2019, but that appeal was voluntarily dismissed Oct. 21, 2020. The master docket was administratively closed August 17, 2020, after resolution of another consolidated action.

9th Circuit (3)

Center for Biological Diversity v. U.S. Fish & Wildlife Service (D. Ariz. 4:17cv475, filed Sept. 25, 2017), an environmental action, consolidated with *Save the Scenic Santa Ritas v. U.S. Forest Service* (D. Ariz. 4:17cv576, filed Nov. 27, 2017) and *Tohono O'odham Nation v. U.S. Forest Service* (D. Ariz. 4:18cv189, filed April 12, 2018). The court granted summary judgment in the two *Forest Service* cases on July 31, 2019 (judgment entered Aug. 2, 2019); the intervenor defendants (copper mine operator) moved to correct the judgment and then appealed, after that motion was denied, on December 20, 2019. Judgment was entered in the lead case on February 11, 2020, after another ruling granting summary judgment to plaintiffs. It is somewhat unclear what remained of the case after the July 31, 2019, order and August 2, 2019, judgment. These cases are included in this report, though, because of an argument in one of the plaintiffs' motions, which appears to ignore the holding in *Hall v. Hall* altogether:

> **I. This Court's July 31, 2019 Order Is Currently Not Appealable**
>
> Federal Defendants' motion for a stay is contingent on whether there is an appeal of this Court's July 31, 2019 Order in the other two consolidated cases. ECF 252 at 2. Federal Defendants' motion fails to recognize or address, however, that the Court's July 31 Order is currently unappealable.
>
> The Ninth Circuit addressed this issue in *Huene v. United States*, 743 F.2d 703 (9th Cir. 1984). In *Huene*, the plaintiffs filed two cases against the Internal Revenue Service ("IRS") pursuant to the Freedom of Information Act, which were consolidated by the district court. *Huene*, 743 F.2d at 703. After the district court granted the IRS's motion for summary judgment in one of the two consolidated cases, the plaintiffs appealed. *Id.* After

> considering the various approaches to this issue in other circuits, the Ninth Circuit determined that "the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions unless a 54(b) certification is entered by the district court." *Id.* at 705. As explained by the Ninth Circuit,
>
> > An appeal prior to the conclusion of the entire action could well frustrate the purpose of which the cases were originally consolidated. Not only could it complicate matters in the district court but it also could cause an unnecessary duplication of efforts in the appellate court.
>
> *Id.* at 704. The Ninth Circuit therefore held: "where an order disposes of only one of two or more cases consolidated at the district court level, the order is not appealable under 28 U.S.C. § 1291 absent a Rule 54(b) certification." *Id.* at 705; see also *Lasalle*, 1997 U.S. App. LEXIS at *2 ("In the Ninth Circuit, no appeal may be taken from a consolidated case without a Rule 54(b) certification from the district court."). Because the July 31, 2019 Order resolved only two of the three consolidated cases, and was not certified under Rule 54(b), the Ninth Circuit "lack[s] appellate jurisdiction to review it." *Id.*

Resp. in Oppos. re: Mot., at 1–2 (docketed Aug. 13, 2019). The last quoted sentence does not appear to be a correct statement of the law in August 2019, but the Ninth Circuit did follow the "deferred-appeals rule" prior to *Hall*.[12]

McCune v. Nova Home Loans (D. Ariz. 4:19cv600, filed Dec. 27. 2019), a pro se real-estate action, was ordered consolidated with *McCune v. PHH Mortgage* (D. Ariz. 4:19cv525, filed Oct. 10, 2019), on April 8, 2020. The order is ambiguous with respect to whether consolidation or reassignment was intended, because the district court granted defendant's motion to dismiss the member case on the same day as the order (April 8) and entered judgment in that case April 21, 2020. The notice of appeal in the *PHH* case was filed April 30, 2020. The *Nova Home Loans* case was dismissed by the court for lack of subject-matter jurisdiction on July 7, 2020; judgment entered the same day; notice of appeal filed on August 3, 2020.

Cormier v. Carrier Corp. (C.D. Cal. 2:18cv7030, filed August 15, 2018), a defective products case, was consolidated for pretrial purposes with *Oddo v. United Technologies Corp.* (C.D. Cal. 8:15cv1985, filed Nov. 25, 2015) on May 13, 2019. As of this writing, *Oddo* was still pending. One plaintiff in *Cormier* (Cormier) accepted an offer of judgment and the court entered judgment on March 2, 2021. The other *Cormier* plaintiff (Shoner) filed a notice of appeal of his dismissed claims on December 15, 2020 (after the offer of judgment was accepted but before judgment was entered). In contrast to the motion quoted in the *Center for Biological Diversity* case, the request for entry of judgment in the *Cormier* case cites *Hall,* possibly even correctly:

> In its October 22, 2018 decision on Carrier's motion to dismiss, this Court dismissed all claims asserted by Mr. Shoner, and allowed certain of Mr. Cormier's claims to proceed. (ECF 52.) The Court afforded the plaintiffs 14 days to amend the complaint, but they chose to stand on the original complaint. Therefore, all of Mr. Shoner's claims have been dismissed since October 22, 2018.

12. *Lammon*, *supra* note 4, at 1004.

> On May 16, 2019, the Court consolidated this action with the action in *Oddo v. United Technologies Corporation*, case number 8:15-cv-01985-CAS(Ex), for pretrial purposes only. (ECF 104.) However, "one of multiple cases consolidated under [Rule 42(a)] retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases." *Hall v. Hall*, 138 S. Ct. 1118, 1128-29 (2018).
>
> On November 16, 2020, Mr. Cormier accepted an offer of judgment in his favor from Carrier, inclusive of costs and fees. (ECF 116.) Mr. Cormier is entitled to entry of judgment under Rule 68, which states that after acceptance of an offer of judgment, "[t]he clerk must then enter judgment."
>
> As there are no longer any claims pending in this action, which retains its independent character from the *Oddo* action, final judgment should be entered in this action: (1) in favor of Mr. Cormier on the terms stated in the accepted Offer of Judgment, and (2) in favor of Carrier on Mr. Shoner's claims, which were dismissed October 22, 2018. Plaintiffs request entry of final judgment in this action in the form filed herewith.

Request for Entry of J., at 1 (docketed Dec. 4, 2020).

10th Circuit (1)

Securities and Exchange Commission v. Management Solutions (D. Utah 2:11cv1165, filed December 15, 2011), a lengthy SEC receivership action, consolidated with "ancillary" cases brought by or against the receiver, including *Miller v. Falconhead Property Owners Association* (D. Utah 2:14cv936) (Miller was the receiver). In that ancillary matter, the property owners' association challenged the receiver's disposition of the property at issue; the court rejected the association's challenge, entering judgment for the receiver on October 26, 2016. A notice of appeal of that judgment was filed within 30 days on November 22, 2016. The main receivership action closed on June 5, 2019.

11th Circuit (1)

Pinares v. United Technologies Corp. (S.D. Fla. 9:10cv80883, filed July 26, 2010) was the lead case in a large consolidation (more than 20 cases total) involving groundwater contamination in Palm Beach, Florida. Member case *Santiago v. United Technologies Corp.* (S.D. Fla. 9:14cv81385, filed Nov. 7, 2014), was consolidated with the lead case on July 14, 2016 (one of the acreage-injury cases); judgment was entered in *Santiago* on November 11, 2018, and a notice of appeal was filed December 10, 2018. The lead docket was closed November 4, 2019.

Three Additional, Ambiguous Instances

5th Circuit (1)

Capshaw v. White (N.D. Tex. 3:12cv4457, filed on Nov. 6, 2012), a qui tam action, was consolidated with *Bryan v. Hospice Plus LP* (N.D. Tex. 3:13cv3392, filed on Aug. 23, 2013) on

May 15, 2014; the *Bryant* docket was closed on that date. The court dismissed the *Bryan* relators, pursuant to Rule 12(b)(1), based on the first-to-file rule, on January 23, 2017; these relators then filed a motion for attorney fees, which was denied, and then a motion to reconsider, which was also denied. They then filed an appeal—styled as an interlocutory appeal—of these orders, on December 27, 2018, which the Fifth Circuit dismissed for lack of jurisdiction on April 10, 2019. The appellees' motion to dismiss the appeal argued that the court of appeals lacked jurisdiction because of the final-judgment rule, appearing to rely on a pre-*Hall* understanding:

> This Court lacks jurisdiction over this appeal. The December 11, 2018 Order (the "Appealed Order", Page ID #7316-17, Order, Doc. #433) from which this appeal is taken is interlocutory. That order denied reconsideration of a prior and also interlocutory Order (the "Fee Order", Page ID #6556-65, Order, Doc. #394), which denied attorneys' fees to counsel for two dismissed relators in this pending False Claims Act case. The district court denied attorney fees on the grounds that the statute's "first-to-file" bar precluded the dismissed relators from bringing their claims in the first place. Nine defendants remain in the underlying case, and no final judgment has been entered.
>
> The Appealed Order thus disposed of fewer than all claims or parties and did not direct entry of a final, appealable judgment under Federal Rule of Civil Procedure 54(b). Nor is the Appealed Order an immediately appealable "collateral order" under the doctrine announced in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546–47 (1949). Thus, this Court lacks jurisdiction over this appeal and should dismiss it.

Mot. To Dismiss, filed Feb. 12, 2019 (5th Cir. 18-11652), at 1–2. The *Capshaw* action was dismissed on October 2, 2019; judgment was entered on June 2, 2020. The *Bryan* relators filed a new motion for attorney fees on October 3, 2019, which the court denied on February 12, 2020. The Bryan relators filed a notice of appeal of this and other orders on March 9, 2020. The notice of appeal states that the order on February 12, 2020, "disposes of all remaining claims, although the District Court has yet to enter a separate final judgment." The *Capshaw* case is an instance where they may have been a *Hall v. Hall* issue, but the odd procedural posture of the case makes it difficult to determine whether and when the dismissed relators could have filed a timely appeal at some point in 2018–2019.

9th Circuit (2)

Griffin v. Sachs Electric Co., N.D. Cal. (5:17cv3778, filed June 30, 2017), a wage-and-hour dispute, was ordered consolidated with *Griffin v. McCarthy Building Co.* (5:18cv2623, filed May 3, 2018) on July 16, 2018. On May 28, 2019, the court granted summary judgment for defendant in the *Sachs* case; the court later entered judgment for the *McCarthy* defendants on December 2, 2018, and the plaintiffs filed a notice of appeal on December 6, 2019. The *McCarthy* case was also voluntarily dismissed on December 2, 2019. It is not clear why the court waited more than six months to enter judgment in the *Sachs* case, and the entry of judgment matters for the question at hand. It is clear from the status report, docketed June 7, 2019, that the summary judgment order only applied to the *Sachs* defendants and that the plaintiffs intended to settle with the *McCarthy*

defendants—which apparently happened, at which time judgment was entered in the *Sachs* case and a notice of appeal was filed.

Brown v. Arizona (D. Ariz. 2:17cv3536, filed Oct. 5, 2017) was consolidated with *DeGroote v. Arizona Board of Regents* (D. Ariz. 2: 18cv310, filed Jan. 1, 2018) for "the limited purpose of consolidating common defense-witness depositions." The court granted summary judgment in *Brown* on March 11, 2020, and a notice of appeal was filed March 31, 2020. *DeGroote* was settled and dismissed on June 5, 2020. If consolidation for discovery purposes is relevant to the inquiry, then there may be more relevant cases.

Conclusion

This report has shown that *Hall* issues are triply rare—they arise only in cases consolidated pursuant to Rule 42(a), and only when the cases in the consolidation terminate at different times, in OAFJs, and, even then, only when an appeal is filed. Consolidation occurs in 2–3% of civil cases, and then OAFJs occur in a relatively small percentage of consolidations. Consolidated cases also represent a small percentage of civil appeals, 3–4%. This report provides two estimates of the rate of OAFJs among consolidated cases. Starting from civil filings consolidated in the district court in 2015–2017, it finds that OAFJs occur in approximately 1 consolidation in 50. Starting from consolidated cases in which an appeal was filed in 2019–2020, OAFJs were more common, occurring in slightly more than 1 consolidation in 20. That OAFJs are more common in the appeals data makes sense given that OAFJs are more likely in cases decided on motion—the kinds of cases in which appeals are also more likely. Settled cases are less likely to give rise to appeals or OAFJs; settlements probably tend to resolve the consolidated cases at the same time.

Even when an OAFJ occurs, a *Hall* problem arises only when a litigant errs with respect to the finality of the judgment for purposes of appeal. These instances prove particularly difficult to find empirically (which is not the same thing as saying that they do not occur). The number of OAFJs discussed in this report (19) is too small from which to generalize. But it is interesting that, even in circuits that did not follow the immediate-appeals rule prior to *Hall*, litigants seemed somewhat inclined to file a notice of appeal after a judgment in a consolidated case without waiting for the entire consolidation to conclude.

TAB 8

8. Multidistrict Litigation Subcommittee

Since the March 29, 2022, meeting of the Advisory Committee, the MDL Subcommittee has developed a revised approach to possible rulemaking. It has not determined that rule amendments are actually needed, but has concluded for the present that it would be preferable to focus on a possible new Rule 16.1 for multidistrict proceedings rather than trying to integrate MDL measures into existing Rule 16.

Some of the stimuli toward this new orientation were discussed during the San Diego meeting in March. In particular, comments the Subcommittee received after the agenda book for that Advisory Committee meeting was prepared raised questions about whether that approach (focusing on possible changes to Rules 26(f) and 16(b)) would actually work in MDL proceedings. Among the problems cited were:

> (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 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.

On May 24, 2022, the MDL Subcommittee convened an online meeting to discuss the initial sketch of a possible Rule 16.1, and suggest revisions to it. Based on that discussion, the sketch was revised, and included in the Standing Committee agenda book for the June 7, 2022, meeting of that committee. See agenda book, Committee on Rules of Practice and Procedure, pp. 1067-72.

After the 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 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.

Representatives of the Subcommittee also attended a conference on MDL proceedings organized by the Stanford Center on the Legal Profession at Stanford Law School on May 20, 2020, which included a number of experienced judges and lawyers.

In addition, further comments have been submitted. Professors Alan Morrison and Roger Trangsrud of George Washington University Law School submitted 22-CV-K, which is in this agenda book.

On Sept. 8, 2022, the Subcommittee met again via Zoom to consider this report to the full Committee. It seeks reactions from members of the Committee on this new approach, particularly with regard to the views expressed by members of AAJ and LCJ. Notes of the Sept. 8 meeting are included in this agenda book.

To introduce the issues, then, this report is in two parts. The first contains the supplemental report to the Standing Committee that was prepared after this Committee's March 29 meeting. The second part, then, attempts to integrate the AAJ and LCJ reactions, and to identify areas of agreement and disagreement. It bears emphasis that this attempt at integration reflects the Reporters' 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.

One key point, going forward, is that it appears substantial progress has been made even if disagreements remain. Of course, neither the Subcommittee nor the full 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.[1]

[1] 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.

I. Rule 16.1 Sketch Before Standing Committee

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. The positions of these two organizations focused on the Alternative 2 version of (c) set out above; Alternative 1 remains before the Subcommittee. 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[2]

(a) MDL MANAGEMENT CONFERENCES. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions to a designated transferee judge,[3] that judge may[4] [must[5]] {should}[6] schedule [an early management conference] {one or more management conferences} to develop a [schedule[7] and] management plan for orderly pretrial activity in the centralized actions.

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[2] 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.

[3] 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.

[4] AAJ prefers "may."

[5] LCJ prefers "must."

[6] The verb choice here remains open. There is an argument that "must" works here because it is highly likely that a new transferee judge, no matter what the size or complexity of the MDL, will convene a case management conference of some kind as one of the initial acts after receiving the assignment from the JPML. If such a conference almost invariably is going to happen, there is no hamstringing of judicial flexibility if the rules recognize (and encourage) it. However, 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 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.

[7] LCJ proposes adding "schedule" here.

(b) DESIGNATION OF [INTERIM] {COORDINATING} COUNSEL FOR PRE-CONFERENCE MEET AND CONFER. The court may[8] designate coordinating[9] [interim] counsel to act on behalf of plaintiffs [and defendants in multi-defendant proceedings][10] 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[11] and does not imply any determination about whether leadership counsel should be appointed.[12]

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[8] 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).

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

[10] 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.

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

[12] 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:

> [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.

(c) PRE-CONFERENCE MEET AND CONFER. The court may [must] {should}[13] direct the parties to meet and confer through their attorneys or through [interim] {coordinating} counsel designated under Rule 16.1(b) before the [initial][14] conference [or conferences][15] under Rule 16.1(a). Unless excused by the court,[16] [If the court directs the parties to meet and confer,] the parties must[17] discuss and prepare a report for the court on [any matter addressed in Rule 16(a) or (b),] {any matter addressed by Rule 16 and designated by the court}[18] and in addition on the following:[19]

[13] 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.

[14] 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."

[15] 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.

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

[17] 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.

[18] 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.

[19] It is likely that the rule text should make clear that the transferee judge may decide to direct discussion of all the matters identified in paragraphs (1) through (4), or only some of them. The ultimate choice must rest with the judge.

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

609 **(2)** Whether [leadership] {lead[23]} counsel for plaintiffs should be appointed [and
610 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. Medical device MDLs may be examples of cases in which defendants may have important information that can track and identify individual plaintiffs in ways plaintiffs cannot on their own.

[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 or an initial census response 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 illustrate possible reasons to proceed with care.

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

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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[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 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. it is hoped that representatives of the Subcommittee will be able to participate at the Judicial Panel on Multidistrict Litigation Conference for Transferee Judges at the end of October, and perhaps receive some judicial reactions to this new direction.

Notes of Zoom Meeting
MDL Subcommittee
Advisory Committee on Civil Rules
Sept. 8, 2022

On Sept. 8, 2022, the MDL Subcommittee of the Advisory Committee on Civil Rules held a meeting via Zoom. Those participating were Judge Robin Rosenberg (Chair, MDL Subcommittee), Judge Robert Dow (Chair, Advisory Committee), Judge David Proctor, David Burman, Joseph Sellers, Ariana Tadler, Helen Witt, Prof. Edward Cooper (Reporter to the Advisory Committee), Prof. Richard Marcus (Reporter of the MDL Subcommittee) and H. Thomas Byron of the Administrative Office.

The meeting began with an introduction of issues to be addressed in terms of the presentation to the full Committee. At a general level, the issues might be as follows:

(1) Is there a consensus on whether proceeding to work on a potential rule amendment is recommended?

(2) If such a consensus exists, is the focus on a Rule 16.1 approach the favored direction?

(3) As between Alternative 1 and Alternative 2, is there a consensus that one or the other is the better vehicle?

(4) Are there wordsmithing issues that can be addressed now? Some examples are:

(a) use of "may," "must," or "should"

(b) terms for counsel to be in charge of organizing for the initial case management conference -- "interim," "coordinating," or some other term.

(c) the term for the lawyers ultimately appointed by the court -- "leadership," "lead," "liaison," or some other term

A reaction was that there is no hurry to be recommending anything for publication now. If a rule-amendment proposal is put out for public comment at the next opportunity, that would be in August 2023. To get to that point, it would have to be on the agenda of the Standing Committee for its June 2023 meeting, which means it would have to be proposed by the Advisory Committee at its March 2023 meeting. Nonetheless, it would be desirable to determine whether the Subcommittee might revert to favoring changes to Rule 16(b) and 26(f). The Discovery Subcommittee is planning to have an action item on the October agenda for changes to those rules regarding privilege logs. It held off presenting that at the March 2022 meeting in part because this Subcommittee might be advancing proposals for the same rules, but then this Subcommittee shifted attention. It would be good to verify that it will not shift back.

Another point was that the 16.1 approach was developed only after the March meeting in San Diego. The rest of the Advisory Committee has never seen it. So though the Subcommittee

has received abundant input on the 16.1 idea, and it was at least on the agenda of the Standing Committee as an information item, the other members of the Advisory Committee have not seen it.

Yet another consideration is that though the Subcommittee has received abundant feedback on the Rule 16.1 approach from AAJ and LCJ lawyers, it has yet to hear from judges. The judges on the Subcommittee will, however, be making a presentation on rule-amendment ideas at the JPML Conference for Transferee Judges at the end of October, and that event offers the promise of significant feedback.

A Subcommittee member offered some tentative reactions. The Subcommittee is in favor of proceeding to try to draft a rule that could be published for public comment. Rule 16.1 is the right approach. Put differently, nobody on the Subcommittee thinks the project should be abandoned now. To the contrary, though difficulties may emerge that ultimately mean no rule is adopted, this is not the time to stop working on it.

A question was raised: Do we have reasons why we think a rule is warranted. That drew a number of reasons:

(1) A very substantial proportion of the federal civil docket consists of actions subject to a JPML transfer order, but there is nowhere in the Civil Rules where the term "multidistrict" even appears;

(2) The JPML is making an effort to add judges to its roster of transferee judges, so there likely will be more judges handling these proceedings who are on their first or second Panel assignment, but who will be confronting a variety of high-stakes decisions right up front, so guidance is good for them;

(3) The transferee judges are looking to expand the opportunity to become leadership counsel to a broader array of lawyers, inevitably involving lawyers with less experience, so those lawyers would benefit from guidance in the rules;

(4) The Manual for Complex Litigation, which is a potential source of guidance, is not familiar to all lawyers, and its bulk may make it daunting to new transferee judges. Other sources of guidance -- "best practices" collections -- are not widely known;

(5) The Committee Note should provide an opportunity to provide further guidance beyond the spare provisions of the rule itself.

A different question was raised -- is there a presumption against creating new rules -- .1, .2, etc.? The answer was no; indeed, the Subcommittee earlier considered a new Rule 23.3.

Discussion returned to the question of choosing between Alternative 1 and Alternative 2. Caution is indicated. For one thing, we do not yet know whether judges might actually prefer the detail of Alternative 1. Our goal throughout will be to ensure that any rule makes clear that the transferee judge retains flexibility to manage the proceeding in the most effective manner. It is

possible that judges (particularly those new to MDL proceedings) could find a "checklist" very useful.

Comments were made in favor of retaining Alternative 1 in the package even though it was not favored by the AAJ or LCJ participants. For one thing, it was in the Standing Committee agenda book even though there was uneasiness about delivering an amendment idea to the Standing Committee that the Advisory Committee had not first seen. Having done that in order to get input from the bar, it would be odd not to present the ideas to the Advisory Committee also.

On the merits of the choice: Alternative 1 is based on fairly widespread experience with MDL proceedings and what has proven important in them. The challenges for transferee judges will exist, and having a rule addressing those challenges is worthwhile. It seems that some lawyers are uneasy about including some things on the long list of possible items in Alternative 1, but most (if not all) of those things have often proved important.

A consensus emerged to include Alternative 1, and discussion shifted to specific features of the list of topics that seemed to elicit uneasiness among the lawyers. One was reference to appointment of a special master, and another was the possible use of master pleadings. The concern seems to be that, if something is mentioned in a rule, some judges will think "I have to do that." Even if Alternative 2 turns out to be the favored route, things now in Alternative 1 might be mentioned there. Moreover, the possibility of over-reading by judges does not seem to be borne out by other rules. Consider Rule 16(c). It has a long list of possible topics, and it's unlikely that many judges regard it as mandatory that they enter orders on each of those topics.

The question was raised whether a very simple rule might suffice if a detailed Committee Note accompanied it. That could sidestep the "it's in the rule so I have to do it" problem.

A member observed that it's too easy to think that we can solve all drafting problems by shifting to the Note. Moreover, there is an abiding preference for avoiding Committee Notes that are mini practice manuals.

Another member expressed a mild preference for Alternative 1. Perhaps the list includes some things that could be removed, but most of them often prove important. It's useful at least to note them. Hearing from the judges seems most important. If they don't want a list, that is a major consideration.

A caution was offered: it is human nature to think that you should do something about all the items in a rule like this. The option of addressing some things in the Note rather than the rule should be kept on the table.

A comparison was offered: In the 2018 amendments to Rule 23(e) there were provisions regarding the showing proponents of a class-action settlement had to make to the court that were called the "early vetting" requirements. Though mainly in the Note, this change has caused positive results.

The view was expressed that either version of a Rule 16.1 would be helpful to judges, perhaps more helpful to them than to lawyers. At a minimum, it's important to see what the judges at the JPML Conference for Transferee Judges say about these ideas. That recalled a 2018 presentation of some rule-amendment ideas at this Transferee Judges Conference during which the judges were very resistant to the amendment ideas. But those ideas were very different from the ones now under consideration, such as an automatic right to appeal and mandatory vetting of claims in every case.

This Rule 16.1 approach directly addresses the concerns of judges like Judge Chhabria -- "If only I had known at the beginning how important this would prove to be later, I would have approached it with greater diffidence." For judges new to this activity a "laundry list" may be just what they need. Indeed, sometimes lawyers are better informed about these issues than the judges. The goal is to advise the judge about what to discuss on the front end. And at least some of the lawyers who have criticized Alternative 1 may mainly be on the lookout for what's good for them in their practices, which is not necessarily the ideal criterion for developing a helpful rule.

Discussion shifted to what might be called a "chicken/egg" problem -- which comes first, selection of leadership or a conference among counsel about management of the proceedings? Sensitivities about the label for counsel initially designated to manage the early negotiations may be motivated by these sorts of concerns. We have recently received a submission from two GW professors who emphasize that only the "real" leadership should be in a position to represent the plaintiff side in negotiations about the many items on the list in Alternative 1, many of which surface also in Alternative 2.

One reaction was that the court has to have some input on who is representing the sides to make the case-management process work. And the court also needs some method of sorting through candidates for that early effort. This member is particularly concerned that this early discussion include the perspectives not only of those with large stakes but also those with small stakes. There are serious downsides to having the judge defer to plaintiff counsel and appoint whoever is favored by a process that might strike some as similar to Tammany Hall.

Another member agreed -- the judge gets this "massive elephant" of a litigation and can't instantly pick leadership either for the initial conference or the longer term. In one large MDL, that is exactly what happened -- partly due to the constraints imposed by the COVID lockdown. The court fairly early made "initial appointments" of counsel with specified duties -- the "April Deliverables Team," for example. It's critical to get the proceeding moving, and not critical to make permanent long-term appointments right at the outset. After some meet-and-confer activity, it was possible in this MDL to appoint longer-term leadership. And "longer-term" does not mean "permanent." Changes remain possible, and perhaps should be built into the process.

Another topic was whether a rule that said "may" is really a rule, and also whether it is unduly peremptory for Rule 16.1 to say that the court "must" hold an early management conference. One reaction to that was that with MDL proceedings it may be an essential substitute for the Rule 16(b) process in individual cases. That process requires the judge to enter a scheduling order. But once dozens or hundreds of cases are reassigned to a single judge it cannot be true that all those schedules continue to apply. The statutory command is that the transferee judge manage

the pretrial proceedings, and it's very hard to understand how that can be done without convening some sort of conference of counsel. "There's probably never been an MDL proceeding in which the transferee judge did not hold an early management conference." Under these circumstances, at least "should" seems a legitimate verb.

Another topic was raised -- there is very little about settlement here. Attention was drawn to item (9) in the notes about the Committee Note in the material put before the Standing Committee. Early on, there was an effort to devise some sort of "settlement review" authority, but that proved too difficult to do.

Similar concerns were raised about reference to a common fund order. But that is such a routine idea, that a rule saying it "may" be considered seems fairly justifiable.

Yet another possible sensitivity is the difference between saying "scheduling" and saying "sequencing." The latter word may conjure up the wrong image, as with the old notion that in class actions discovery had to be "sequenced," with "class discovery" first and "merits discovery" afterwards. It would be desirable to arrive at a neutral term.

The conclusion was that all these matters should be put before the full Committee in October, and that it might be possible to have a proposed preliminary draft for publication for comment at the March 2023 meeting. That would probably require pretty fast work after the Nov. 1 Transferee Judges Conference session, and might prove impossible to achieve.

The draft agenda report can be used to educate the full Committee in October, and Subcommittee members can express their views on how to proceed at that time.

22-CV-K

August 18, 2022

COMMENT OF ALAN B. MORRISON & ROGER TRANGSRUD
CO-DIRECTORS, JAMES F. HUMPHREYS COMPLEX LITIGATION CENTER
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
RE
DRAFT MDL RULE 16.1

The draft proposed by the MDL subcommittee and its accompanying notes raise many questions. This comment will address only the threshold issue of what should take place at the preliminary meeting prior to the initial MDL management conference. Until that is determined, none of the other issues can be resolved. Therefore, this comment takes no position on these other issues at this time.

My first question is why is it necessary or at least desirable to have a meeting of some kind before the management conference? The answer requires an understanding of what will happen at the management conference. Although written for the preliminary conference, Alternative A, section (c), suggests the main areas that the MDL court should address at the management conference They can be summarized as follows: (a) all matters relating to appointment of lead counsel and their relation to other counsel for MDL plaintiffs [items 1-5]; (b) identification of the principal legal and factual issues in these cases [item 6]; (c) preliminary discovery matters [items 7 & 10]; (d) pleadings and motions [items 8, 9 & 12]; and (e) scheduling of future conferences and other issues [items 11, 13, & 14].

There seem to be two main reasons why a preliminary conference should be held. The first is to help organize the information for the MDL judge. By definition, in complex MDL

proceedings there will be many attorneys for the plaintiffs and sometimes for the defendants. Cases will be at various stages of discovery and motion practice, with some subject to Rule 16 and Rule 26 orders and others just filed. Thus, one function will be to help sort through the cases and to prepare an organized summary of what is then known for the MDL transferee judge.

The second function of a preliminary meeting is to assist the transferee judge with the appointment process for lead counsel and for related functions. The work at the preliminary meeting would include presenting options for the appointment of counsel and might include gathering resumes and other information about counsel who are seeking appointment to various positions. Ideally, this information would be presented in writing to the transferee judge and made available to all counsel well in advance of the initial management conference.

Lawyers, like nature, abhor a vacuum, and so if there is no formal preliminary meeting, lawyers will get together and gather some or all of the information suggested above and have it available for the judge at the initial management conference. The most likely area in which this will occur is the appointment of lead and other counsel because lawyers in MDLs care more about that than anything else. And when that occurs, it is most likely that lawyers with prior MDL experience with band together and present the MDL judge with their preferred slate. At one time, that approach may have been appropriate, but today MDL judges are using many other options for deciding whom to appoint to various positions, and so one function of a formal preliminary conference would be to take those issues out of the hands of groups of lawyers alone, and assure that all lawyers have input into what is presented to the MDL judge.

It is for this reason that it would be advisable for the transferee judge to designate a magistrate judge or a special master (or perhaps even another district judge) to manage the preliminary conference and to oversee the production of a report that would include the relevant

information about the issues noted in Alternative A and present various options for appointing counsel. Designating coordinating counsel for the preliminary conference creates too great a risk that those lawyers would have a substantial advantage in becoming lead counsel, a problem that can be avoided by designating a magistrate judge to run the preliminary conference. The transferee judge would include in the designation order a statement as to whether the report should include specific information regarding proposed lead counsel etc, or whether that information will be submitted after the initial management conference.

TAB 9

9. Rule 41 Subcommittee -- 21-CV-O and 22-CV-J

These submissions address a conflict among the courts about the scope of Rule 41(a)(1)(A) unilateral dismissal by the plaintiff. 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.

The 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). Both these submissions should be in this agenda book. In brief, the disagreement was about whether a Rule 41(a)(1)(A) unilateral dismissal by a plaintiff could be used to dismiss only certain claims, or only the claims asserted by or against certain parties, leaving the action still pending in the district court.

Giving a "plain meaning" reading to the rules, Judges Furman and Halpern explained that 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, say that the issue is a "recurring circumstance," and cite 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

suggested 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, which was included in the agenda book for the March 2022 meeting of the Committee and is also included in this agenda book. 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, as to which 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) 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), also included in this agenda book. 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, including sometimes 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 Subcommittee consideration

These issues were briefly introduced at the Committee's March 2022 meeting. After that meeting, a Rule 41 Subcommittee was appointed, chaired by Judge Bissoon. It held an online meeting on June 28, 2022, and another on Sept. 7, 2022. Notes of those meetings are also in this agenda book. The Subcommittee 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. At the October meeting it will attempt to introduce the various issues and hopes to elicit experience and guidance from the other members of the Advisory Committee.

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), to focus 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 agenda memo provides footnotes exploring the variety of points that might be made about the terminology used in the current rule, including Rule 41(c). This report focuses on the issues specifically presented by these submissions and examined in the Rules Law Clerk research memo included in the March 2022 agenda book.

An additional wrinkle merits mention: 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.

The question posed by the agenda materials for the March 2022 full Committee meeting was whether to 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.

The Subcommittee's initial orientation is to limit its attention to Rule 41(a)(1). Though it is not convinced that any change is really needed, the existing (and possibly impending) circuit conflicts suggest a number of possible amendment routes.

The Subcommittee discussion indicates that there are multiple possible amendment routes. (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.) Whether to focus attention also on Rule 41(c) remains an open issue. To facilitate discussion, however, it seems useful to offer some concrete examples, purely for purposes of discussion. These might be regarded as "cartoons," not even eligible to be called "sketches."

1. Adopting the minority "literal" view

Burton DeWitt's memo reports 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][1] 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[2] 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.

Of course, a rule amendment is not bound by the courts' interpretation of the current rule, since by definition it's amending the rule. A suggestion in the March 2022 agenda book went 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.

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

[2] 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."

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 of 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[3]

(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.

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

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

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.

Another candidate for mention (perhaps in a Committee Note) is Rule 21, which applies to "misjoinder" (probably not the sort of situation we are talking about as to parties) and says the court may "add or drop a party" at any time.

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.[4] 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.

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

[4] 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.

> 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

The Committee could look farther than the problem called to its attention by these two submissions. Indeed, there is a variety of questions that 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[5]

(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[6] may dismiss an action[7] 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;[8] or

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[5] 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.

[6] 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.

[7] 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.

[8] This cuts way back on an old common law attitude under which plaintiffs 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 defendants may occur before the time to plead has arrived. A prominent and old example is Harvey Aluminum, Inc. v. American Cyanamid 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. Nartron Corp., 511 F.2d 294 (6th Cir. 1975) ("The defendant can

(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[9] previously dismissed any federal- or state-court action[10] based on or including the same claim,[11] 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[12] may be dismissed over the defendant's[13] 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.

* * * * *

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)."

[9] Again a singular plaintiff.

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

[11] 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.

[12] 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?

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

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule[14] applies to the dismissal of any counterclaim, crossclaim, or third-party claim.[15] A claimant's[16] voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served;[17] or

(2) if there is no responsive pleading, before evidence is introduced at a trial or hearing.[18]

[14] This seems to be awkward rule text. "This rule" might mean only 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.

[15] 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).

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

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

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

Notes of Online Meeting
Rule 41 Subcommittee
Advisory Committee on Civil Rules
Sept. 7, 2022

On Sept. 7, 2022, the Rule 41 Subcommittee of the Advisory Committee on Civil Rules met via Zoom. Participants included Judge Cathy Bissoon (Chair of the Subcommittee), Judge Robert Dow (Chair of the Advisory Committee), Ariana Tadler, Dean A. Benjamin Spencer, David Burman, Professor Edward Cooper (Reporter of the Advisory Committee), Professor Richard Marcus (Associate Reporter of the Advisory Committee), and H. Thomas Byron and Christopher Pryby representing the Administrative Office.

The meeting began with the observation that the draft agenda memo lays out a variety of options and fleshes out what they might mean. One issue is whether the unilateral dismissal option ought to be curtailed when a motion to dismiss is filed. At present, only a motion for summary judgment or answer cuts off the right to dismiss under Rule 41(a)(1). Beyond that, there is the question whether the rule's reference to dismissal of "actions" should be revised to permit dismissal of claims. Related to that is whether dismissal of "actions" should include situations in which one of multiple plaintiffs wishes to dismiss while others want to continue the action, or plaintiff wishes to dismiss against one defendant but not all defendants. In those circumstances, the "action" would continue, but with a shorter cast of characters.

Another initial observation was that these issues were first presented to the full Committee rather briefly during the March meeting in San Diego. This Subcommittee was formed only after that, and its initial discussion at the June meeting identified a variety of issues catalogued in the draft agenda memo. To some extent, the Subcommittee might wisely "tread water," in a sense, until it has heard the full Committee's reactions. It may be that some Committee members have strong views on the issues outlined in the agenda memo.

A member reported having virtually no experience with Rule 41 in practice. At the same time, it's becoming clear that there are quite a few moving parts here. There is the question whether one permits dismissal only if it is for the entire "action," or merely a "claim." There is the question how the rule should be applied in multi-party actions. In short, there is a range of options now on the table. And in approaching those options it is worth taking account of the disconcerting complications that might arise later if the Subcommittee pursued a narrow amendment only to conclude from public comment that it should have taken a broader view, and then to have to go back to the drawing board. There are lots of moving parts, and the ramifications of making changes are not entirely clear.

A contrast was drawn to 28 U.S.C. §§ 1915(e) and 1915A. Section 1915(e) refers variously to "the case" and "the action." Section 1915A refers to dismissal of "the complaint, or any portion of the complaint." It is unclear, however, whether this statutory wording (addressing ifp practice and actions brought by prisoners) was meant to correspond to the issues addressed in Rule 41(a)(1).

Another member offered initial reactions: There is really no ambiguity in Rule 41(a). An "action" is an action -- all plaintiff's claims against all defendants. The cases giving a literal

interpretation to "action" are right. The right conferred by Rule 41(a) means that a plaintiff who wants to terminate the entire action may do so without a stipulation or court approval. Other things can be done under other rules. In particular, Rule 15 permits amendment to add or drop parties and to add or drop claims. There is no reason to revise the current rule, and the Subcommittee should opt for the first item on the list -- making it clear that the literal interpretation is the right one.

That view prompted a further question -- how about adding a Rule 12 motion to dismiss as another development that, like the filing of an answer or a motion for summary judgment, terminates the Rule 41(a)(1) right? The answer was that Rule 15(a) already deals with that situation. Upon receipt of such a motion, the plaintiff has 21 days to amend to correct the cited problems. There is no reason to make this more like Rule 15(a). Rule 15(a) does its job, and Rule 41(a)(1) does a different job.

One reaction to this literal construction was that taking this view could mean we must go back to the drawing board. This member has limited experience with the sorts of cases that might ordinarily involve complete dismissal of the action. Instead, this member has multi-plaintiff cases, often against multiple defendants. It's not clear why Rule 41(a)(1) should be interpreted in such a narrow manner. It seems that many courts want to be able to use it more flexibly, and to endow plaintiffs with more flexibility.

Another reaction was that the literal interpretation could produce difficulties if the time to amend as a matter of right has expired. Usually these sorts of things are sorted out under Rule 41(a)(2), involving a stipulated order. Ordinarily it's all worked out among the parties, and the judge signs on.

A separate question came up: How does this rule work in MDL proceedings? There may be 100 "actions" transferred to a single judge for pretrial proceedings. Would plaintiff in case no. 50 be able to dismiss the "action" unilaterally under Rule 41(a)(1), perhaps to refile in state court by adding nondiverse defendants to prevent removal? A reaction was that the Panel's transfer order would not convert each "action" into a part of a larger case, although the filing of a consolidated complaint might change that. The Supreme Court's holding in *Gelboim* that each "action" may immediately be appealed upon final judgment in that action even though others are still pending in the district court shows that. And *Hall v. Hall*, involving separate "actions" consolidated for trial, confirms it.

Another view was offered on the "literal" reading: One might be skeptical about a "plain meaning" or "literal" reading of a rule that was written more than 80 years ago. Monumental changes have occurred in American litigation during this period. To take one example, the adoption of the MDL statute in 1968 profoundly changed federal-court litigation. As we have repeatedly been reminded, something like 40% of all pending civil cases in the federal court system are subject to a Panel centralization order. To take another example, the 1966 amendment to Rule 23 has produced class-action litigation practice uncontemplated in 1938.

In addition, it's worth noting that courts interpreting the current rule have diverged in ways that suggest more flexibility is desirable. Some treat dismissal as to one but not all defendants as

permissible via 41(a)(1). Others sometimes permit dismissal of fewer than all claims against fewer than all defendants.

Another view was that judges understandably do not mourn the reduction in the dimensions of the cases they must manage resulting from a broader interpretation of the dismissal right under Rule 41(a)(1). That would explain their willingness to permit dismissal without prejudice under Rule 41(a)(2) even when defendants resist it. "Even focusing on the cases in which defendants resist dismissal without prejudice, only one in fifty ever returns." The likelihood is that an abandoned claim, even without prejudice, will not actually be revived later. It would be a good idea for the Subcommittee to "keep all the balls in the air" for now.

Another participant agreed with the idea that the issues should be presented to the full Committee during its October meeting. When parties want to get rid of part of a case, or let some parties go, judges are understandably receptive. Yes, amendment is often easy to obtain; one almost never will be reversed for granting leave to amend but might be reversed for denying leave to amend. We should not pretermit anything until the full Committee has had its say. At the San Diego meeting this was a purely introductory item; we really have not heard from the full Committee about it.

Moreover, relying on Rule 15 may have drawbacks. Though amendments may let claims out or let parties go, they may also result in additional burdens for the parties that remain and with regard to the claims that remain. Indeed, one concern voiced was that further attention be given to the burdens of amendment. An example could arise in actions making claims against the government and also *Bivens* claims against individual defendants. A restrictive interpretation of Rule 41(a) might contribute to a narrowing of interpretation of Rule 15(a)(1). Care must be taken in any amendment possibilities the Subcommittee pursues.

Another member observed that it is striking that this rule is not really a source of actual problems, even though there are different interpretations of its language.

The discussion shifted to Rule 41(c), also mentioned in the draft agenda memo. This clearly does permit dismissal of "claims" of various sorts. But it does not afford that latitude to plaintiffs. That seems sensible on the notion that these parties are roped into litigation somewhat against their desires -- they did not file the suits, while the plaintiffs did do that. (Of course, things may look a bit different if this is a case removed by the defendant to federal court from a state court in which plaintiff would have broad dismissal rights.)

Another point about (c) is that, as the Federal Practice & Procedure treatise points out, when the 1948 amendment to cut off 41(a) dismissal upon filing of a motion for summary judgment was drafted, the drafters forgot to make a parallel change to 41(c).

An argument for retaining the greater latitude 41(c) gives to parties in a defensive posture is that they did not choose when or where to be sued. But perhaps they should be put on an equal footing with regard to summary judgment motions. Those may require very substantial effort, and perhaps the party who imposed that effort ought not be able unilaterally to withdraw from the field

to fight another day in another court. But a reaction was "I can see why these involuntary parties are given more leeway to withdraw in the face of a summary-judgment motion."

The consensus was to leave consideration of Rule 41(c) in the report to the full Committee and to present the full array of issues.

Notes of Online Meeting
Rule 41 Subcommittee
Advisory Committee on Civil Rules
June 28, 2022

On June 28, 2022, the Rule 41 Subcommittee of the Advisory Committee on Civil Rules met via Zoom. Participants included Judge Cathy Bissoon (Chair of the Subcommittee), Judge Robert Dow (Chair of the Advisory Committee), Ariana Tadler, Dean A. Benjamin Spencer, David Burman, Professor Edward Cooper (Reporter of the Advisory Committee), Professor Richard Marcus (Associate Reporter of the Advisory Committee), and Allison Bruff, Bridget Healy, and Burton DeWitt of the Administrative Office.

The meeting began with the observation that the submission from Judges Furman and Halpern is limited to the term "an action" in Rule 41(a)(1)(A), but that the initial discussions at the Advisory Committee meeting in March showed that a wider set of issues might be taken up. On the point raised by Judges Furman and Halpern, Burton DeWitt's thorough research shows that there is a definite circuit split about what "an action" means in the rule. It could mean the entire action or could be limited to certain claims or parties. But this split has existed for several decades, so there does not seem to be much urgency about it.

So a starting point is to ask whether the Subcommittee has an initial consensus on how broad its focus should be. One possibility is to conclude that no amendment is really necessary. This is not a prominent rule, and there are multiple routes to achieve much the same thing, including amendments of right under Rule 15(a).

An initial reaction to this question was that "action" is broadly understood to mean the entire action. Treating dismissal of anything less than the entire action therefore deviates from the text of the rule. Rule 41(a) permits a plaintiff unilaterally to dismiss the "action." Rule 15(a) permits one unilateral amendment to make other changes, which could include dropping claims or parties as well as adding them. It is clearly not about abandoning the entire "action," for making an amendment assumes that the action will continue.

A second reaction was that the existence of this circuit split is a good reason to amend the rule to make it clear. By and large, the time differences are minor -- for plaintiffs, the opportunity to use Rule 41(a) unilaterally ends as soon as the defendant files an answer or motion for summary judgment. If courts are pushing back against the language of the rule to permit dismissal by notice of "less than all" of the action, that suggests allowing plaintiffs that option makes sense. There's something to be said for providing plaintiffs with considerable latitude to pare back their cases without dropping them altogether.

Another Subcommittee member reported being on the fence. The point about the term in the rule really meaning the whole action had to be dismissed to invoke the rule is persuasive; the words in the rules should have meaning, and have a consistent meaning throughout the rules. But it's not clear what concerns should govern this choice, or whether there is reason to question the considerations that seem to prompt courts to interpret unilateral dismissal of "an action" to include

dismissal of one claim or one defendant. It's also not clear how best to address this set of issues, and it would be unfortunate to muddy the waters further.

Attention was drawn to a variety of features of Rule 41 and some other rules that might be noted as pertinent to this Subcommittee's discussion:

Rule 41(a)(1)(A) says the plaintiff may dismiss, suggesting that it might not apply if there is more than one plaintiff.

Rule 41(a)(1)(A)(ii) applies when there is a stipulation of dismissal signed by all parties who have appeared, which appears to contemplate multi-party actions, at least on the defense side.

Rule 41(a)(2) permits dismissal by court order at the plaintiff's request, but says that if a defendant has pleaded a counterclaim before service of 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." Is that "independent adjudication a separate "action"?

Rule 41(b) authorizes a defendant to move for involuntary dismissal of "the action or any claim." So under that provision (regarding motions by defendants and not unilateral action by plaintiffs), a Rule 41 order may be limited to certain "claims."

Rule 41(c) says "[t]his rule" applies to dismissal of any counterclaim, crossclaim, or third-party claim. It appears to permit unilateral action by the "claimant" but not to call for dismissal of the entire "action." But if "[t]his rule" means 41(a)(1), it would seem to require dismissal of the entire "action."

Rule 15(a)(1)(B) cuts off leave to amend unilaterally 21 days after service of a motion under Rule 12(b), (e) or (f), as well as 21 days after service of an answer. Whether the service of one of these Rule 12 motions should also cut off voluntary dismissal could be considered.

Rule 54(b) permits the court to enter final judgment as to one or more, but fewer than all, claims or parties, again moving beyond the entire action, though only by court order.

Probably other comparisons to current rules could be made.

Another way of looking at this collection of rule provisions is that it provides the Subcommittee a series of possible decision points:

1. Take no action because this rule has not frequently caused problems and (particularly as to Rule 15(a)) there are additional routes to the same general destination.

2. Amend the rule to adopt the majority interpretation, perhaps by amending to say "the entire action." Then a Committee Note could explain that this amendment resolves an existing split in the courts.

3. Amend the rule to permit unilateral dismissals by any plaintiff or with regard to any defendant in multi-party actions.

4. Amend the rule (somewhat in parallel to Rule 15(a)) to cut off the unilateral dismissal when a motion under Rule 12(b), (e), or (f) is served.

Additional permutations could arise if the Subcommittee's attention were to expand beyond Rule 41(a)(1).

At the same time, it was observed the Advisory Committee does not always regard the existence of a circuit split about interpretation of a rule to require a clarifying amendment. But the only way to resolve this circuit split would be by amending the rule; the Committee cannot issue an "advisory opinion" on the interpretation of the current rules.

On that point, the present discussion suggests that one productive way to proceed would be to present the full Committee at its October meeting with a report saying that the Subcommittee has considered a variety of possible approaches and invites the other members of the full Committee to offer their views. It does not appear that the members of the Subcommittee have found the potential for unilateral action by plaintiffs to have produced much heartache. Before 1938, when the federal courts followed state procedure, it was possible for plaintiffs in some states to dismiss unilaterally very late in the process, perhaps right up to when the jury retired to deliberate. Rule 41(a)'s cutoff prevents that from happening.

Discussion turned to whether there was support for giving serious attention to amending any rule other than 41(a)(1). The first reaction was that the Subcommittee should limit its attention to the problem presented to it, and therefore only to this rule.

Another Subcommittee member expressed concern about the multi-party issue. It was suggested that most civil actions in federal court nowadays are not one-on-one lawsuits but more often involve multiple parties on at least one side. That is not certain, but it does seem true that the rule speaks only of a single plaintiff and a single defendant. The reference in Rule 41(a)(1)(A)(ii) to "all parties who have appeared," on the other hand, seems to assume there are multiple parties, not just one plaintiff and one defendant. Presumably all plaintiffs have appeared, so this rule provision seems to focus on multiple defendants.

Another Subcommittee member expressed the view that it is highly unlikely that a simple fix of the problem under consideration here would produce unintended consequences. And this member continues to believe that it's valuable to provide flexibility for plaintiffs. This member has practiced in state courts in which unilateral dismissal at a much later stage of the case is permitted, but does not think this state practice has produced major problems. If the only way to dismiss some but not all claims or some but not all defendants were to move for a court order, that requirement would be likely to prompt the defendant to urge the court to dismiss with prejudice,

something the rule seems designed to permit the plaintiff to avoid. Holding the plaintiff's feet to the fire in this way does not seem to be warranted.

A reaction was that such a view would then permit a plaintiff unilaterally to drop one of two claims against the defendant. The response to that was that preclusion made this a very "narrow door" for the plaintiff. If the claims were really very distinct, neither claim preclusion nor issue preclusion would likely affect the bringing of another suit on the claim that was dropped. The statute of limitations might prevent the filing of a new suit, though tolling doctrines could perhaps permit the plaintiff to rely on the pendency of the original action to avoid the limitations bar.

Another member returned the discussion to Rule 15. That rule permits unilateral action of the sort also permitted under 41(a)(1). Why need we amend Rule 41 when Rule 15(a) affords such flexibility (though it does cut that off 21 days after service of certain Rule 12 motions)? One answer is that Rule 15(a) permits such unilateral amendment only once, and that opportunity might already have been used.

Another observation was that stipulations of dismissal are fairly common in multi-defendant situations. Amendment under Rule 15(a) might offer another route to the same outcome. But there is a time limit under 15(a) that unilateral amendment is allowed only once. Moreover, it may be that many people regard amendments only as ways to add parties or claims, not to drop them. Technically, amendment offers a two-way street, but that may be underappreciated.

Concern was expressed about the risk that giving plaintiffs too much latitude in this rule could produce bad results. It can be legitimate for a defendant to say something like "You've dragged me into this court, so if you want to end it, end the whole thing, not just parts of it." The current rule, interpreted as requiring dismissal of the entire action, serves a purpose. If the plaintiff does not want to go the whole way, a stipulation is always possible, or a motion to the court.

At this point, it seemed worth confirming a couple of assumptions about ideas the Subcommittee does not consider worth pursuing:

> First, it could consider revising the rule to require that dismissal be permitted only upon court order or stipulation, in other words abrogating Rule 41(a)(1)(A)(i). That idea does not seem to have any support.
>
> Second, there does not seem to be any interest in trying to cut off the unilateral dismissal right when the court addresses the merits of the case, as on a motion for a preliminary injunction. The Second Circuit once found the denial of a preliminary injunction to cut off unilateral dismissal [Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953)], but that has not been followed. The Subcommittee does not want to try to write something like that into the rule. Moreover, trying to define what (beyond an answer or a motion for summary judgment or perhaps also some Rule 12 motions) would also cut off the right provided by Rule 41(a) would be quite difficult.

There was consensus that these ideas were not under serious consideration.

Instead, it was observed, it seems that the Subcommittee may want to recommend a change to the rule to clarify what it means by "an action." That could include explicitly addressing the matter of multiple parties and multiple claims when only some parties or some claims are to be dropped.

Another point was raised -- usually, without regard to Rule 41(a)(1), courts enter scheduling orders with cutoff times for amending the pleading. Indeed, Rule 16(b)(3)(A) says: "The scheduling order must limit the time to * * * amend the pleadings." Experience suggests that amendments will not be allowed after that deadline unless there is a strong justification for the delay, and that up until that time courts are relatively receptive to amendments on motion.

The discussion was summarized as indicating that it might ultimately be the Subcommittee's recommendation that no rule amendment be pursued. And there seemed little appetite to go beyond Rule 41(a)(1), the rule addressed in the submission from Judges Furman and Halpern. Perhaps all that need be done is to add something like "entire" before "action."

A reaction was that the multi-party aspect deserves attention as well; the rule seems to assume the case has only one plaintiff and one defendant. Whether or not that is true of most civil cases in federal court, it is surely true that there are many cases that have more elaborate party structures. Indeed, Rule 41(c) takes some account of that, with its mention of crossclaims and third-party claims.

It was also stressed that the relationship between Rules 41(a)(1) and 15(a) should be kept in mind. It may be that there is some overlap of situations in which the two rules operate. For example, a plaintiff might file an amended complaint dropping some claims or some defendants. Whether the potential dual operation of these two rules is a matter of concern is uncertain.

For the present, it does not seem the Subcommittee has come to a consensus on what should be done, if any amendment is worth considering seriously. Given that, it seems likely that it should report to the full Committee in October about the various possibilities discussed during this meeting and invite input from the other members of the full Committee.

To clarify that, however, it would also be desirable for the Subcommittee to meet another time before the agenda materials for the October meeting must be submitted. The Subcommittee is to meet again via Zoom on Sept. 7 at 4:00 p.m. Eastern Time.

MEMORANDUM

TO: Professors Ed Cooper and Rick Marcus
Reporters, Advisory Committee on Civil Rules

FROM: Burton S. DeWitt
Rules Law Clerk

DATE: August 22, 2022

RE: **Suggestion 21-CV-O:** Proposed Amendment to Rule 41(a) (Voluntary Dismissal of an Action)

This memo relates to a suggestion submitted by Judge Jesse M. Furman and Judge Philip M. Halpern that Rule 41(a) be amended to clarify what constitutes an "action" pursuant to the rule. This memorandum contains the results of my supplemental research into each state's equivalent to the federal Rule 41(a). Specifically, I tried to locate each state's voluntary dismissal rule or statute and determine whether the text of the rule or statute (1) provided a different cut-off time than the federal rule for a plaintiff's right to voluntarily dismiss his suit, and (2) specified whether a plaintiff could dismiss only certain claims or defendants from an action. Due to time constraints, I did not review caselaw interpreting the state rules or statute, and I was unable to quickly locate about five or six state's rules or statutes.

In Section I, I briefly address the 14 states that depart from federal Rule 41(a) regarding the time at which a plaintiff's right to voluntarily dismiss his action ends. In Section II, I provide an overview of the ten states that specify that a plaintiff can dismiss less than the whole action. In Section III, I list in bullet-point format excerpts from or a short summary of every state whose rule or statute is inconsistent with federal Rule 41(a). As this is just a survey of the state laws, I do not offer any separate or additional conclusions in this memorandum.

I. Fourteen states have a different cut-off time than Federal Rule 41(a)

The federal rule allows a plaintiff to voluntarily dismiss once without prejudice up until the time the defendant files an answer or moves for summary judgment. And a significant majority of states have adopted that federal standard as their own. However, the state law equivalent of Rule 41(a) in 14 states provides a different cut-off time for a plaintiff's ability to voluntarily dismiss his suit once as of right.

Of these 14 states, 12 diverge by more or less maintaining the common law rule that the plaintiff may terminate his suit up until trial.[1] They vary in the details—some end the right 10 days before trial, while others allow up until the point the case is submitted to the jury or judge for decision—but they all protect the plaintiff's right much longer than the federal rule.

[1] Ark R. Civ. P. 41(a); Cal. Code Civ. Pro. § 581(c); Fla. R. Civ. P. 1.420(a)(1); Iowa R. Civ. P. 1.943; Mo. Sup. Ct. R. 67.02(a); Neb. Rev. Stat. § 25-601; N.C. R. Civ. P. 41(a)(1); Ohio R. Civ. P. 41(A)(1); Okla. Stat. §§ 12-683 to -684; Ore. R. Civ. P. 54A(1); Va. Code Ann. § 8.01-380; Wash. Super. Ct. Civ. R. 41(a)(1)(B).

Uniquely, Florida partially follows the federal rule to some extent. Although the plaintiff may still voluntarily dismiss after the defendant answers the complaint, the right pauses when the defendant files a motion for summary judgment.[2] However, if the court denies that motion, the plaintiff may then again voluntarily dismiss his suit up until the jury retires or the case to submitted to the judge for decision.[3] This has the novel solution of preventing a plaintiff from mooting a motion for summary judgment through voluntarily dismissing his suit, but still allows him to voluntarily dismiss it once the motion is denied.

Two states join the federal rule in eschewing common law practice, but they go even earlier in cutting off the plaintiff's right to voluntarily dismiss his suit. Wisconsin terminates the right once the defendant either answers the complaint or files any motion.[4] This is similar to the one of the proposals the subcommittee is currently considering. Louisiana terminates the right as of the time the defendant appears, although the court may in its discretion permit dismissal without prejudice after this point.[5]

II. Ten states specifically allow a plaintiff to dismiss less than his entire action

As detailed in my previous memorandum on Rule 41(a), there are splits of authority on whether federal Rule 41(a) may be used to dismiss fewer than all claims in a suit. While the majority of state rules and statutes have the similar ambiguous language (i.e., "action") to the federal equivalent, ten states have added language to their rule or statute so as to specifically permit a plaintiff to dismiss fewer than all claims in a suit.

Specifically, seven states have adopted rule text both to explicitly permit a plaintiff to use its version of Rule 41(a) to dismiss all claims against any given defendant, as well as to dismiss only some claims against any given defendant.[6] Regarding all claims against any given defendant, this adopts by rule text what is the majority approach under federal practice. However, allowing a plaintiff to dismiss only some claims against any given defendant is the minority approach in federal court.

Only two states adopt both majority approaches. Specifically, both Ohio and Oregon have adopted rule text that permits a plaintiff to dismiss all claims against any given defendant, but prohibits a plaintiff from dismissing only some claims against a defendant.[7]

One state—Maine—appears to have adopted rule language that allows a plaintiff to dismiss any single claim, so long as he dismisses that claim against every defendant.[8] If my reading of this rule is correct, this approach is different than any I have seen a federal court employ, and it is not one that the subcommittee has previously considered.

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[2] *See* Fla. R. Civ. P. 1.420(a)(1).
[3] *See id.*
[4] *See* Wis. Stat. Ann. § 805.04(1).
[5] *See* La. Code Civ. P. Art. 1671.
[6] Cal. Code Civ. Pro. § 581(c); Fla. R. Civ. P. 1.420(a)(1); Ky. Ct. R. 41.01(1); Md. R. Civ. P. 2-506(a); N.C. R. Civ. P. 41(a)(1); Vt. R. Civ. P. 41(a)(1); Va. Code Ann. § 8.01-380.
[7] Ohio R. Civ. P. 41(A)(1); Ore. R. Civ. P. 54A(1).
[8] Me. R. Civ. P. 41(a)(1).

III. Summary of States

In this section, I will provide a brief discussion of my findings, as well as summaries or excerpts from each state law that appears to diverge from federal Rule 41(a). I note that I have **not** had a chance to review the caselaw under any state rules to see whether courts have applied them differently than the text of the rule calls for. For some of the more ambiguously worded rules, such as Maine's, it may be worth performing a quick citation search to ensure that I have properly read the rule. I also note that due to time constraints, I did not locate a few states' equivalent rules or statutes.

Below is a chart that categorizes which states fall into which divergent camps. Then, I provide short summaries of those states' rules or statutes, as well as a few others that appear substantively different (but that I was unable to categorize):

I. Different time cut-offs than federal rules
   1. Plaintiff may voluntarily dismiss up until (or sometime during or slightly before) trial – **12 states**
      a. Arkansas, California, Florida, Iowa, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, Oregon, Virginia, Washington
   2. Plaintiff may voluntarily dismiss without prejudice up until the defendant appears, at which point it is up to court's discretion – **1 state**
      a. Louisiana
   3. Plaintiff may voluntarily dismiss until defendant answers or files any motion – **1 state**
      a. Wisconsin

II. Provide more specifics than just "action"
   4. Plaintiff may voluntarily dismiss all claims against a single defendant – **9 states**
      a. California, Florida, Kentucky, Maryland, North Carolina, Ohio, Oregon, Vermont, Virginia
   5. Plaintiff may voluntarily dismiss fewer than all claims against any given defendant – **7 states**
      a. California, Florida, Kentucky, Maryland, North Carolina, Vermont, Virginia
   6. Plaintiff may dismiss any given claim, but must dismiss that specific claim against all defendants – **1 state**
      a. Maine

<u>Divergent State Rule Summaries</u>

- Ark. R. Civ. P. 41(a) – Dismissal of an action permissible until submitted to jury.
- Cal. Code Civ. Pro. § 581(c) – "A plaintiff my dismiss his or her complaint, or any cause of action asserted in it, in its entirety, or as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial."
- Fla. R. Civ. P. 1.420(a)(1) – "Except in actions in which property has been seized or is in the custody of the court, an action, a claim, or any part of an action or claim may be dismissed by plaintiff" up until defendant files a motion for summary judgment. If the defendant files a motion for a summary judgment and the court denies the motion, the plaintiff can then voluntarily dismiss up until the jury retires or until the case is submitted to the judge for decision.

- Haw. R. Civ. P. 41(a)(1) – The text of Rule 41 is substantively identical. However, Rule 41.1(b)(3), which sets out how a party is to effect a Rule 41 dismissal, specifically permits parties to dismiss parts of a case. I have not categorized Hawai‘i above, as it is possible to read Rule 41(a)(1) and 41.1 such that the 41.1(b)(3) path only applies to other subsections of 41. The caselaw may be more enlightening, but I've not explored it.
- Iowa R. Civ. P. 1.943 – "A party may . . . dismiss that party's own petition, counterclaim, cross-claim, cross-petition, or petition of intervention" up until 10 days prior to trial.
- Ky. Ct. R. 41.01(1) – "an action, or any claim therein, may be dismissed by the plaintiff"
- La. Code Civ. P. Art. 1671 – Right to dismiss without prejudice terminates when the defendant appears. After that, the court has discretion.
- Me. R. Civ. P. 41(a)(1) – Starts out identically, but then provides that "A dismissal under this paragraph may be as to one or more, but fewer than all claims, but not as to fewer than all of the plaintiffs or defendants." If I am reading that correctly, it means that a plaintiff can dismiss a particular claim so long as he dismisses that claim against every defendant.
- Md. R. Civ. P. 2-506(a) – Explicitly allows dismissal of "all or part of the claim"
- Mo. Sup. Ct. R. 67.02 – Dismissal until jury is sworn for voir dire, or in a bench trial, until evidence is introduced
- Neb. Rev. Stat. § 25-601 – Dismissal of an action permissible until submitted to jury
- N.H. R. Super. Ct. 41 – Completely different; does not address voluntary dismissal. I am guessing the rule is located elsewhere and I just did not locate it.
- N.C. R. Civ. P. 41(a)(1) – "an action or any claim therein may be dismissed by the plaintiff" up until the point where he rests his case
- Ohio R. Civ. P. 41(A)(1) – This rule specifically adopts both majority approaches discussed in my memorandum. Specifically, it allows a plaintiff to "dismiss all claims asserted by that plaintiff against a defendant." The right continues until start of trial "unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant."
- Okla. Stat. § 12-683 and -684 – Dismissal of an action permissible until pretrial hearing
- Ore. R. Civ. P. 54(A)(1) – Like Ohio, this adopts both majority approaches. Specifically "a plaintiff may dismiss an action in its entirety or as to one or more defendants" up until 5 days before trial "if not counterclaim has been pleaded"
- Vt. R. Civ. P. 41(a)(1) – "an action or claim may be voluntarily dismissed"
- Va. Code Ann. § 8.01-380 – a party may nonsuit "as to any cause of action or claim, or any other party to the proceeding" up until "a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision"
- Wash. Super. Ct. Civ. R. Rule 41 – plaintiff may dismiss until the conclusion of his opening case
- Wis. Stat. Ann. § 805.04(1) – plaintiff may dismiss an action "at any time before service by an adverse party of responsive pleading or motion"

MEMORANDUM

TO: Professors Ed Cooper and Rick Marcus
Reporters, Advisory Committee on Civil Rules

FROM: Burton S. DeWitt
Rules Law Clerk

DATE: February 28, 2022

RE: **Suggestion 21-CV-O:** Proposed Amendment to Rule 41(a) (Voluntary Dismissal of an Action)

This memo relates to a suggestion submitted by Judge Jesse M. Furman and Judge Philip M. Halpern that Rule 41(a) be amended to clarify what constitutes an "action" pursuant to the rule. You asked me to survey how courts have interpreted the term under a wide variety of situations, specifically including (but not limited to) when a plaintiff attempts to dismiss all claims against fewer than all defendants, and when a plaintiff attempts to dismiss fewer than all claims against any given defendant. In researching the two specific situations that you asked me to look into, I also found a handful of cases addressing "action" in other situations, which I address briefly later in this memorandum. My research involved reading Judge Furman's suggestion and the cases referenced therein, as well as reviewing the leading treatises and cases, and running citing searches from these cases. Because the treatises provided a very helpful starting point—although my research did show they reached somewhat incomplete conclusions—and because nearly every case cited a very small handful of leading cases in each circuit, I did not rely on any keyword searches.

As a threshold matter, although the initial research project was limited to Rule 41(a)(1), preliminary research indicated that courts treat the definition of "an action" under Rule 41(a)(1) and Rule 41(a)(2) substantially identically.[1] Therefore, and subsequent to an email exchange between me and you, the research was expanded to include both subdivisions of the Rule.

In Section I of this memorandum, I discuss Judge Furman and Judge Halpern's suggestion. In Section II, I address the most common issue I found in the caselaw: plaintiffs attempted dismissal of all claims against fewer than all defendants. Circuits are split on whether a plaintiff may properly use Rule 41(a) to effect such a dismissal. In Section III, I briefly address the similar issue of cases with multiple plaintiffs or multiple claimants in which fewer than all plaintiffs or claimants seek to dismiss all their claims against all defendants. In Section IV, I survey cases where plaintiffs seek to dismiss fewer than all claims against any given defendant. This issue is almost as common as that in Section II, and no circuit has explicitly permitted Rule 41(a) to be used in

[1] To the extent there is a relevant difference, in cases where the Rule 41(a)(2) dismissal will only dismiss some parties from the suit, it is that in exercising discretion under Rule 41(a)(2), the court should consider whether there will be any prejudice to the remaining parties in granting dismissal of other parties. *See, e.g.*, Tycom Corp. v. Redactron Corp., Civ. No. 74-65, 1977 WL 23174, at *1 (D. Del. Aug 17, 1977) (citing cases).

such a way. However, a handful of intra-circuit splits have developed or are developing. In Section V, I note two cases that permitted plaintiffs to dismiss class allegations pre-certification under Rule 41(a). Finally, in Section VI, I recommend that the committee consider resolving the circuit split discussed in Section II by amending the rule to explicitly adopt the majority approach. I also recommend that the committee consider clarifying that plaintiffs may not use Rule 41(a) to dismiss fewer than all claims against any single defendant.

I. Judge Furman and Judge Halpern's suggestion

Judge Furman and Judge Halpern requested that the committee review whether Rule 41(a) allowed a court to dismiss anything less than all claims in an action. Rule 41(a)(1) provides that subject to a few irrelevant (for purposes of this review) rules and statutes, a plaintiff "may dismiss an action without a court order by filing" either (i) a notice of dismissal before the opposing party answers the complaint or moves for summary judgment, or (ii) a stipulation of dismissal signed by all parties. Rule 41(a)(2) allows the plaintiff to request a court order dismissing its "action" in situations not covered by Rule 41(a)(1). However, neither subdivision of Rule 41(a) defines "action," leaving it to courts to determine whether either subdivision applies when the plaintiff seeks to dismiss fewer than all claims or parties to a suit.

The two judges suggest that the committee conduct a "comprehensive survey" of the caselaw to see how courts have interpreted the provision. The suggestion specifically notes Judge Furman's "impression" that "most, if not all" courts permit a plaintiff to dismiss all claims against less than all defendants in a suit. Judge Furman also noted a split of authority on whether a plaintiff may dismiss anything less than all claims against any given defendant. Judge Furman cited his decision in *Alix v. McKinsey & Co.*, where he briefly addressed the issue before resolving the pending motion on other grounds.[2]

In their suggestion, Judge Furman and Judge Halpern do not take a position on how "action" should currently be interpreted under the rule, nor do they suggest any particular way the rule can or should be amended to change or improve practice under the rule. Rather, they just note the apparent inconsistent interpretation within the Second Circuit and potentially nationwide.

II. There is a longstanding circuit split regarding whether Rule 41(a) can be used to effect dismissal of all claims against fewer than all defendants

A distinct 6-3 circuit split has developed regarding whether Rule 41(a) can be used to dismiss all claims against fewer than all defendants. While district courts have had differing interpretations of "action" since shortly after the Rules first came into effect, by the 1960s appellate decisions from the Second and Sixth Circuits on the one hand and the Fifth Circuit on the other materialized a nationwide split. More than half a century later, the split has widened, and now all but three of the twelve[3] circuits have weighed in.

[2] 470 F. Supp. 3d 310 (S.D.N.Y. 2020).

[3] I have excluded the Federal Circuit from this count. As the voluntary dismissal of parties or claims is not a procedural issue "pertaining to patent law," the Federal Circuit applies to Rule 41(a) issues the law of the circuit in which the district court sat. *See, e.g.*, Wordtech Sys., Inc. v.

The majority approach, which has been adopted by the First, Third, Fifth, Eighth, Ninth, and Eleventh (through old-Fifth Circuit authority) Circuits, allows a plaintiff to dismiss all claims against some but not all defendants via Rule 41(a).[4] These cases reject the literal wording of Rule 41(a) and cite policy considerations to allow plaintiffs to voluntarily dismiss defendants from the suit. Conversely, the Second, Sixth, and Seventh Circuits have read "action" to mean all claims against all parties, and note the distinction to Rule 41(b), which uses "claims" instead.[5] Courts following these cases therefore require a plaintiff seeking to dismiss fewer than all defendants to amend its complaint under Rule 15. The Fourth, Tenth, and D.C. Circuits have not addressed the

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Integrated Networks Sols., Inc. 609 F.3d 1308, 1318–19 (Fed. Cir. 2010). While the Federal Circuit also hears cases on appeal from the Court of Federal Claims, those courts use a separate (although nearly identical) ruleset. I have not reviewed how the Federal Circuit interprets Court of Federal Claims Rule 41(a).

Of note, and as discussed later in this memorandum, the Federal Circuit issued one of the leading decisions on the issue of whether a plaintiff can dismiss fewer than all claims against a given defendant. *See* Gronholz v. Sears, Roebuck & Co., 836 F.2d 515, 517–18 (Fed. Cir. 1987). In that case, the Federal Circuit did not address which circuit's law it was applying to Rule 41(a) issues. However, because nothing under Rule 41(a) is an issue "pertaining to patent law," I assume the court applied its understanding of Eighth Circuit law (the applicable circuit) in that appeal.

[4] Cabrera v. Mun. of Bayamon, 622 F.2d 4, 6 (1st Cir. 1980); Young v. Wilkie Carrier Corp., 150 F.2d 764, 764 (3d Cir. 1945); Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc., 474 F.2d 250 (5th Cir. 1973); State *ex rel.* Nixon v. Coeur d'Alene Tribe, 164 F.3d 1102, 1105–06 (8th Cir. 1999); Wilson v. City of San Jose, 111 F.3d 688 (9th Cir. 1997).

In dicta, the Eleventh Circuit evidenced that it still follows old Fifth Circuit precedent. *See* Klay v. United HealthGroup, Inc., 376 F.3d 1092, 1106 (11th Cir. 2004) ("Put simply, Rule 41 allows a plaintiff to dismiss all of his claims against a particular defendant . . . ."). More recent dicta hints otherwise. *See* Perry v. Schumacher Grp., 891 F.3d 954, 958 (11th Cir. 2018). I will discuss the Eleventh Circuit in more detail later in this Section.

The Fifth Circuit itself still follows its old precedent, but it nearly changed course. Less than two years ago, the court reconsidered the issue *en banc*, with four of its judges dissenting in favor of explicitly overturning the leading case in the Circuit. *See* Williams v. Seidenbach, 958 F.3d 341, 360–63 (5th Cir. 2020) (en banc) (Oldham, J, dissenting).

Outside the Eleventh Circuit, the odd district court decision from majority-approach circuits may hold otherwise, but these can be ignored as decisions that are overtly incorrect under applicable circuit law. *See, e.g.*, Close v. Acct. Resol. Servs., Civ. No. 20-11871-MLW, -- F. Supp. 3d ---, 2021 WL 3684066, at *1 n.2 (D. Mass. Aug. 19, 2021) (quoting a district court case dealing with attempts to dismiss fewer than all claims against a given defendant to express doubt whether Rule 41(a) permits stipulated voluntary dismissal of all claims against a given defendant, but ruling that Rule 41(a) was inapplicable because not all defendants had signed the stipulation of dismissal).

[5] Harvey Aluminum, Inc. v. Am. Cyanamid Co., 203 F.2d 105, 108 (2d Cir. 1953); Philip Carey Mfg. Co. v. Taylor, 286 F.2d 782, 785–86 (6th Cir. 1961); Taylor v. Brown, 787 F.3d 851, 857–58 (7th Cir. 2015). As will be discussed later in this Section, the use of the present perfect tense is intentional, as both the Second and Seventh Circuits have to varying degrees walked back their literal readings of Rule 41(a).

issue, and an intra-circuit split has developed in both the Fourth and Tenth Circuits.[6] In the remainder of this Section, I address in detail the three minority approach circuits, the three circuits not to have decided the issue, and the Eleventh Circuit.

Second and Seventh Circuits. Although the minority approach circuits all based their view on a literal reading of the rule, subsequent decisions hint that at least two of the circuits may join (or already de facto are part of) the majority in the future. The Second Circuit has questioned the wisdom of its leading case.[7] As evidenced by Judge Furman's opinion that prompted his suggestion, courts within the Second Circuit have therefore felt free to eschew precedent and follow the majority approach.[8] And while the Seventh Circuit only weighed in with a panel decision in the middle of the last decade,[9] a similar resistance is developing,[10] supported no doubt by undermining dicta just last year from the Seventh Circuit itself.[11]

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[6] Discussion and citation of relevant cases from districts in the Fourth, Tenth, and D.C. Circuits follow later in this Section.

[7] The Second Circuit has avoided fully overruling *Harvey Aluminum* by stating that the standard a district court should employ in determining whether to allow a party to amend its complaint to drop a claim under Rule 15 is the same as a withdrawal under Rule 41(a). *See* Wakefield v. N. Telecomm. Inc., 769 F.2d 109, 114 n.4 (2d Cir. 1985). This often renders irrelevant which rule should be used to effect the termination of a party to the suit.

[8] In fact, the majority approach may in fact be the majority approach for district courts within the Second Circuit. *See, e.g.*, Frank v. Trilegiant Corp., No. 10 CV 5211(DRH)(ARL), 2012 WL 214100, at *3 (E.D.N.Y. Jan. 24, 2012); Cent. N.Y. Laborers' Health & Welfare Fund v. Fahs Constr. Grp., Inc., 170 F. Supp. 3d 337, 343–44 (N.D.N.Y. 2016); ICICI Bank Ltd. v. Doshi, No. 19-CV-11788 (RA), 2021 WL 6052117, at *1–2 (S.D.N.Y. Dec. 21, 2021); Greenwood Grp., LLC v. Brooklands, Inc., No. 1:15-CV-00851 EAW, 2016 WL 3828685, at *1–2 (W.D.N.Y. July 12, 2016); *see also* Mut. Beneficial Life Ins. Co. in Rehab. v. Carol Mgmt. Corp., No. 93 Civ. 7991 (LAP), 1994 WL 570154, at *1 (S.D.N.Y. Oct. 13, 1994) (noting that even the Second Circuit has "criticized and rejected" *Harvey Aluminum*, and that "[i]t is no longer persuasive authority on the issue" of dismissal of parties under Rule 41).

[9] *Taylor*, 787 F.3d at 857–58.

[10] *See, e.g.*, Manuel v. Nalley, No. 15-CV-783-SMY-RJD, 2017 WL 6593703, at *1 (S.D. Ill. Dec. 26, 2017) (noting *Taylor*, but allowing a stipulated dismissal with prejudice against two of four defendants "in the interest of judicial economy"); Hanusek v. FCA US LLC, No. 18-CV-509-NJR-GCS, 2019 WL 1239265, at *1 n.2 (S.D. Ill. Mar. 18, 2019) (noting *Taylor*, but allowing dismissal of all claims by one plaintiff under Rule 41(a) "in the interest of judicial economy").

[11] *See* Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare [sic] Servs., Inc., 7 F.4th 555, 559 n.4 (7th Cir. 2021). In *Meinders*, the Seventh Circuit affirmed the stipulated dismissal of all claims against seven UnitedHealth entities. The court noted that this dismissed "the 'entire action' as it related to the United entities." However, it admonished that "Rule 15(a) is the better course for voluntarily dismissing individual parties or claims in the future." Although the company name is UnitedHealthcare Services, the reporter incorrectly placed a space between United and Healthcare in the case name.

Sixth Circuit. The Sixth Circuit is open and committed to being an "outlier."[12] The court has recognized that due to one inconsistent decision, its "interpretation of Rule 41 is unclear."[13] However, the near-unanimous weight of authority in the circuit is that "Rule 41(a)(1)(A)(i) can only be used to dismiss all claims against all defendants, not individual claims or parties."[14]

Tenth Circuit. The Tenth Circuit has not expressly addressed the issue. In dicta in *Gobbo Farms & Orchards v. Poole Chemical Co.,* the court implied that it approved of a literal reading of Rule 41.[15] And following *Gobbo*, some courts have treated Rule 41(a) notices of dismissal of a defendant as Rule 15 motions to amend the complaint.[16] However, following the District of Utah's decision in *Van Leeuwen v. Bank of America, N.A.* in 2015, the majority of courts in the Tenth Circuit have allowed plaintiffs to dismiss one or more of multiple defendants via Rule 41, distinguishing *Gobbo* as limited to where a plaintiff sought to dismiss only some claims against one defendant.[17]

Fourth Circuit. The Fourth Circuit likewise has not addressed the issue, and an intra-circuit split has developed. Similar to the Tenth Circuit, dicta from a case where a plaintiff tried to dismiss certain claims, as opposed to all claims against a defendant, has led some courts to strike Rule 41

Prior to the Seventh Circuit's *Taylor* decision, courts in the Seventh Circuit permitted dismissal of claims against one defendant under Rule 41(a). *See, e.g.*, Futch v. AIG, Inc., Civ. No. 07-402-GPM, 2007 WL 1752200, at *1 (S.D. Ill. June 15, 2007) (citing cases).

[12] *See, e.g.*, Barton v. Lockwood, Andrews & Newnam, P.C., No. 17-cv-11392, 2018 WL 8608300, at *1 (E.D. Mich. May 23, 2018).

[13] Letherer v. Alger Grp., L.L.C., 328 F.3d 262, 265–66 (6th Cir. 2003), overruled on other grounds by Blackburn v. Oaktree Capital Management, LLC, 511 F.3d 633 (6th Cir. 2008) (refusing, when plaintiff attempted to voluntarily dismiss a defendant pursuant to Rule 41, to definitely decide the issue, but holding that the court dismissed the defendant pursuant to Rule 21, not Rule 41).

[14] EQT Gathering, LLC v. A Tract of Property Situated in Knott Cnty., Ky., No. 12-58-ART, 2012 WL 3644968, at *1 (E.D. Ky. Aug. 24, 2012). *But see* Banque de Depots v. Nat'l Bank of Detroit, 491 F.2d 753 (6th Cir. 1974) (noting reservations but holding the district court did not abuse its discretion under Rule 41(a)(2) by dismissing one defendant).

[15] *See* 81 F.3d 122, 123 (10th Cir. 1996).

[16] *See, e.g.*, Ashford v. Neb. Furniture Mart, Inc., No .17-2097-DDC-GLR, 2017 WL 1332706, at *1 (D. Kan. Apr. 11, 2017) (Crabtree, J).

[17] 304 F.R.D. 691, 696–97 (D. Utah 2015); *see also* City of Scranton v. Orr Wyatt Streetscapes, No. 18-4035-DDC-TJJ, 2018 WL 4222414, at *1 (D. Kan. July 16, 2018) (approving of *Van Leeuwen* and explicitly rejecting the court's prior holding in *Ashford*) (Crabtree, J); Grim v. FedEx Ground Package Sys., Inc., No. CV 19-10 MV/GBW, 2020 WL 587846, at *3 (D.N.M. Feb. 6, 2020). Interestingly, due to its extensive analysis of the circuit split, *Van Leeuwen* has been frequently cited by courts in the Sixth Circuit to note that Circuit's status as an outlier— according to Westlaw, 28 of the 41 cases to cite it are from Sixth Circuit courts. *See, e.g.*, U.S. *ex rel* Doe v. Preferred Care, Inc., 326 F.R.D. 462, 464 (E.D. Ky. 2018).

motions to dismiss a defendant.[18] Most courts, however, have taken the "sounder view" and adopted the majority approach.[19]

D.C. Circuit. Courts in the D.C. Circuit appear to have been unanimous in reading Rule 41 as not prohibiting voluntary dismissal of some, but not all, defendants.[20]

Eleventh Circuit. The Eleventh Circuit follows the majority approach through binding pre-split Fifth Circuit precedent.[21] But in *Perry v. The Schumacher Group*, the Eleventh Circuit took a textual approach, reading Rule 41(a) as only allowing dismissal of the entire case and not "a portion of a plaintiff's lawsuit . . . while leaving a different part of the lawsuit pending before the trial court."[22] However, that case concerned an attempted stipulated dismissal of fewer than all claims against a defendant, not all claims against fewer than all defendants.[23] A few district courts have seized on this dicta and read *Perry* as overruling old Fifth Circuit precedent.[24] But a majority of courts so far have reconciled *Perry* with the prior precedent and still permit a plaintiff to use

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[18] *See, e.g.*, Volvo Trademark Holding Aktiebolaget v. AIS Constr. Equip. Corp., 162 F. Supp. 2d 465, 467 & n.3 (W.D.N.C. 2001) (citing Skinner v. First Am. Bank of Va., 64 F.3d 659 (table), 1995 WL 507264 (4th Cir. 1995)) (adopting magistrate recommendation to strike Rule 41 notice of dismissal against individual defendant and to proceed instead as a motion to amend complaint). *But cf.* Miller v. Terramite Corp., 114 F. App'x 536, 540 (4th Cir. 2004) ("Because Rule 41(a)(2) provides for the dismissal of 'actions' rather than claims, it can be argued that Rule 15 is technically the proper vehicle to accomplish a partial dismissal of a single claim, but similar standard govern the exercise of discretion under either rule."); Armstrong v. Frostie Co., 453 F.2d 914, 916 (4th Cir. 1971) ("[Rule 41(a)(1)(i)] is designed to permit a disengagement of the parties at the behest of the plaintiff only in the early stages of a suit . . . .").

[19] *E.g.*, Duke Progress Energy LLC v. 3M Co., No. 5:08-CV-460-FL, 2015 WL 5603344, at *2 (E.D.N.C. Sept. 22, 2015) (citing cases from three different districts in the circuit that have followed the majority approach); *see also* Ownby v. Cohen, No. 3:02CV00034, 2002 WL 1877519, at *3 n.1 (W.D. Va. Aug. 15, 2002). Other courts have noted the intra-circuit split, but avoided ruling on the issue. *See, e.g.*, Hedrick v. E.I. du Pont de Nemours & Co., Civ. No. 2:12-06135, 2013 WL 2422661, at *4 n.1 (S.D. W. Va. June 3, 2013).

[20] *See, e.g.*, Reetz v. Jackson, 176 F.R.D. 412, 413 & n.2 (D.D.C. 1997); Detroit Int'l Bridge Co. v. Canada, Civ. No. 10-476 (RMC), 2011 WL 6010230, at *2 (D.D.C. Dec. 1, 2011).

[21] *See* Bonner v. City of Prichard, 661 F.2d 1206, 1209–10 (11th Cir. 1981) (en banc); *see also* Klay v. United HealthGroup, Inc., 376 F.3d 1092, 1106 (11th Cir. 2004) ("Put simply, Rule 41 allows a plaintiff to dismiss all of his claims against a particular defendant . . . .").

[22] 891 F.3d 954, 958 (11th Cir. 2018).

[23] *See id.* 956–57.

[24] *See, e.g.*, West v. Zacharzewski, No. 2:18-CV-14155-Rosenberg/Maynard, 2019 WL 3426321, at *1 n.1 (S.D. Fla. Apr. 18, 2019) (Rosenberg, J) (reading *Perry* as prohibiting use of Rule 41(a) to dismiss all claims against fewer than all defendants, and sua sponte, in a footnote, without analysis interpreting a Rule 41(a) stipulated dismissal of all claims against a defendant "as a request to dismiss [defendant] from the consolidated cases with prejudice"); *see also* Walker v. Trans Union, LLC, No. 2:19cv85-MHT, 2019 WL 1283440, at *1 n.* (M.D. Ala. Mar. 20, 2019) (Thompson, J) (expressing doubt whether post-*Perry* Rule 41(a) can still be used to permit dismissal of all claims against a given defendant).

Rule 41(a) to dismiss all claims against a given defendant.[25] It is too soon to say whether a true intra-circuit split will develop, especially in light of even stronger language from an August 2021 Eleventh Circuit decision that may further question the state of the law in the Eleventh Circuit.[26]

I note, however, that regardless what language the Eleventh Circuit uses, a panel of the Eleventh Circuit (like that in the two cases referenced in the previous paragraph) cannot overturn pre-split Fifth Circuit precedent within the circuit: Only the court *en banc* may.[27]

One tangential issue is whether, in courts that permit a plaintiff to voluntarily dismiss all claims against fewer than all defendants under Rule 41(a), that right is terminated if *other* defendants answer the complaint or file a summary judgment motion. I have not specifically researched this issue, but all courts I have encountered that have addressed it have permitted the dismissal so long as that specific defendant had not yet answered the complaint or motioned for summary judgment.[28]

III. Courts appear to apply Rule 41(a) similarly to dismissal of claimants or plaintiffs as they do to defendants

There is very limited caselaw addressing voluntary dismissal of all claims by one plaintiff or by one claimant. However, those courts have been unanimous in applying the same law to plaintiffs[29] and claimants[30] as they do to voluntary dismissal of a defendant. Therefore, although there is not sufficient caselaw to show a circuit split and no circuit court seems to have directly addressed the issue,[31] it would appear the split discussed above in Section II of this memorandum would likely also manifest here.

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[25] *See* Walker v. Home Point Fin. Corp., No. 8:21-cv-1916-KKM-AAS, -- F. Supp. 3d ---, 2021 WL 5368863, at *2 (M.D. Fla. Nov. 18, 2021) (collecting cases).

[26] *See* Estate of West v. Smith, 9 F.4th 1361, 1367 (11th Cir. 2021) ("[W]e now apply Rule 41(a)(1)(A)(ii) to the facts of this case. The stipulation of dismissal was signed by all the parties who had appeared at that time . . . . And the stipulation clearly dismissed all claims that were alleged against all named defendants . . . . Accordingly, by the terms of Rule 41(a)(1)(A)(ii), which means precisely what it says, the action itself—not specific claims and not specific defendants—was dismissed.").

[27] *See Bonner*, 661 F.2d at 1209–10.

[28] *See, e.g.*, United Sur. & Indem. Co. v. Yabucoa Volunteers of Am. Elderly Hous., Inc., 306 F.R.D. 88, 90 (D.P.R. 2015).

[29] Miller v. Stewart, 43 F.R.D. 409, 412–13 (E.D. Ill. 1967) (dismissal of certain plaintiffs according to same standard as dismissal of one defendant); *Tycom Corp.*, 1977 WL 23174, at *1 & n.5 (discussing standard for dismissal of parties); Kingsburg Apple Packers, Inc. v. Ballantine Produce Co., No. 1:09-CV-00901-AWI-JLT, 2010 WL 1027813, at *1 (E.D. Cal. Mar. 17, 2010) (dismissing intervenor plaintiff according to same standard as dismissal of one defendant).

[30] United States v. Julius Baer & Co., 307 F.R.D. 249, 252 (D.D.C. 2014) (dismissal of one claimant according to same standard as dismissal of one defendant); United States v. $448,840.92 in U.S. Currency, No. 4:21-CV-00202, 2021 WL 5578847, at *2 (E.D. Tex. Nov. 29, 2021) (same).

[31] In *Bailey v. Shell Western E&P, Inc.*, the Fifth Circuit may have implicitly stated that one plaintiff could dismiss all his claims against all defendants. 609 F.3d 710 (5th Cir. 2010). In

IV. Nearly all courts do not allow voluntary dismissal of fewer than all claims against a defendant, although the law is unsettled in the Second, Fourth, and Eighth Circuits

The general consensus, as expressed in the leading treatises[32] and nearly all reported cases, is that a plaintiff may not use Rule 41(a) to voluntarily dismiss fewer than all claims against a given defendant. The policies behind reading "action" broadly to permit dismissal of all claims against a given defendant do not hold true when that defendant would still be subject to the suit on some claims regardless. Conversely, and as noted by multiple circuit courts, whether Rule 41(a) permits voluntary dismissal of claims has practical implications as to both district court[33] and, sometimes, circuit court subject matter jurisdiction.[34] Perhaps for this reason, I have found no circuit court decision explicitly holding that Rule 41(a) can be used to dismiss fewer than all claims against a given defendant. And decisions from the Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have explicitly held to the contrary.[35] Furthermore, while the First,[36] Third,[37]

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that case, two plaintiffs brought suit alleging both individual and False Claim Act causes of action. *Id.* at 717. At some point in a long and convoluted procedural history, one of the two plaintiffs filed a notice of voluntary dismissal of just his individual claims. *Id.* at 720. The court seemed to find no fault in just one plaintiff seeking to voluntarily dismiss his claims, but held that Rule 41(a) was improper for the reason that this one plaintiff was only dismissing some of his claims. *See id.*

[32] *E.g.*, Wright & Miller, *Federal Practice & Procedure* § 2362 (4th ed. 2021).

[33] For instance, if Rule 15, as opposed to Rule 41, is used to remove only federal claims, the "amendment of the complaint . . . [leaves] no federal claims to which the state claims may be appended" and therefore no ability for the court to exercise supplemental jurisdiction. Mgmt. Invs. v. United Mine Workers of Am., 610 F.2d 384, 395 (6th Cir. 1979).

[34] For example, as the Federal Circuit noted, if Rule 41 allowed a plaintiff to voluntarily dismiss the only patent claim in a multi-claim action, appellate jurisdiction would still rest in the Federal Circuit despite the absence of any patent issues on appeal. *See* Gronholz v. Sears, Roebuck & Co., 836 F.2d 515, 517–18 (Fed. Cir. 1987) (granting motion to transfer to the Eighth Circuit because plaintiff's voluntary dismissal of patent claim was actually a Rule 15 motion to amend, since Rule 41 only allows voluntary dismissal of an action).

[35] *Bailey*, 609 F.3d at 720 (Fifth Circuit); *Mgmt. Invs.*, 610 F.2d at 395 (Sixth Circuit); *Taylor*, 787 F.3d at 857–58 (Seventh Circuit); ECASH Techs., Inc. v. Guagliardo, 35 F. App'x 498, 499 (9th Cir. 2002); *Gobbo*, 81 F.3d at 123 (Tenth Circuit); Campbell v. Altec Indus., Inc. 605 F.3d 839, 841 n.1 (11th Cir. 2010); *see also Gronholz*, 836 F.2d at 517–18 (Federal Circuit presumably applying its interpretation of Eighth Circuit law in holding that Rule 41(a) does not permit a plaintiff to dismiss only some claims against a defendant).

[36] Addamax Corp. v. Open Software Found., Inc., 149 F.R.D. 3, 5 (D. Mass. 1993); Hanson v. Corr. Health Partners, LLC, No. 1:19-cv-00393-JDL, 2020 WL 974868, at *2 (D. Me. Feb. 28, 2020); Santiago-Ramos v. Autoridad de Energia Electrica de P.R., Civ. No. 11-1987(JAG/SCC), 2015 WL 846750, at *7 (D.P.R. Feb. 26, 2015).

[37] Courts in at least four of the five districts within the circuit have addressed the issue, ruling consistently with the majority approach. New W. Urban Renewal Co. v. Viacom, Inc., 230 F. Supp. 2d 568, 571 n.2 (D.N.J. 2002); Otto v. Williams, Civ. No 15-3217, 2016 WL 3136923, at *1–2 (E.D. Pa. June 6, 2016); Greens at Greencastle Ltd. P'ship v. Greencastle GIBG LLC, No. 1:06-CV-1708, 2007 WL 328718, at *1 (M.D. Pa. Jan. 31, 2007); Rosario v. Strawn, No. 2:19-cv-

and D.C. Circuits[38] have not addressed the issue, district courts in those circuits appear unanimous in not permitting a plaintiff to dismiss fewer than all claims against a given defendant.

However, as will be discussed later in this Section, the story is more complicated in a few circuits. The Fourth Circuit held that it followed the majority approach in an unpublished opinion[39] after previously implying the same in a published decision,[40] although a recent decision from the court implied otherwise.[41] Moreover, the law is unsettled in both the Second and Eighth Circuits. And despite binding authority directing courts in the Ninth Circuit, some courts in the Ninth Circuit have incorrectly permitted plaintiffs to voluntarily dismiss fewer than all claims against a defendant due to dicta from another Ninth Circuit case. I will address each of these circuits in turn.

Fourth Circuit. While district courts within the Fourth Circuit have consistently followed the majority approach when addressing the issue, the Fourth Circuit itself has not. The Fourth Circuit first addressed the issue in an unpublished opinion in 1995, squarely holding that a plaintiff may not use Rule 41(a) to dismiss fewer than all claims against any given defendant.[42] This followed a published decision in which the court had implied as much, stating that when some claims were dismissed by order under Rule 12(b)(6) and plaintiff thereafter attempted to notice a dismissal of the remaining claims under Rule 41(a), that notice was effective because the remaining claims "comprised the entire action for Rule 41(a)(1)(i) purposes."[43] In 2004, the court noted the issue was still open, but refused to resolve it because whether Rule 15 or Rule 41(a) was the appropriate vehicle, the district court did not abuse its discretion in denying plaintiff's request to either dismiss or amend under the facts of the case.[44] However, a 2020 decision in *Affinity Living Group, LLC v. StarStone Speciality Insurance Co.* implied that a plaintiff could dismiss fewer than all claims against a defendant under rule 41(a), as the majority accepted without analysis that such

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01040, 2020 WL 5810009, at *3–4 (W.D. Pa. Sept. 30, 2020). Prior to any circuit court considering the issue, a decision from the Eastern District of Pennsylvania was the leading opinion nationwide. *See* Smith, Kline & French Labs. V. A. H. Robins Co., 61 F.R.D. 24, 27–30 (E.D. Pa. 1973).

[38] Featherston v. District of Columbia, 910 F. Supp. 2d 1, 11 (D.D.C. 2012).

[39] Skinner v. First Am. Bank of Va., 64 F.3d 659 (Table), 1995 WL 507264, at *2 (4th Cir. 1995).

[40] *See* Wilson-Cook Med., Inc. v. Wilson, 942 F.2d 247, 251 (4th Cir. 1991) (holding that when a district court granted a partial Rule 12(b)(6) motion to dismiss, those claims were no longer part of the suit and therefore a Rule 41(a)(1)(i) notice of dismissal of the remaining claims "comprised the entire action for Rule 41(a)(1)(i) purposes").

[41] *See* Affinity Living Grp., LLC v. StarStone Specialty Ins. Co., 959 F.3d 634, 643 n.1 (4th Cir. 2020) (King, J, dissenting) ("By accepting the stipulated dismissal as effective, my good colleagues in the majority must assume that Rule 41(a) can be utilized to dismiss specific claims against one defendant . . . . Without staking my dissent on the issue, I simply observe that some of our sister circuits disagree.").

[42] *Skinner*, 64 F.3d 659 (Table), 1995 WL 507264, at *2.

[43] *See Wilson-Cook Medical*, 942 F.2d at 251.

[44] *See* Miller v. Terramite Corp., 114 F. App'x 536, 539–40 (4th Cir. 2004) ("Under either [Rule 15 or Rule 41(a)], the district court did not abuse its discretion in concluding that Miller's attempt to dismiss the ERISA claim was untimely and would waste judicial resources.").

a stipulated dismissal was effective.[45] Judge King explicitly called out this implication in his dissent.[46]

No court has yet cited this case in relation to Rule 41(a), leaving its impact unclear. Prior to *Affinity Living Group*, courts in the Fourth Circuit were near-unanimous in not permitting a plaintiff to voluntarily dismiss fewer than all claims against any given defendant.[47] However, as *Affinity Living Group* itself shows by being an appeal where no party raised the issue of whether the district court *could* permit plaintiff to voluntarily dismiss fewer than all claims against a defendant, district courts may not always have addressed the issue, leaving the potential—a potential that exists nationwide[48]—that courts have been permitting such dismissals without addressing the issue in a written opinion.

Second Circuit. As Judge Furman noted, some courts in the Second Circuit—and a fairly significant number in the Southern District of New York[49]—have likewise allowed dismissal of only some claims under Rule 41(a).[50] As stated by one court in the District of Connecticut, while

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[45] *See Affinity Living Grp.*, 959 F.3d at 636.

[46] *See id.* at 643 n.1 (King, J, dissenting).

[47] *See, e.g.*, Iraheta v. United of Omaha Life Ins. Co., 353 F. Supp. 2d 592, 595 (D. Md. 2005); McGill v. Crown Cork & Seal Co., Civ. No. 7:08-2888-HFF-BHH, 2009 WL 3380619, at *2 (D.S.C. Oct. 20, 2009); Cox v. Cawley, No. 3:11CV557-HEH, 2011 WL 4828890, at *3 (E.D. Va. Oct. 11, 2011); Martin v. MCAP Christiansburg, LLC, No. 7:14cv464, 2015 WL 540183, at *2–3 (W.D. Va. Feb. 10, 2015).

[48] For example, a court in the Southern District of New York permitted plaintiffs to dismiss with prejudice under Rule 41(a) their federal law claims, keeping only state law claims against defendants. *See* Seidman v. Chobani, LLC, No. 14 Civ. 4050 (PGG), 2016 WL 1271066, at *1, 5 (S.D.N.Y. Mar. 29, 2016). However, in that case, defendants did not contest whether Rule 41(a) could be used to effect such a dismissal, objecting instead on grounds that they would be unfairly prejudiced if the court permitted the dismissal. *See* Defs.' Joint Opp'n to Pls.' Mot. to Voluntarily Dismiss Their Federal Law Claims, Seidman v. Chobani, LLC, No. 14 Civ. 4050 (PGG), 2015 WL 10549950 (S.D.N.Y. Aug. 7, 2015).

[49] *See, e.g.*, Azkour v. Haouzi, No. 11 Civ. 5780(RJS)(KNF), 2013 WL 3972462, at *3–4 (S.D.N.Y. Aug. 1, 2013) (overruling the magistrate's recommendation and permitting plaintiff to voluntarily dismiss without prejudice all claims against one defendant and fewer than all claims against another defendant under Rule 41(a)1(A)); HOV Servs., Inc. v. ASG Techs. Grp., Inc., No. 18-cv-9780 (PKC), 2021 WL 355670, at *2 (S.D.N.Y. Feb. 2, 2021) (granting voluntary dismissal with prejudice of plaintiff's federal law claims); Nix v. Off. of Comm'r of Baseball, No. 17-cv-1241 (RJS), 2017 WL 2889503, at *2–3 & n.2 (S.D.N.Y. July 6, 2017) (granting plaintiffs' stipulated voluntary dismissal of one claim under Rule 41(a)).

[50] In addition to the Southern District of New York, I have found cases from three districts that have permitted plaintiffs to dismiss fewer than all claims against a given defendant. *See, e.g.*, Cent. N.Y. Laborers' Health & Welfare Fund v. Fahs Constr. Grp., Inc., 170 F. Supp. 3d 337, 343–44 (N.D.N.Y. 2016) (permitting voluntarily dismissal under Rule 41(a) of all of plaintiff's claims against one defendant and fewer than all against another defendant); Gordon v. Kaleida Health, No. 08-CV-378S, 2009 WL 4042929, at *6 (W.D.N.Y. Nov. 19, 2009); Doody v. Bank of Am.,

"a plaintiff wishing to eliminate some but not all claims or issues from the action *should* amend the complaint under [Rule 15(a)]," which rule the plaintiff chooses is "immaterial" and therefore Rule 41(a) is a permissible vehicle.[51] Conversely, other cases have held that Rule 41(a) may not be used to effect such dismissal,[52] or have noted the issue but ruled on other grounds.[53]

As such, the law within the Second Circuit is unsettled, and an intra-circuit split has developed.[54] My sense (without counting cases) is that, with exceptions, the Southern District of New York tends to permit a plaintiff to dismiss fewer than all claims against a defendant, while the Eastern District of New York prohibits it. Courts in the District of Connecticut are split. I have found an insufficient number of cases from the other three districts to draw any conclusions regarding them at this time.

Eighth Circuit. The Eighth Circuit has refused to address the issue, and noted in an opinion by then-Judge Blackmun that "it may not be material whether the court acts under Rule 15(a) which relates to amendments . . . or Rule 41(a)[]."[55] Nonetheless, district courts in the Eighth Circuit have predominantly followed the majority rule,[56] although a few have seized on Judge Blackmun's language to permit Rule 41(a) dismissal of fewer than all claims against a defendant,[57]

N.A., No. 3:19-cv-1191 (RNC), 2021 WL 4554056, at *2 n.1 (D. Conn. Oct. 5, 2021) ("Rule 41(a)(1)(A)(i) allows a plaintiff to voluntarily dismiss an action, or part of an action . . . .").

[51] Vogel v. Am. Kiosk Mgmt., 371 F. Supp. 2d 122, 129–30 (D. Conn. 2005).

[52] *See, e.g.*, Robbins v. City of New York, 254 F. Supp. 3d 434, 436–37 (E.D.N.Y. 2017); Puccino v. SNET Info. Servs., Inc., No. 3:09-cv-1551 (CFD) 2011 WL 13237585, at *1–2 (D. Conn. Nov. 14, 2011).

[53] *See, e.g.*, Century Sur. Co. v. Vas & Sons Corp., No. 17-CV-5392 (DLI) (RLM), 2018 WL 4804656, at *2 (E.D.N.Y. Sept. 30, 2018); *Alix*, 470 F. Supp. 3d at 315.

[54] I note that *Harvey Aluminum*'s holding would cover this issue and is technically binding precedent, but as noted above in Section II, the Second Circuit does not appear to still follow the case, and district courts in the circuit universally ignore it and limit it to its facts.

[55] Johnston v. Cartwright, 355 F.2d 32, 39 (8th Cir. 1966) (Blackmun, J); *accord* Wilson v. Crouse-Hinds Co., 556 F.2d 870, 873 (8th Cir. 1977).

[56] Courts in at least seven of the ten districts within the Eighth Circuit have so held. *See, e.g.*, Brown v. Mortg. Elec. Registration Sys., Inc., No. 6:11-CV-06070, 2012 WL 12919480, at *3 (W.D. Ark. July 26, 2012); Env't Dynamics, Inc. v. Robert Tyer & Assocs., 929 F. Supp. 1212, 1224–26 (N.D. Iowa 1996); Cross v. City of Liscomb, No. 4:03-CV-30172, 2004 WL 840274, at *3 (S.D. Iowa Mar. 2, 2004); Tucker v. City of Duluth, Civ. No. 13-3074 (MJD/LIB), 2014 WL 5307608, at *3 (D. Minn. Oct. 16, 2014); Paglin v. Saztec Int'l, Inc., 934 F. Supp. 1184, 1189 (W.D. Mo. 1993); Fry v. Doane Univ., No. 4:18CV3145, 2019 WL 454098, at *1 (D. Neb. Feb. 5, 2019); Planned Parenthood Minn., N.D. v. Daugaard, 946 F. Supp. 2d 913, 917–18 (D.S.D. 2013).

[57] *See, e.g.*, Graco, Inc. v. Techtronic Indus. N.A., Inc., Civil No. 09-1757 (JRT/RLE), 2010 WL 915213, at *2–4 (D. Minn. Mar. 9, 2010) (noting that most courts have not allowed dismissal of fewer than all claims against a defendant under Rule 41(a), but proceeding under Rule 41(a) as opposed to Rule 15 "in order to clearly reflect that [claims being dismissed with prejudice] may not be reasserted"); Hardee's Food Sys., Inc. v. Hallbeck, No. 4:09CV00664 AGF, 2010 WL 4968180, at *2 (E.D. Mo. Nov. 24, 2010) (similar).

or have thus refused to resolve the issue and instead proceeded without determining whether the court was acting under Rule 15 or Rule 41(a).[58] Hence, like in the Second Circuit, the law is unsettled in the Eighth Circuit, albeit with a clear majority position.

Ninth Circuit. While a significant majority of Ninth Circuit courts do not allow parties to dismiss fewer than all claims against a defendant via Rule 41(a), Ninth Circuit dicta has led a few district courts astray. In *Wilson v. City of San Jose*, the Ninth Circuit stated that a plaintiff "may dismiss some or all of the defendants, or some or all of his claims, through a Rule 41(a)(1) notice."[59] However, that case did not involve a plaintiff trying to dismiss only some of the claims against a defendant, and other cases from the Ninth Circuit in which the issue was squarely before the court explicitly prohibit the use of Rule 41 to dismiss anything less than all the claims against any given defendant.[60] Nonetheless, because of this dicta, a few courts within the Ninth Circuit have allowed parties to dismiss fewer than all claims against a defendant through Rule 41(a).[61] But because these decisions go against binding Ninth Circuit precedent, they are incorrect (within the circuit) and do not demonstrate an intra-circuit split or that the law is unsettled.

V. Class Action Allegations

Voluntary dismissal under Rule 41(a) of class allegations raises unique issues. Rule 41(a) "[s]ubject[s]" Rule 41(a)'s requirements to Rule 23(e), which in turns limits the ability to voluntarily dismiss class allegations by requiring court permission.[62] However, Rule 23(e) only comes into relevance after the court has already certified a class, or when a class is proposed to be certified for purposes of settlement.[63]

While other issues likely abound, of note is whether pre-certification a plaintiff may dismiss class allegations under Rule 41(a) without dismissing his individual claims. At least one court in the District of Columbia has allowed the named plaintiff and opt-in class members to

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[58] *See, e.g.*, Stratasys, Inc. v. Microboards Tech., LLC, Civ. No. 13-3228 (DWF/TNL), 2015 WL 12778849, at *2, 5 (D. Minn. Mar. 25, 2015).

[59] 111 F.3d 688, 692 (9th Cir. 1997).

[60] *See, e.g.*, Ethridge v. Harbor House Rest., 861 F.2d 1389, 1392 (9th Cir. 1988); *see also* Kennedy v. Full Tilt Poker, No. CV 09-07964 MMM (AGRx), 2010 WL 3984749, at *2 n.16 (C.D. Cal. Oct. 12, 2010) ("Certain Ninth Circuit cases have suggested that a plaintiff can dismiss 'some or all of his claims' by filing a notice of dismissal under Rule 41(a)(1). [These cases] concerned the dismissal of claims against fewer than all defendants. [These] also concerned actions in which plaintiffs sought to dismiss the entire action. Consequently, the actions did not specifically address the dismissal of single claims, as did *Ethridge* and *Hells Canyon*, and the court concludes that the cases directly addressing that issue are the precedent that should be followed." (citations and parenthetical notations omitted)).

[61] *See, e.g.*, Moore v. Garnand, No. CV-19-00290-TUC-RM (LAB), 2019 WL 13108478, at *1–2 (D. Ariz. Oct. 30, 2019); Lambert v. Weller, No. C20-1558-JLR-MAT, 2021 WL 1393066, at *2 (W.D. Wash. Mar. 16, 2021); Bridgham-Morrison v. Nat'l Gen. Assurance Co., No. C15-927RAJ, 2016 WL 2739452, at *3 (W.D. Wash. May 11, 2016).

[62] *See* Fed. R. Civ. P. 23(e); *id.* R. 41(a).

[63] *See id.* R. 23(e).

dismiss class allegations under Rule 41(a)(1) without dismissing their individual claims.[64] In reliance on that case, a court in the District of Massachusetts acted similarly.[65] However, I have not found other cases to address this issue. That said, it likely is an issue that percolates more often than the reported cases suggest.

VI. Conclusions

The circuit split discussed in Section II of this memorandum may be something for the committee to consider resolving. The circuit split is long-standing, and three-quarters of the circuits have weighed in one way or another. This split is exacerbated by the intra-circuit splits in two of the three circuits to never have addressed the issue.

Additionally, although there does not appear to be a circuit split regarding use of Rule 41(a) to voluntarily dismiss fewer than all claims against a given defendant, recent Fourth Circuit caselaw shows that one might soon develop. Thus, if the committee does consider revisions to address dismissal of all claims against fewer than all defendants, the committee may want to also consider whether a plaintiff should be permitted to dismiss fewer than all claims against any given defendant.

Finally, to the extent the committee does consider amending Rule 41(a) to address the issue of a plaintiff dismissing fewer than all claims against a given defendant, it may likewise need to consider the issue discussed in Section V regarding pre-certification dismissal of class allegations.

[64] Jackson v. Innovative Sec. Servs., LLC, 283 F.R.D. 13, 15 (D.D.C. 2012).

[65] *See* Botero v. Commonwealth Limousine Serv. Inc., Civ. No. 12-10428-NMG, 2014 WL 6634848, at *1–2 (D. Mass. Nov. 21, 2014).

From: Jesse Furman 21-CV-O
Sent: Monday, June 21, 2021 9:36 AM
To: Robert Dow; Edward Cooper; Richard Marcus
Cc: John Bates
Subject: Suggestion for the Civil Rules Advisory Committee: Rule 41(a)

Dear Bob et al.,

With my S.D.N.Y. colleague, District Judge Philip Halpern, I have a suggestion for consideration by the Civil Rules Advisory Committee: whether Rule 41(a) should be amended to make clear whether it does or does not permit dismissal of some, but not all claims in an action. At present, courts appear to be divided on the question. *Compare, e.g.*, *CBX Res., L.L.C. v. ACE Am. Ins. Co.*, 959 F.3d 175, 177 (5th Cir. 2020) ("Rule 41(a) should not be available to dismiss only some claims a plaintiff has against a defendant."), *and Taylor v. Brown*, 787 F.3d 851, 857 (7th Cir. 2015) ("Since we give the Federal Rules of Civil Procedure their plain meaning, Rule 41(a) should be limited to dismissal of an entire action." (internal quotation marks, citation, and alterations omitted)), *with Azkour v. Haouzi*, No. 11-CV-5780 (RJS) (KNF), 2013 WL 3972462, at *3 (S.D.N.Y. Aug. 1, 2013) (Sullivan, J.) (joining "other courts in [the Second] Circuit in interpreting Rule 41(a)(1)(A) as permitting the withdrawal of individual claims" (citing cases)). In case you are interested, the issue is discussed in my opinion in *Alix v. McKinsey & Co.*, 470 F. Supp. 3d 310, 315 (S.D.N.Y. 2020), although I ultimately avoided the issue on which courts are split by concluding that the notice of dismissal there was with respect to the whole action as the only other claim (a federal RICO claim) had already been dismissed. If the Committee takes up the issue, it may also want to consider whether the Rule permits dismissal of an action as to one defendant in a multi-defendant case. My impression is that most, if not all, courts have held that it does - in which case there may be no need for amendment - but it might make sense to do a more comprehensive survey of the case law than I've done.

Please let me know if I should submit this suggestion through more formal channels and/or if you need anything else from me.

Many thanks,
Jesse Furman

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22-CV-J

July 24, 2022

Committee on Rules of Practice and Procedure
c/o Rules Committee Staff
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

We write to bring to the Committee's attention a deficiency in Rule 41 of the Federal Rules of Civil Procedure. In regularly recurring circumstances, courts lack express authorization to dismiss one of several defendants at the plaintiff's behest and without objection from the remaining parties. We identified this issue while clerking for Judge Benjamin Beaton[1] and decided to bring it to the Committee's attention after seeing it repeatedly during our time with the court. And we're not alone. As the Committee is aware, federal judges throughout the county have wrestled with and requested resolution of this issue.[2]

Federal Rule of Civil Procedure 41(a) allows a plaintiff to voluntarily dismiss an action (in some circumstances) or ask the court to do so (in other circumstances).[3]

But what happens when a plaintiff, without objection from the defendants, wishes to dismiss one (or fewer than all) of several defendants? By its plain language, Rule 41 doesn't apply because it allows parties to dismiss only an "action"—a term that, read literally, "refers to the whole of the lawsuit."[4] There remain only two avenues under the Rules for a plaintiff seeking to dismiss against fewer than all defendants. First, she could amend her complaint under Federal Rule of Civil Procedure 15. Or second, in the case of misjoinder, a plaintiff could move for dismissal under Federal Rule of Civil Procedure 21.

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[1] Judge Beaton sits on the United States District Court for the Western District of Kentucky.

[2] *See* Letter from Hon. Jesse Furman & Hon. Philip Halpern (21-CV-0), released on June 21, 2021, available at https://www.uscourts.gov/rules-policies/archives/suggestions/hon-jesse-furman-and-hon-philip-halpern-21-cv-o.

[3] *See* Fed. R. Civ. P. 41(a).

[4] *Brownback v. King*, 141 S. Ct. 740, 751 (2021) (Sotomayor, J., concurring). In full, Justice Sotomayor stated:

> An "action" refers to the whole of the lawsuit. *See* Black's Law Dictionary, at 37 (defining "action" as a "civil or criminal judicial proceeding"); Black's Law Dictionary 43 (3d ed. 1933) ("The terms 'action' and 'suit' are now nearly, if not entirely, synonymous"). Individual demands for relief within a lawsuit, by contrast, are "claims." *See* Black's Law Dictionary, at 311 (2019) (defining a "claim" as "the part of a complaint in a civil action specifying what relief the plaintiff asks for"); Black's Law Dictionary, at 333 (1933) (defining a "claim" as "any demand held or asserted as of right" or "cause of action").

Id. (Sotomayor, J., concurring); *see also Columbia Gas Transmission, LLC v. Raven Co., Inc.*, No. 12-72-ART, 2014 WL 12650688, at *1 (E.D. Ky. March 6, 2014) (Thapar, J.) ("Rule 41(a)(1)(A) only permits voluntary dismissal of an "action," which according to the Sixth Circuit means the *entire* controversy—all claims against all defendants, not individual claims or parties.").

Somewhere along the line, however, the courts blurred any Rules-based distinctions in this context by using Rules 15, 21, and 41(a) interchangeably, though inconsistently, in cases where a plaintiff sought to dismiss one of several defendants in a case.[5] According to Wright & Miller's *Federal Practice and Procedure*, "the net result is that there is a certain amount of inconsistency in the cases."[6] An understatement, to be sure. In reality, there are inter- and intra-circuit splits leaving litigants without clear guidance on this issue.[7] Another regrettable result of the widespread discrepancies is that district courts are left to do the best they can to muddle through "to secure the just, speedy, and inexpensive determination of every action and proceeding."[8]

With an eye toward practicality and judicial economy, we agree with Wright & Miller's assessment that it would "seem[] undesirable and unnecessary to invoke inherent power to avoid an artificial limit on Rule 41(a) that results from a highly literal reading of one word in that Rule."[9] But fortunately, stretching the Rules beyond their plain meaning to cover these common circumstances isn't the only answer. The Committee can amend the Rules to resolve this inconsistency.

We ask the Committee to step in and help clear the confusion. We also propose an amendment to Rule 41(a)(1)(A)—simply adding the words "or a claim." The relevant part of the rule would then read: "Without a Court Order. Subject to Rules 23(e), 23.1(c), and 66 and any applicable federal statute, the plaintiff may dismiss an action ***or a claim*** without a court order …."[10] The addition of these three words would simply and efficiently resolve what has become an unnecessarily murky issue by allowing a plaintiff to dismiss her cause(s) of action against individual defendants.

A potential (and perhaps obvious) objection to this revision comes to mind. One might argue that the proposed revisions miss the mark because Rule 41 is titled "Dismissal of Actions," not "Dismissal of Actions and Claims." True. But the title misrepresents the Rule as it currently

[5] 9 Fed. Prac. & Proc. Civ. § 2362 (4th ed.) (collecting cases that run the gamut).

[6] *Id.*

[7] *See, e.g., id.* (collecting cases from around the nation that take different approaches to this issue); *United States ex rel. Doe v. Preferred Care, Inc.*, 326 F.R.D. 462, 464 (E.D. Ky. 2018) (noting the inconsistency *within the Sixth Circuit* on this issue).

[8] Fed. R. Civ. P. 1. In the Western District of Kentucky, for example, Judge Beaton settled on the following text order: "Plaintiff and Defendant Experian Information Solutions, Inc. have filed and signed a proposed agreed order of dismissal with prejudice (DN 11). The Court therefore acknowledges the dismissal of Experian Information Solutions, Inc. only from this case in accordance with Fed. R. Civ. P. 41, or, in the alternative, dismisses Experian Information Solutions, Inc. in accordance with Fed. R. Civ. P. 21." *Jones v. Edfinancial, et al.*, 3:21-cv-721, ECF No. 13. A game of legal twister if there ever were one.

[9] 9 Fed. Prac. & Proc. Civ. § 2362 (4th ed.).

[10] (emphasis added to suggested addition).

exists; Rule 41 already allows the dismissal of claims in some instances.[11] And if the Committee is concerned with this inconsistency, it can always amend the title accordingly.

On behalf of litigants, law clerks, and judges everywhere, we thank the Committee for its attention to this matter.

Sincerely,

David J. Wenthold & Zachary T. Reynolds.

[11] *See* Fed. R. Civ. P. 41(b) (allowing a defendant to "move to dismiss the action *or any claim* against it" where a "plaintiff fails to prosecute or to comply with these rules or a court order") (emphasis added).

TAB 10

10. Pro se e-filing intercommittee project

As reported during the March 2022 Committee meeting, the Committee has received a number of proposals to change the current provisions in Rule 5(d)(3)(B) that unrepresented litigants may file electronically only if allowed to do so either by a local rule of the district court in question, or by a court order from the assigned judge.

An inter-committee effort has spent considerable time on these questions that is presented in much greater detail in the memo in this agenda book from Professor Catherine Struve, Reporter of the Standing Committee, and has been the subject of extensive FJC research reflected in the thorough report also included in this agenda book. This brief introduction provides an interim view of this ongoing work for the Committee's information. If Committee members have concerns, it would be good to identify them in a timely manner.

One important question is about the capacities and evolving specifics of the CM/ECF system. That system is not controlled by the rules committees, but one might say that Rule 5(d)(3)(A) relies on it in requiring represented parties to "file electronically." To the extent that evolution of that system is likely to be ongoing, and that the evolution of the system bears on e-filing, it may well be that the rather cumbersome process of Enabling Act responses is less than ideal.

Another pertinent subject is to make certain what qualifies as "filing electronically." Current information suggests the answer to this question is not uniform across the 94 districts. Moreover, the initial filing opening a case file may present special problems; having that done by anyone but the clerk's office could produce untoward results.

National uniformity may be an important topic also. To the extent that permitting pro se e-filing depends on having a clerk's office equipped to handle that, it may be that national uniformity is a dubious objective. One proposal is that the national rule try to specify criteria for affording pro se access to CM/ECF, but that might raise issues like those presented by consideration of prompting more uniformity in handling of ifp petitions. Assuming most pro se filers do all or most of their filing in only one district, national uniformity might seem a theme only for those who expect it to provide greater access in their respective districts. Since it seems that some districts now routinely permit such e-filing, proponents of pro se e-filing would likely resist a national rule forbidding local permissions.

On the other hand, in districts in which individual judges may determine whether to permit such e-filing it may seem odd that a given litigant is permitted to file electronically in regard to cases before Judge *X* but not in cases before Judge *Y*.

Many of these considerations may support variations in approach among the various sets of rules. The Criminal Rules, for example, always involve the United States on one side and often involve an accused with appointed counsel on the other side. The Bankruptcy Rules, on the other hand, may see a high proportion of unrepresented petitioners. But there may be a special concern with e-filing of petitions in bankruptcy court due to the automatic stay.

The variety of situations presented under the Civil Rules is probably broader than under the Criminal or Bankruptcy Rules. But at least some of the same sorts of difficulties may be important in a significant number of cases. Prisoners are often pro se litigants. (On that score, the issues presented regarding ifp status, also on the agenda of this meeting, are likely to bear on many prisoner litigants.) Prisoners are likely to have limited access to facilities for e-filing. They may also be moved from one facility to another without full notice to other parties or the clerk's office.

One topic seems unlikely to generate such complications. Rule 5 also is widely (but not universally) interpreted to require pro-se filers to mail a paper copy to the other parties even though the clerk's office routinely uploads the paper filing and serves the others via CM/ECF. That presently seems a pointless effort. But there may be serious questions about whether a paper filer knows which other parties are receiving service via CM/ECF. Rule language might excuse paper service on any party the filer knows will be served by the clerk.

Further fact-gathering is proceeding. Meanwhile, efforts are also underway to solicit reactions from court clerk organizations. Additional wrinkles (potholes?) regarding the operation of CM/ECF continue to come up. (For example, if pro se filers need not serve parties that get CM/ECF service with redundant paper copies, how do they know which parties these are?)

One final comment: The COVID pandemic has been emphasized as another reason to support e-filing by pro se litigants because having to file in person could subject them to risk. Given that any rule amendment published for comment in August 2023 could not become effective until Dec. 1, 2025, we may all hope that the COVID problem will no longer be urgent for when the amendment goes into effect.

MEMORANDUM

DATE: August 24, 2022

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Project on electronic filing by pro se litigants

Under the national electronic-filing rules that took effect in 2018, self-represented litigants presumptively must file non-electronically, but they can file electronically if authorized to do so by court order or local rule. In late 2021, in response to a number of proposals submitted to the advisory committees, a cross-committee working group was formed to study whether developments since 2018[1] provide a reason to alter the rules' approach to e-filing by self-represented litigants. This working group includes the reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules advisory committees as well as attorneys from the Rules Committee Support Office and researchers from the Federal Judicial Center (FJC). The working group has convened via Zoom for three discussions. The December 2021 discussion centered on potential research questions for a projected study by the FJC. By March 2022, Tim Reagan, Carly Giffin, and Roy Germano of the FJC had conducted the study and had circulated to the working group a draft of their report. The working group's March 2022 discussion focused on the study's findings. The final version of the report became available in May 2022,[2] and the working group met in August 2022 for further discussion of the study's findings.

This memo sketches possible topics that the advisory committees might discuss in light of the FJC's findings.[3] Part I.A of the memo provides a brief overview of the current rules on

1 For a review of current practices in the state courts, see National Center for State Courts, Self-Represented Efiling: Surveying the Accessible Implementations 3 (2022) (reporting that self-represented state-court litigants "often enjoy the same ability to efile as attorneys in the trial courts that offer electronic filing"), available at https://www.ncsc.org/__data/assets/pdf_file/0022/76432/SRL-efiling.pdf. An appendix to the study provides links to relevant e-filing programs by state. See id. Appendix A.

2 See Tim Reagan et al., Federal Courts' Electronic Filing by Pro Se Litigants (FJC 2022), available at https://www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants ("FJC Study").

3 The suggestions gathered in this memo reflect insights contributed by many working-group members. Those members have a variety of views on the issues discussed here, and the suggestions in the memo may not be endorsed by all working-group members. My goal here is to collect possible issues for discussion rather than to report a consensus view of the working group.

electronic filing and on service, while Part I.B summarizes pending proposals to amend the rules with respect to electronic filing by self-represented litigants. Part II outlines possible questions for discussion by the advisory committees as to both filing and service.

I. The current rules, and proposals to amend them

In Part I.A., I briefly summarize the current rules on self-represented electronic filing and on service. Part I.B synopsizes pending proposals to amend the electronic-filing rules.

A. The current rules

Under the rules as amended in 2018, pro se litigants can file electronically only if permitted to do so by court order or local rule. The Civil, Bankruptcy, and Appellate Rules contemplate that courts can require electronic filing by a pro se litigant, so long as they do so by order, or via a local rule that includes reasonable exceptions. The Criminal Rule does not permit a court to require pro se litigants to file electronically; the Committee Note observes that incarcerated defendants will typically lack the opportunity to file (and receive notices) electronically. As to service, requirements for separate service of a filing hinge on whether the filing was made via the court's case management / electronic case filing (CM/ECF) system or otherwise.

1. Filing

As amended in 2018, Civil Rule 5(d)(3) currently reads:

> (3) Electronic Filing and Signing.
>
> > (A) By a Represented Person--Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.
> >
> > (B) **By an Unrepresented Person--When Allowed or Required. A person not represented by an attorney:**
> >
> > > **(i) may file electronically only if allowed by court order or by local rule; and**
> > >
> > > **(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.**
> >
> > (C) Signing. A filing made through a person's electronic-

> filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.
>
> (D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules.

(Emphasis added.) Substantively similar electronic-filing provisions appear in Appellate Rules 25(a)(2)(B) and Bankruptcy Rules 5005(a)(2) and 8011(a)(2)(B).

The 2018 Committee Note to Civil Rule 5(d) states in part:

> Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by state prisoners.

A similar passage appears (without the last sentence in the quote above) in the Committee Note to Bankruptcy Rule 5005(a)(2); the Committee Note to Appellate Rule 25(a)(2)(B) briefly observes that that provision parallels the approach taken in Civil Rule 5.

Criminal Rule 49(b)(3) provides:

> (3) Means Used by Represented and Unrepresented Parties.
>
> (A) Represented Party. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

> **(B) Unrepresented Party. A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.**

(Emphasis added.) The 2018 Committee Note to Criminal Rule 49(b)(3)(B) explains:

> Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

2. Service

The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their filings[4] on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even persons that are CM/ECF users.

A review of Civil Rule 5 illustrates the general approach.[5] Civil Rule 5(a)(1) sets the general requirement that litigation papers "must be served on every party."[6] Civil Rule 5(b)(2)(E) provides that one way to serve a paper is by "sending it to a registered user by filing it with the court's electronic-filing system."[7] Civil Rule 5(d)(1)(B) requires a certificate of service for every filing, except that "[n]o certificate of service is required when a paper is served by

4 The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). The discussion here focuses on filings subsequent to the initiation of a case.

5 Bankruptcy Rule 7005 expressly applies Civil Rule 5 to adversary proceedings in a bankruptcy. The footnotes that follow cite provisions in Appellate Rule 25, Bankruptcy Rule 8011 (concerning appeals in bankruptcy cases), and Criminal Rule 49 that are similar to those in Civil Rule 5.

6 See also Appellate Rule 25(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review."); Bankruptcy Rule 8011(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal."); Criminal Rule 49(a)(1) ("Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.").

7 See also Appellate Rule 25(c)(2)(A); Criminal Rule 49(a)(3)(A).

filing it with the court's electronic-filing system."[8]

In a case where all parties are represented by counsel,[9] these provisions combine to exempt the litigants from any requirement that they separately serve other litigants; their filings via CM/ECF automatically effect service on all parties. In a case that involves one or more self-represented litigants, however, the situation is more complicated. Service on a self-represented litigant can only be made via CM/ECF if the self-represented litigant is a registered user of CM/ECF – which, as noted in Part I.A.1, occurs only if the litigant receives permission (to use CM/ECF) by court order or local rule.

As for service by a self-represented litigant on a registered user of CM/ECF, one might argue – as a policy matter – that separate service is just as unnecessary as it is when the filer is a registered user of CM/ECF. Because clerk's offices routinely scan paper filings and upload them into CM/ECF, registered users will receive a CM/ECF-generated notice of electronic filing each time a paper filing is uploaded into CM/ECF in one of their cases. However, a number of courts appear to interpret the current rules to require that a person filing by means other than CM/ECF must separately serve the filing, even when the recipient of the filing is a registered user of CM/ECF.[10]

It should be noted that, in its research, the FJC found at least one clerk's office that took a different view of Civil Rule 5(b)(2)(E). Under this office's interpretation, Civil Rule 5(b)(2)(E) exempts paper filers from serving registered users of CM/ECF. The argument is that when a filer submits a filing to the court by a means other than CM/ECF and the court staff then dockets the filing in CM/ECF, the filer has "sen[t the filing] to a registered user by filing it with the court's electronic-filing system" because the filing is eventually uploaded (by the clerk's office) into the court's electronic-filing system. A counter-argument,[11] though, might be that such an argument proves too much: All filings, no matter how submitted, are eventually uploaded into the CM/ECF system, and thus if that interpretation were correct, the drafters of Rule 5(b)(2)(E) could have

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8 See also Appellate Rule 25(d)(1); Criminal Rule 49(b)(1).

9 Civil Rule 5(b)(1) presumptively requires that service on a represented party "must be made on the attorney." See also Appellate Rule 25(b); Criminal Rule 49(a)(2). And Civil Rule 5(d)(3)(A)'s presumptive requirement that "[a] person represented by an attorney must file electronically" guarantees, in practice, that any attorney appearing as counsel of record will be a registered user of CM/ECF. See also Appellate Rule 25(a)(2)(B)(i); Criminal Rule 49(b)(3)(A).

10 See, e.g., Pro Se Handbook for Civil Suits, U.S. District Court, Northern District of Texas, § 6 ("If you and the opposing side are both ECF users, the ECF system will complete the service for you, and a Certificate of Service is not required. If either of you is not an ECF user, or if you learn that service sent through ECF did not reach the person, you must serve the document by other means …."), available at https://www.txnd.uscourts.gov/sites/default/files/documents/handbook.pdf; Electronic Submission For Pro Se Filers, U.S. District Court, Western District of Texas ("Service of pleadings filed in the drop box must be performed by the filing party."), available at https://www.txwd.uscourts.gov/filing-without-an-attorney/electronic-filing-for-pro-se/ .

11 Other possible counter-arguments exist. For example, some rules expressly distinguish between "service by the clerk" and service by "a party." See Appellate Rule 25(b); Bankruptcy Rule 8011(b).

saved eight or nine words by deleting "with the court's electronic-filing system" and instead saying simply, "sending the filing to a registered user by filing it."

B. Current proposals

Pending before the advisory committees are a number of proposals to amend one or more of the electronic filing rules so as to adopt a national rule permitting pro se litigants to file electronically. I will highlight in this section the two most detailed proposals.[12] Sai proposes adoption of nationwide presumptive permission for pro se litigants to file electronically.[13] John Hawkinson, by contrast, proposes that if the requirement of permission by court order or local rule is retained, then the national rules[14] could be amended to address the standard for granting permission.

Sai initially submitted Sai's proposal as a response to the package that became the 2018 electronic filing amendments. Sai has re-submitted the proposal, which includes the following elements:[15]

> 1. Remove the presumptive prohibition on pro se use of CM/ECF, and instead grant presumptive access. This includes CM/ECF access for case initiation filings.
>
> 2. Treat pro se status as a rebuttably presumed good cause for nonelectronic filing.
>
> > a. For pro se prisoners, this is treated as an irrebutable presumption, in the spirit of the FRCrP Committee's notes and for conformity across all the rules.
>
> 3. Require courts to allow pro se CM/ECF access on par with attorney filers, prohibiting any restriction merely for being pro se or a non-attorney, and prohibiting registration fees.
>
> 4. Permit *individualized* prohibitions on CM/ECF access for good cause, e.g. for vexatious litigants, and (in the notes) construe pre-enactment vexatious designation as such a prohibition.

John Hawkinson proposes that Civil Rule 5 be amended to address local court bans on pro se electronic filing, and perhaps to address the standard for granting leave to file

12 Other suggestions also support a national rule allowing pro se electronic filing and offer policy reasons to adopt such a rule. See, e.g., infra note 40 (citing one such suggestion).
13 I focus here on Sai's suggestion No. 21-CV-J, submitted to the Civil Rules Committee.
14 Mr. Hawkinson's suggestion focuses on Civil Rule 5. See Suggestion No. 20-CV-EE.
15 This is an excerpt from Sai's 2017 proposal.

electronically:

> I recently became aware that some districts by standing order unconditionally bar non-attorney pro se litigants from even seeking electronic filing privileges and routinely deny their motions, a sharp contrast from the prevailing practice nationwide. N.D. Ga. Standing Order 19-01 ¶5; LR App.H I(A)(2), III(A). See Perdum v. Wells Fargo Home Mortg., No. 17-cv-972-SCJ-JCF, ECF No. 61 (N.D. Ga., April 12, 2018) (collecting cases). See also Oliver v. Cnty. of Chatham, 2017 U.S. Dist. LEXIS 90362, No. 4:17-cv-101-WTM-BKE (S.D. Ga., June 13, 2017).
>
> The Committee might recommend language in Rule 5 discouraging such blanket bans, and perhaps even that leave should be freely given (such courts have found a "good cause" standard is not met, although it is unclear why. Oliver at *1). It seems an easier lift than removing the motion requirement, and goes to administrative fairness.

II. Possible discussion topics

This section sketches some topics that the advisory committees might consider at their fall meetings. In II.A, I outline some issues about electronic filing, and in II.B, I sketch questions about service.

A. Electronic filing

On the topic of electronic filing, there are questions both about access to the CM/ECF system and about other electronic methods for submitting filings to the court. There are also questions about whether the best way forward is through rule amendments or whether other measures could increase self-represented litigants' electronic access.

Shifting the rules' default position. As noted in Part I.A.1, the current rules permit, but do not require, the courts to provide self-represented litigants with access to CM/ECF. A court can provide such access either by local rule or by order in a case. Should the rules be amended to provide the opposite default rule – namely, that self-represented litigants may[16] use CM/ECF unless the court otherwise provides (by local rule or order in a case)? In assessing this question, it seems important to consider the current practices in the various types of court. Qualitatively, the FJC study reports that "[m]any courts are leery of letting pro se litigants use CM/ECF, but those that have done so reported fewer problems than expected."[17]

16 None of the pending proposals suggests that self-represented litigants should be *required* to use CM/ECF.

17 FJC Study, supra note 2, at 7.

Quantitatively, the study found that, among the courts of appeals, five circuits[18] presumptively permit CM/ECF access for non-incarcerated self-represented litigants,[19] seven circuits allow it with permission in an individual case, and one circuit has a rule against such access (but has made exceptions in some instances).[20] The FJC Study used two techniques to ascertain what district courts are doing on this question: Researchers (in a separate 2019-2022 study) reviewed the local rules for all 94 districts,[21] and researchers in the FJC Study conducted interviews with personnel in 39 district clerks' offices.[22] The researchers report that, based on the local rules, at least[23] 9.6% of districts "permit nonprisoner pro se litigants to register as CM/ECF users without advance permission" (in existing cases, though typically not to file complaints);[24] 55% of districts "state that nonprisoner pro se litigants are permitted to use CM/ECF to file in their existing cases with individual permission"; 15% state "that pro se litigants may not use CM/ECF"; and 19% fail to "specify one way or the other whether pro se litigants can use CM/ECF."[25] Further along the spectrum, the study found that it is "very unusual for pro se debtors to receive CM/ECF" access in the bankruptcy courts.[26]

A proposed rule amendment that flatly required courts to provide self-represented litigants with access to CM/ECF would confront opposition from stakeholders, given that most courts do not offer blanket permission for CM/ECF use by self-represented litigants and some courts bar such use altogether. A proposal to shift the presumption (that is, to presumptively permit rather than to presumptively disallow CM/ECF access for self-represented litigants)

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18 The five-circuit figure excludes the Ninth Circuit, see FJC Study at 7 nn. 3 & 4. But the FJC Study reports, based on its interview(s) with court staff, that "[i]n fact, the [Ninth Circuit] encourages pro se use of CM/ECF." FJC Study at 13; see also Ninth Circuit Rule 25-5(a).

19 In the interests of simplicity, this discussion of e-filing access focuses on non-incarcerated self-represented litigants. Access policies for incarcerated self-represented litigants present distinct issues.

20 See FJC Study, supra note 2, at 6-7.

21 See id. at 4.

22 See id.

23 Given the timing of the FJC's local-rules study, it may not fully capture courts' adoption of more permissive practices specifically during COVID. For instance, "[e]ffective May 1, 2020, and until further notice," the Northern District of California granted blanket permission for self-represented litigants to register for CM/ECF in existing cases. See https://cand.uscourts.gov/cases-e-filing/cm-ecf/setting-up-my-account/e-filing-self-registration-instructions-for-pro-se-litigants/ . This district is not listed as one that has a local rule granting blanket permission. See FJC Study at 7 n.7.

24 The districts with local provisions providing blanket permission include three that have a large volume of cases involving pro se litigants (the Northern District of Texas, the Northern District of California, see supra note 23, and the Northern District of Illinois) as well as districts with a more moderate volume of such cases (the Western District of Washington, the Western District of Missouri, the District of Kansas, and the Southern District of Illinois) and districts with a smaller volume of such cases (the Western District of Wisconsin, the District of Nebraska, and the District of Vermont). See https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map (showing volume of pro se civil cases filed 2000-2019, by district).

25 FJC Study at 7.

26 Id. at 8.

would allow courts to continue their current practices. Under such a shifted presumption, a court wishing to limit or disallow CM/ECF access for self-represented litigants would have to do so by local rule or court order; this would impose on courts the costs of taking such action, but it might also nudge some courts to reconsider their current reluctance to permit such access.

However, participants in the working group discussions have asked whether it would make sense to adopt a default rule that is out of step with the practices of most courts. If not, that might raise the possibility that the case for switching the default rule is stronger with respect to the courts of appeals, where the practice has already moved farthest in the direction of presumptive access to CM/ECF.[27] On the other hand, the fact that the courts of appeals are already moving to increase access without being required to do so by the national rules might be taken, instead, as a reason that a national rule change is not necessary.

Proscribing outright bans. The FJC study found a number of district courts[28] – and, at least nominally, one court of appeals[29] – that do not permit any self-represented litigants to access CM/ECF. As noted in Part I.A, the current rules permit outright bans, in the sense that the rules permit, but do not require, the courts to grant access by local rule or by order in a case. Mr. Hawkinson proposes that the rules be revised to "discourag[e] such blanket bans, and perhaps even [to provide] that leave should be freely given."[30]

Treating case-initiating filings differently. A number of courts are more restrictive with respect to case-initiating filings. The FJC Study notes courts that permit self-represented litigants access to CM/ECF but only for filings after case initiation,[31] as well as a few districts that are similarly restrictive even as to attorneys' filings.[32] Thus, although one proponent of increased CM/ECF access argues that case-initiating access is important,[33] it seems likely that increasing

27 Participants have suggested that the appellate courts' relative willingness to provide CM/ECF access to self-represented litigants may be connected to the relative simplicity of the dockets on appeal (compared with the dockets in the district courts and bankruptcy courts).

28 The FJC Study observes that "[t]he rules for fourteen district courts state that pro se litigants may not use CM/ECF." Id. at 7. In addition to the 14 districts noted in that passage, the study found three other districts that appear to take the same position. See id. at 16 (noting that despite local provisions nominally permitting access by permission, "[i]n fact, pro se litigants are never granted CM/ECF filing privileges" in the District of Idaho); id. at 27 (reporting that in the Southern District of Georgia, "[p]ro se litigants may not file using CM/ECF"); id. at 43 (reporting that in the District of Utah, "[p]ro se parties may not use CM/ECF.").

29 "The electronic filing guide for [the Sixth Circuit] states that the court does not permit pro se litigants to use CM/ECF, … but some pro se litigants have been granted electronic filing privileges as exceptions to the rule." FJC Study at 7. See id. at 12 ("Pro se litigants have occasionally been granted individual exceptions to this proscription. The court is exploring more expansive permission for pro se electronic filing.").

30 See Hawkinson suggestion, supra note 14.

31 See, e.g., FJC Study at 7 ("Pro se plaintiffs seldom can use CM/ECF to file their complaints.").

32 See id. at 23-24 (discussing Western District of Arkansas); id. at 43 (discussing District of Utah).

33 See Sai's proposal, supra note 13, at 24 (arguing that inability to initiate a case via electronic filing

CM/ECF access for case-initiating filings could meet with particular resistance. A prime concern, here, is the difficulty that can ensue if a person uses CM/ECF to mistakenly create a new record with a new case number.[34] However, as a matter of court practice, an intermediate possibility may exist: a number of courts permit attorneys to file complaints via CM/ECF without opening a new case file; the filing goes into a shell case, and the clerk's office then (if appropriate) opens the new case file and transfers the filing into it.[35]

Treating incarcerated self-represented litigants differently. It is not uncommon for local provisions on self-represented filing to distinguish between incarcerated and non-incarcerated self-represented litigants. As the FJC Study found:

> Prisoners cannot use CM/ECF, because they do not have sufficient access to the internet. Some courts have arrangements with some prisons, generally state rather than federal prisons, for electronic submission of prisoner filings. In some arrangements, electronic submission is mandatory and prisoners are not permitted to file on paper.
>
> Typically, a prisoner presents a filing to the prison librarian, who scans it and emails it to the court. Some prisons accept electronic notices on behalf of the prisoners, and then convert them to paper documents. Many prisons do not, so prisoners must be served with other parties' filings and court filings by regular mail.[36]

In considering possible rule changes, it will be important to consider how to take account of the specific issues arising in carceral settings.[37]

Encouraging alternative means of electronic access. One topic of discussion is whether courts could provide self-represented litigants with benefits akin to those of CM/ECF through electronic-submission avenues that do not carry CM/ECF's projected disadvantages.[38] The FJC

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could impede a litigant's ability to timely file a case or to obtain time sensitive interim relief).

34 See FJC Study at 6.

35 See id.

36 Id. at 8.

37 Among the potential complicating factors for incarcerated litigants' access to courts is the fact that they may be moved among different facilities during the pendency of a case. And even if a particular institution provides an opportunity to *file* documents electronically, it may not similarly facilitate receiving and retrieving notices and documents electronically.

38 During prior discussions of CM/ECF access for self-represented litigants, participants cited – as possible downsides of such access – litigants' lack of competence to use CM/ECF; the burden on clerk's offices of training litigants to use CM/ECF and of addressing filing errors; inappropriate filings; inappropriate docketing practices (wrong event or wrong case) and sharing of credentials. See, e.g., Minutes of April 2017 Meeting of Bankruptcy Rules Committee; Minutes of April 2016 Meeting of Civil Rules Committee; Minutes of April 2015 Meeting of Civil Rules Committee; Minutes of March 2015 Criminal Rules Committee Meeting. Compare FJC Study at 7 (stating that courts that have allowed self-

Study observes that "[s]ome courts … accept submissions by email" and "[a] few accept submissions by electronic drop box, a web portal that allows a user to upload a PDF," but that "[m]any to most courts do not accept such electronic submissions."[39]

An avenue for electronic submission of filings to the court would offer self-represented litigants a number of the advantages offered by CM/ECF access. Litigants would avoid the costs and logistical challenges[40] of printing and mailing the papers filed with the court, and their filings would reach the court more quickly than if they were filed by mail. Advantages would also accrue to court personnel who would spend less time scanning paper filings. And court personnel and litigants who have visual impairments could benefit because files submitted electronically may be more likely to be accessible to those with visual impairments than files created by scanning paper filings.[41]

A perhaps unsettled question is whether an alternative electronic-submission system would automatically offer self-represented litigants the benefit of a later filing deadline. Under the time-computation rules, those using "electronic filing" presumptively may file up to midnight in the court's time zone, whereas those using "other means" of filing must file before the scheduled closing of the clerk's office.[42] If submission via email to a court-provided email address or via upload to a court's electronic drop box were regarded as "electronic filing," then the users of such systems could benefit from that extended filing time. However, it is not entirely certain that all courts would take this view; accordingly, it seems useful for a court adopting such a submission system to clarify by local rule the time-of-day deadline for such electronic submissions.[43]

It should be noted that provision of an alternative method for electronic *submission to the court* will not by itself offer self-represented litigants all of the advantages of CM/ECF participation. Two of those advantages merit separate discussion: electronic noticing, and avoiding the need for separate service on registered CM/ECF users. The CM/ECF system automatically provides registered users with electronic notice (and a free download) of any filings in their cases. A number of courts separately provide self-represented litigants who are

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represented litigants to use CM/ECF "reported fewer problems than expected").

39 FJC Study at 9.

40 Logistical challenges include those faced by filers outside the country, those with a disability, and those who have health concerns about visiting public spaces during the pandemic. See Sai's proposal, supra note 13, at 27; comment of Dr. Usha Jain, Nos. 20-AP-C & 20-CV-J.

41 See infra note 47.

42 See Bankruptcy Rule 9006(a)(4); Civil Rule 6(a)(4); Criminal Rule 45(a)(4). Appellate Rule 26(a)(4) includes a few more tailored approaches for particular filing scenarios, but adopts the same basic idea that electronic filers get the latest deadline – midnight in the relevant time zone.

This feature of the time-computation rules is currently under study. See generally Tim Reagan et al., Electronic Filing Times in Federal Courts (FJC 2022), available at https://www.fjc.gov/content/365889/electronic-filing-times-federal-courts .

43 The time-computation rules permit courts to specify a different time of day via local rule or order in a case. See the rules cited supra note 42.

not users of CM/ECF with the opportunity to register to receive electronic notice of filings in their case.[44] Such an electronic-notice mechanism seems to be an important component of a program to provide self-represented litigants with access equivalent to that furnished by CM/ECF – both because it provides an avenue for notice that may be more timely and effective than service by mail[45] and because the notice recipient receives an opportunity to download an electronic copy of the relevant filing.[46] Among other advantages, such an electronic copy may increase accessibility for readers with visual disabilities, because this electronic copy will likely be more amenable to use by text-to-speech programs than a copy made by scanning a paper received in the mail.[47] On the other hand, it makes sense that the courts providing an electronic-noticing program typically make it optional, not mandatory – because some self-represented litigants could not navigate the electronic-notice-and-download tasks and, for those litigants, hard copies sent by mail are the better option.

As noted in Part I.A.2, because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. To qualify for this exemption the litigant must "send[the paper] to a registered user by filing it with the court's electronic-filing system." For the reasons noted in Part I.A.2, a court might conclude that submission via an alternative means of electronic access (email or upload to a court portal) does not fit within this description. In that view, electronic submission to the court outside of CM/ECF might not exempt a self-represented litigant from the duty to separately serve all other parties (even those that are registered users of CM/ECF). This issue could be addressed by adopting a local rule exempting non-CM/ECF users from separately serving registered CM/ECF users,[48] or by revising the national rules concerning service. I turn to the latter possibility in Part II.B.

Non-rule-based avenues for change. A recurring question during the working group's discussions has been whether the rules themselves are an impediment to increasing access for

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44 See FJC Study at 11. See also, e.g., U.S. District Court, S.D.N.Y., Pro Se (Nonprisoner) Consent & Registration Form to Receive Documents Electronically, available at https://www.nysd.uscourts.gov/sites/default/files/pdf/proseconsentecfnotice-final.pdf .

45 Sai has pointed out that the ability to receive electronic notice of filings is particularly important for litigants who are traveling or who have a disability. See Sai's proposal, supra note 13, at 24-25.

46 See FJC Study at 11 ("CM/ECF electronic notice gives an attorney or a pro se litigant one free look at the filing. If the recipient of the notice does not print or download the document during the one free look, then the recipient will have to pay Pacer fees to look at it again.").

47 As Sai points out, a text-to-speech program cannot read a scanned PDF unless the scanned PDF is first processed using optical character recognition ("OCR") technology; and the resulting OCR-processed file may contain errors that would not be present in the same document if it were in native PDF format. See Sai's proposal, supra note 13, at 28.

48 Local rules, of course, must be "consistent with" the national rules. Civil Rule 83(a)(1); see also Appellate Rule 47(a)(1); Bankruptcy Rule 9029(a)(1); Criminal Rule 57(a)(1). For the reasons discussed in Part I.A.2, perhaps the national service rules might be viewed as ambiguous on the question of what counts as "sending … to a registered user by filing … with the court's electronic-filing system." If so, then a local rule could be viewed as clarifying that ambiguity.

self-represented litigants. With the possible exception of the service issue (discussed in Part II.B), the access issues noted in this memo could be addressed by a court entirely through local provisions, consistent with the current national Rules. A court could offer self-represented litigants access to CM/ECF. Or it could offer self-represented litigants a non-CM/ECF option to email or upload documents plus an option to register to receive electronic notices of others' filings in the case. While the current rules do not nudge the courts in this direction, neither do they impede a court from pursuing this direction if it wishes to do so.

Thus, some participants have asked whether the proposals to increase electronic-filing access are best addressed by measures other than a rule amendment. A helpful approach might be to provide resources and training that could address underlying reasons for reluctance to expand electronic access for self-represented litigants. Resources might include, for example, training modules that could be provided to self-represented litigants on the use of CM/ECF, and anti-malware technology that could be provided to courts to screen electronic files submitted via email or upload. Such matters lie outside the province of the rules committees, but it could be useful for the rules committees to consider making a recommendation that other federal-judiciary actors study these matters – for example, the Judicial Conference Committee on Court Administration and Case Management and perhaps the Judicial Conference Committee on Information Technology, in coordination with any existing working group that is addressing issues facing self-represented litigants.

The need for broad consultation. The public suggestions proposing greater access for self-represented litigants have raised important points about the experience of those who represent themselves in federal court. Further insights on the experience of pro se litigants might be gained by consulting lawyers with experience assisting pro se litigants in federal court.[49] It is likewise important to gain perspective from clerks' office personnel. The interviews conducted by the FJC provide a head start on that task; as proposals are developed, it could also be useful to solicit views from organizations such as the National Conference of Bankruptcy Clerks, the Federal Court Clerks Association, the Administrative Office's Bankruptcy and District Clerk Advisory Groups, and the circuit clerks.

B. Service on registered CM/ECF users

Part I.A.2 observed that because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even persons that are CM/ECF users. It would be useful for the advisory committees to consider whether this difference in treatment is desirable.

Requiring self-represented litigants to make separate service on registered CM/ECF users may impose an unnecessary task. Each filing a self-represented litigant makes by a means other

49 A potential resource, in this regard, is the Federal Courts working group of the Self-Represented Litigation Network, see https://www.srln.org/taxonomy/term/677.

than CM/ECF will eventually be uploaded by the clerk's office into CM/ECF, and at that point all registered CM/ECF users in the case will receive a notice of electronic filing and an opportunity to download the document. As a practical matter, though there may be a lag between the submission of the document and the time when the court clerk uploads it into CM/ECF, it seems plausible to surmise that the document will ordinarily become available to the judge no sooner than it becomes available to registered users via the notice of electronic filing.

The hardship imposed by that additional task (serving registered CM/ECF users) will depend on the circumstances of the case and the litigant. For some litigants, effecting separate service might not be onerous; this would be true if the self-represented litigant is thoroughly conversant with email and has been able to obtain all other litigants' consent to email service. But for self-represented litigants who lack reliable access[50] to or proficiency with email – or who have not been able to obtain their opponent's consent to email service – the separate-service requirement means making additional hard copies of the paper in question and delivering them by non-electronic means. And regardless of the alternate service method (email or paper), the rules require a certificate of service, which is an additional technical requirement that might trip up a self-represented litigant.

Presumably for these reasons, some courts have adopted local provisions eliminating the requirement of separate service on registered users of CM/ECF.[51] A question for the advisory committees is whether it would be useful to amend the national rules to adopt that approach. Such an amendment would provide a national imprimatur for the existing local rules, and would also change the practice in districts that currently require separate service even on registered CM/ECF users. Because some districts have already adopted this practice, there is a reservoir of experience on which the committees could draw in determining whether the practice has any downsides.[52]

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50 For instance, many incarcerated litigants likely lack reliable access to email.

51 See, e.g., D. Ariz. E.C.F. Admin. Policies & Procedures Manual II.D.3 ("A non-registered filing party who files document(s) with the Clerk's Office for scanning and entry to ECF must serve paper copies on all non-registered parties to the case. There will be some delay in the scanning, electronic filing and subsequent electronic noticing to registered users. If time is an issue, non-registered filers should consider paper service of the document(s) to all parties."); S.D.N.Y. Electronic Case Filing Rule 9.2 ("Attorneys and pro se parties who are not Filing or Receiving Users must be served with a paper copy of any electronically filed pleading or other document. Service of such paper copy must be made according to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Local Rules. Such paper service must be documented by electronically filing proof of service. Where the Clerk scans and electronically files pleadings and documents on behalf of a pro se party, the associated NEF constitutes service.").

52 Personnel in those courts could tell us, for example, how non-CM/ECF users discern which other litigants are and are not registered CM/ECF users. Litigants who file via CM/ECF receive a system-generated notice of electronic filing that says who is being automatically served and who is not. Paper filers will not receive the notice of electronic filing (unless, perhaps, they are registered for electronic noticing). Such filers might instead draw inferences from a party's status as counseled or self-represented, or from the contact information listed on the docket sheet; or they might ask the clerk's office.

If the advisory committees are inclined to consider such amendments, questions about implementation arise. For example, should the exemption extend only to service on registered CM/ECF users, or should it also encompass service on non-CM/ECF users who have registered with the court to receive notices of electronic filing in the case? And, of course, there are drafting questions. As to the latter, I sketch below – purely for purposes of illustration – one possible way to accomplish this type of amendment; but there may well be better ways to implement the idea. The sketch below illustrates a possible amendment to Civil Rule 5:

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service <u>on non-users of electronic-filing [and electronic-noticing] system[s]</u> ~~in General~~. A paper is served under this rule <u>on [one who has not registered for the court's electronic-filing system] [one who has not registered for either the court's electronic-filing system or a court-provided electronic-noticing system]</u> by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address--in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic-filing system or~~ sending it by ~~other~~ electronic means that the person consented to in writing--in ~~either of~~ which event~~s~~ service is complete upon ~~filing or~~ sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing--in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) ~~Using Court Facilities. [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.)]~~ **Service on users of the court's electronic-filing [or electronic-noticing] system**. A paper is served under this rule on a registered user of [either] the court's electronic-filing system [or a court-provided electronic-noticing system] by filing it, in which event service is complete upon filing, but is not effective if the filer learns that it did not reach the person to be served.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

* * *

(B) Certificate of Service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-filing system~~ under subdivision (b)(3). When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

* * *

III. Conclusion

The FJC Study has given the advisory committees an invaluable factual basis on which to consider whether amendments to the national rules might usefully address questions of electronic filing, and questions of service, by self-represented litigants. As noted in Part II, an additional question is whether the rulemaking committees might recommend that other groups within the federal judiciary consider fostering increased access through means other than rule amendments. I look forward to learning from the advisory committees' discussion of those possibilities.

Federal Courts'

Electronic Filing by Pro Se Litigants

Federal Judicial Center
2022

FEDERAL COURTS' ELECTRONIC FILING BY PRO SE LITIGANTS

Tim Reagan, Carly Giffin, and Roy Germano
Federal Judicial Center 2022

We learned from several dozen federal clerks of court and members of their staffs that pro se litigants[1] are sometimes able to file electronically using the federal courts' Case Management/Electronic Case Files (CM/ECF) system, but many courts are hesitant to allow pro se filing in CM/ECF. Prisoners have limited access to the internet at most, so it is seldom feasible for them to use CM/ECF.

Many courts accept filings from pro se litigants, including prisoners, by electronic submission: email, PDF upload, or online form. Like paper submissions, the electronic submissions are docketed as electronic filings by the court's staff. Concerns about malware and cost are among the reasons that courts have not embraced more extensively electronic submission alternatives to CM/ECF.

We conducted this research at the request of the federal rules committees' working group on pro se electronic filing. The most salient rules-related lessons of this research are (1) perhaps paper filers should not be required to serve their filings on parties already receiving electronic service; and (2) because electronic filing is sometimes understood to mean filing using CM/ECF and sometimes understood to mean submitting filings electronically, such as by email, perhaps the rules should clarify their references to electronic filing.

Contents

1. We use the expression "pro se," but we recognize the growing trend to use less jargony expressions, such as "self represented," "unrepresented," "not represented," "uncounseled," "lawyerless," "without an attorney," and "without counsel." The legal community has not yet settled on a preferred alternative to "pro se," and we have declined to weigh in.

Method

Important Distinctions

We kept four distinctions in mind:

1. *Case Initiation.* There is a big difference between using CM/ECF to file in an existing case and using CM/ECF to initiate a case. The former is much more available to pro se litigants than the latter.
2. *Electronic Submission.* There is a difference between electronically submitting something to the court—by email, electronic drop box, or preparation software—and actually using CM/ECF to file it. Submissions are converted into filings by the court's staff after a quality control review.
3. *Prisoners.* Prisoners do not have unrestricted access to the internet, so their ability even to submit things electronically depends upon procedures developed by the prisons.
4. *Case Types.* Appeals, civil cases, criminal cases, and bankruptcy cases present different pro se electronic filing challenges and opportunities.

Interview Questions

There are 190 clerks of court. This includes one for each of the ninety-four district courts and the thirteen courts of appeals. There are only ninety bankruptcy courts, because there is one bankruptcy court for both districts in Arkansas and three territorial districts have bankruptcy divisions, not separate bankruptcy courts. There seven districts with district court clerks who also oversee the districts' bankruptcy courts. We contacted seventy-nine clerks of court, and all but one agreed to participate in this study. We found a loosely structured interview to be an effective method. We spoke with the clerks or other knowledgeable members of their staffs.

Following are the topics that we discussed.

1. *Permitted.* Are pro se litigants permitted to file electronically?
2. *Prisoners.* Are prisoners ever able to submit filings electronically?
3. *Other Filers.* In bankruptcy cases, to what extent can parties appearing without attorneys, such as pro se creditors, use CM/ECF?
4. *Procedures.* What are the procedures that pro se litigants follow to become electronic filers?
5. *Initiating Cases.* Can pro se litigants initiate cases electronically? In some courts, even attorneys do not open cases in CM/ECF directly; they may submit initial documents to the court electronically, but it is the court that actually opens the case and assigns it a case number.

6. *Criminal Cases.* Are criminal cases opened electronically by the U.S. Attorney's office, or are they opened with the submission of a paper indictment or other charging document? Are criminal defendants ever able to file electronically? Few criminal defendants are pro se, they are typically detained, and they usually have assigned stand-by counsel who help them with filing and service.
7. *Service.* Are paper filers required to provide paper service to parties who are receiving electronic service? Paper filings are docketed electronically by the court, so electronic service on other parties occurs as a matter of course. But some courts require separate service.
8. *Email and Fax.* Does the court ever accept filings by email, fax, or electronic drop box?
9. *Signatures.* When the court receives electronic submissions, as by email or fax, what are the court's requirements for signatures?
10. *Drop Box.* Does the court have a physical drop box? Where is it located? When is it available? Physical drop boxes often were removed when the court began using electronic filing, and they often came back because of the COVID-19 pandemic.
11. *Time Stamp.* How do things submitted to a drop box get a time stamp?

Court Selection

From December 2021 through March 2022, we interviewed clerks' offices for five of the thirteen courts of appeals, thirty-nine of the ninety-four district courts, and forty of the ninety-three bankruptcy courts and divisions.

From 2019 through 2022, we studied filing times of day for another project.[2] From a review of court rules for the filing-time project, we were able to classify courts into those that (1) generally permit the use of CM/ECF by pro se litigants, (2) permit pro se use of CM/ECF with permission, (3) forbid pro se use of CM/ECF, and (4) do not clearly state one way or the other whether pro se litigants can seek permission to use CM/ECF.

Among the courts of appeals, five generally permit pro se use of CM/ECF, seven permit it with permission, and one forbids it. We selected one court at random from each group, and we also interviewed the courts of appeals for two unusual circuits: the Ninth, because of its unusual size and complexity, and the Federal, because of its unusual jurisdiction.

There are ten districts that do not have separate bankruptcy clerks of court, including the three territorial courts without separate bankruptcy courts. We interviewed the clerks' offices for four selected at random. In addition, we interviewed the clerks' offices for the two other districts that explicitly authorize pro se use of CM/ECF in the district court, one generally (the District of Vermont) and one with permission (the District of Columbia).

2. Tim Reagan, Carly Giffin, Jessica Snowden, George Cort, Jana Laks, Roy Germano, Marie Leary, Saroja Koneru, Jasmine Elmasry, Nafeesah Attah, Rachel Palmer, Annmarie Khairalla, and Danielle Rich, Electronic Filing Times in Federal Courts (Federal Judicial Center 2022), www.fjc.gov/content/365889/electronic-filing-times-federal-courts.

We interviewed thirty-three district courts where the same clerk does not oversee both district court and bankruptcy cases. We interviewed eighteen selected at random. We interviewed five additional district courts so that we would have interviewed all seven that generally permit nonprisoner pro se use of CM/ECF in civil cases, including one that requires pro se use of CM/ECF unless the judge grants an exception (the Northern District of Texas). We interviewed an additional district court that we initially but erroneously thought generally permitted nonprisoner pro se use of CM/ECF. We interviewed one additional district court so that we would have interviewed four of the fourteen that do not clearly state one way or the other whether pro se use of CM/ECF is permitted. We selected to interview at random two of the thirteen district courts that forbid pro se use of CM/ECF, but one court declined to participate. We interviewed another two with rules forbidding pro se use of CM/ECF, because in the filing-time project we observed pro se use of CM/ECF in 2018.

We interviewed the Eastern District of Washington, because its rules state that pro se electronic filing is possible for prisoners. It turns out to be electronic submission rather than use of CM/ECF. We interviewed the Southern District of Alabama, because its rules state that pro se use of CM/ECF can be ordered. The judges wanted this option, but they have never used it. We decided to interview the District of Arizona, because it is often regarded as a model court with respect to judicial policy initiatives. And we interviewed two district courts because their rules provide for a time-of-day deadline before midnight, a feature relevant to the filing-time project.

We interviewed thirty-four bankruptcy courts where the same clerk does not oversee both district court and bankruptcy cases. We interviewed twenty-one selected at random. We interviewed seven additional bankruptcy courts so that we would have interviewed all eight with rules stating that they permit pro se use of CM/ECF with permission. We interviewed one of the remaining six bankruptcy courts, out of eight total, with rules explicitly forbidding pro se use of CM/ECF.

We interviewed another five bankruptcy courts that use the "electronic self-representation" (eSR) module for electronic submission of bankruptcy petitions. These were not selected precisely at random, because we learned about some using eSR after we made the selections.

Observations

Electronic Filing by Attorneys

Electronic presentation to the court of a document to be included in the case file is faster than regular mail and faster than personal delivery, if the filer has the necessary electronic equipment. Electronic filing has been an option in federal courts for about two decades.

There has long been a distinction between submission of a document to the court and filing it. In the days of paper filing, if a document was obviously suitable for filing, a counter clerk would stamp copies "filed" and add the document to the appropriate case file. Otherwise, the counter clerk would stamp

copies something like "received," and the court would later determine whether it would be included in the case file. A document presented to the court but not immediately accepted for filing was frequently referred to as "lodged" with the court.

With CM/ECF, there is an important distinction between using CM/ECF to immediately add a document to a case file, true e-filing, and otherwise submitting a document to the court, which then perhaps uses CM/ECF to add the document to the case file. The court may do this with a document it receives electronically or with a document it receives on paper.

In most district courts, an attorney opens a civil case directly by filing a complaint in CM/ECF, thereby immediately creating a new case record with a new case number. Attorneys are sometimes interrupted, and they sometimes make mistakes. Failed attempts to create new cases used to result in skipped case numbers. Because skipped case numbers look like sealed cases, courts now typically reuse case numbers for cases that were never fully opened.

In some courts, attorneys may use CM/ECF to file complaints, but they do not create new cases that way. The complaint may be filed in a shell case, and then deputy clerks transfer the new filing to a new case record. A few courts still receive complaints on paper, even from attorneys who will use CM/ECF for later filings in existing cases.

Procedures for filing a bankruptcy petition are similar to procedures for filing a civil complaint.

Criminal cases are typically opened by paper indictment, information, or complaint, which deputy clerks file into new cases. Even if the court accepts filings for new criminal cases electronically, it is typically the court and not the U.S. attorney's office that opens the case in CM/ECF.

In the courts of appeals, it is always members of the court staff who open the cases. When a notice of appeal is filed in a district court, and the filing fee paid to the district court, the staff of the district court electronically transmits the most relevant parts of the record to the court of appeals, and the staff of the court of appeals opens a new case, assigning it a case number. Agency appeals and mandamus actions—original cases in the courts of appeals—can be opened using CM/ECF, but attorneys do not open the cases directly. Similar to how some district courts accept new complaints in shell cases, CM/ECF is used in the courts of appeals to submit an original action electronically, but it is court staff that actually make the new case's electronic record live with a case number.

Once a case is opened, attorneys generally are required to use CM/ECF to file.

Pro Se Filing in the Courts of Appeals

Filing in the courts of appeals is less complicated than filing in the district and bankruptcy courts. It is mostly briefs, with the occasional motion practice. The typical case has an appellant brief, an appellee brief, maybe a reply brief, and a decision. According to their local rules and administrative procedures, five

courts of appeals generally permit pro se litigants to register as CM/ECF users[3] and seven allow them to do so with individual permission.[4] The electronic filing guide for one court states that the court does not permit pro se litigants to use CM/ECF,[5] but some pro se litigants have been granted electronic filing privileges as exceptions to the rule.

Nonprisoner Civil Cases

Based on a review of all local rules,[6] the rules for somewhat more than half of the district courts state that nonprisoner pro se litigants are permitted to use CM/ECF to file in their existing cases with individual permission (55%). At least nine courts permit nonprisoner pro se litigants to register as CM/ECF users without advance permission (9.6%),[7] but they usually can file only in their existing cases. Pro se plaintiffs seldom can use CM/ECF to file their complaints. The rules for fourteen district courts state that pro se litigants may not use CM/ECF (15%).[8] The rules for the other district courts do not specify one way or the other whether pro se litigants can use CM/ECF (19%).

To use CM/ECF, the filer must have an email address and be able to create PDFs. Typically it is the presiding judge who considers pro se requests to use CM/ECF, which typically are presented by formal motion. In some courts, the approval decision is made by the clerk's office, and a less formal application is required. Courts generally avoid giving electronic filing privileges to vexatious litigants.

Many courts are leery of letting pro se litigants use CM/ECF, but those that have done so reported fewer problems than expected. Electronic filing saves court time that otherwise would be spent scanning documents.

Pro se litigants sometimes have mental health issues that might result in filings that depart from customary practice. Even without mental health issues, they sometimes make errors using CM/ECF. Attorneys make errors sometimes as well. But attorney errors are somewhat easier to correct than pro se

3. The courts of appeals for the First, Third, Eighth, Eleventh, and Federal Circuits.

4. The courts of appeals for the District of Columbia, Second, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits.

5. The court of appeals for the Sixth Circuit.

6. A review for another project of all of the courts' local rules and all of the courts' office hours was conducted by Tim Reagan, Carly Giffin, Jessica Snowden, Saroja Koneru, Jasmine Elmasry, Nafeesah Attah, Rachel Palmer, Annmarie Khairalla, and Danielle Rich.

7. The district courts for the Northern District of Illinois, the Southern District of Illinois, the District of Kansas, the Western District of Missouri, the District of Nebraska, the Northern District of Texas (where nonprisoner pro se litigants are typically required to use CM/ECF), the District of Vermont, the Western District of Washington, and the Western District of Wisconsin.

8. The district courts for the Middle District of Alabama, the Northern District of Alabama, the District of Alaska, the Northern District of Georgia, the Northern District of Mississippi, the Southern District of Mississippi, the District of Montana, the District of New Jersey, the Eastern District of North Carolina, the Western District of North Carolina, the District of North Dakota, the Western District of Oklahoma, the Eastern District of Virginia, the District of Wyoming.

errors, because the court does not owe attorneys the same level of forgiveness that it owes pro se litigants. Also, because attorneys are familiar with the rules, their mistakes do not arise from substantial misunderstandings about procedures.

Courts that have transitioned to the Next Generation of CM/ECF (NextGen) do not give litigants CM/ECF filing privileges directly. A litigant first registers with Pacer (the federal courts' Public Access to Court Electronic Records). Then the court links the Pacer account to CM/ECF filing privileges in the court. Typically the court limits the filing privileges to the pro se litigants' existing cases.

Electronic Filing in Civil Cases by Prisoners

Prisoners cannot use CM/ECF, because they do not have sufficient access to the internet. Some courts have arrangements with some prisons, generally state rather than federal prisons, for electronic submission of prisoner filings. In some arrangements, electronic submission is mandatory and prisoners are not permitted to file on paper.

Typically, a prisoner presents a filing to the prison librarian, who scans it and emails it to the court. Some prisons accept electronic notices on behalf of the prisoners, and then convert them to paper documents. Many prisons do not, so prisoners must be served with other parties' filings and court filings by regular mail.

Courts that have adopted electronic communications with prisoners reported a reduction in controversies over the reliability of prison mail.

Some courts currently require, or used to require, prisons to send to the court in batches the original documents that were scanned and submitted electronically for the prisoners. That provides the court with originals in case there is a problem with the scans, and it provides the court with wet signatures.[9]

Criminal Cases

It is theoretically possible for a pro se criminal defendant who is not detained to obtain CM/ECF filing privileges in some district courts. But criminal defendants are often detained. Very few are pro se. Even those that are pro se typically have appointed standby counsel, and one of the things that standby counsel does is assist the defendants with filing.

Pro Se Electronic Filing in Bankruptcy Cases

It is very unusual for pro se debtors to receive CM/ECF privileges.

Several courts offer eSR, which is now easily available to courts using NextGen CM/ECF. This "electronic self-representation" module allows the

9. A wet signature is an original signature made with a writing device (generally with temporarily wet ink) on physical paper. *See generally* Molly T. Johnson, Bankruptcy Court Rules and Procedures Regarding Electronic Signatures of Persons Other than Filing Attorneys (Federal Judicial Center 2013), www.fjc.gov/content/317113/bankruptcy-court-rules-and-procedures-regarding-electronic-signatures-persons-other.

debtor to prepare a bankruptcy petition package on the court's website, including the petition itself, statements, schedules, and the creditor matrix. The package is electronically submitted to the court, and the debtor must provide payment and signature pages separately, either by regular mail or by a visit to the court.

One of eSR's advantages for the court is that the petitions generated with eSR are structurally whole. The petitions are legible, because they are not handwritten. The debtor benefits from eSR's helping the debtor to create the petition in addition to the obvious benefits of avoiding the inconvenience of travel to the court or the delay of regular mail. Some courts are concerned, however, that eSR may make filing a petition too easy, because the debtor receives no advice on whether bankruptcy is the right way to go. Also, eSR does not really provide electronic self-representation, because actual representation would extend beyond the filing of a petition. Subsequent filings cannot be submitted with eSR. Still, some bankruptcies are "one and done," in that the debtor does not file anything after the initial petition package, which includes the petition itself and the necessary schedules and statements.

Many bankruptcy courts allow pro se creditors to register with CM/ECF as limited filers. Alternatively, most courts allow pro se creditors to use the courts' electronic proof of claim (ePOC) portals. CM/ECF filing privileges are more likely to be granted to and used by large businesses that are frequent filers.

Electronic Submission

Forms of electronic submission other than filing in CM/ECF offer many of the benefits of true electronic filing without requiring a pro se litigant to master CM/ECF. Arrangements with prisons for electronic submissions by prisoners are an example. Some courts otherwise accept submissions by email. A few accept submissions by electronic drop box, a web portal that allows a user to upload a PDF. Many to most courts do not accept such electronic submissions.

Electronic submission saves the court the time required to scan paper documents, and it relieves courts of the sometimes physically difficult mail they can get from prisons. Electronic submissions often do require staff time to organize or even sift through PDFs to convert submissions to proper filings. And there are security concerns when the court gets electronic submissions directly from pro se litigants. The court does not have to scan a paper document into an electronic one, but it may need to scan the email for malware.

Although the Administrative Office has developed eSR for bankruptcy petitions, it does not appear to have developed a module for courts to receive other electronic submissions, and costly security requirements have dissuaded some courts from developing their own. Several courts reported that they developed their own electronic drop boxes, typically called the Electronic Document Submission System (EDSS). Courts are also looking at Box.com as an option.

Most courts do not generally accept filings by email or fax, and fax is now a seldom-used method of submission anyway. Many courts have accepted

emergency filings by email with individual special arrangements. During the COVID-19 pandemic, some courts became more lenient with email filings, and some of those courts have become less lenient again as the pandemic eased.

Considering our sampling scheme, we can estimate how many courts have accepted electronic submissions by prisoner or nonprisoner pro se litigants for filing, one way or another, at least occasionally, and perhaps because of the COVID-19 pandemic: 69% of the courts of appeals, 80% of the courts where the same clerk oversees both district court and bankruptcy cases, 50% of the other district courts, and 78% of the other bankruptcy courts.

Physical Drop Boxes

Many courts stopped using drop boxes with the advent of electronic filing. Some began to use them again during the COVID-19 pandemic, when many intake counters closed or reduced their hours.[10] Drop boxes also facilitated social distancing by relieving a filer of a visit to the counter. Some courts that established drop boxes during the pandemic have continued to use them, and some have not.

In a few courts, the drop box is available at all hours, typically because it is outside the building, but in at least one location because the building never closes. Much more commonly, the drop box is available only for a short time before the clerk's office opens and for a short time after it closes, because it is only available during the building's open hours. Although it is typical for a time stamp to be at the drop box, some drop boxes do not have time stamps. If the drop box does not have a time stamp, documents retrieved in the morning typically are dated as received the day before.

Many courts are concerned about the security threat posed by a drop box, especially if it were to be accessible from outside the building's security. Use of drop boxes that do exist appears to be light.

Filing Fees

In many courts, filing fees can be paid electronically using Pay.gov.

Interestingly, many courts no longer accept cash, and those that do often cannot make change. It is sometimes more expensive to maintain bank accounts and transport cash to the bank than the court receives in cash fees.

Bankruptcy courts generally do not accept payment by personal check, debit card, or credit card for bankruptcy petition filing fees. Cashier's check, money order, and sometimes cash are accepted. Some bankruptcy courts accept payments via Pay.gov, but that requires special arrangements with Pay.gov to block credit card and debit card options.

10. Court hours are given in this report for each court in the study based on research done in 2019, before the COVID-19 pandemic.

Signatures

Electronic signatures are a part of using CM/ECF. Documents submitted electronically some other way will not have wet signatures, but they may have images of original signatures.

The bankruptcy courts are much more concerned about original signatures than the district courts and the courts of appeals are. Filings in the district courts and the courts of appeals do not generally have the same immediate impact on the filer and others, aside from an obligation to respond, as the filing of a bankruptcy petition does. In the district courts and the courts of appeals, an impact on others generally requires court action.

During the COVID-19 pandemic, some courts accepted images of original signatures without requiring wet signatures as an emergency measure.

If a wet signature is required, it must be submitted within a certain number of days after an electronic submission. That is generally the requirement for use of eSR. In the district courts, filers are sometimes required only to maintain original wet signatures for a period of time in case they are needed.

Electronic Notice and Service

Some courts permit pro se litigants to register for electronic notice of other parties' filings without having CM/ECF filing privileges. CM/ECF electronic notice gives an attorney or a pro se litigant one free look at the filing. If the recipient of the notice does not print or download the document during the one free look, then the recipient will have to pay Pacer fees to look at it again. If a party is represented by more than one attorney, each attorney may get his or her own one free look.

In the bankruptcy courts, pro se debtors can register for the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN).

Some courts do not require paper filers to separately serve other parties who already are receiving electronic notice. In some courts, there still is a separate service requirement on paper, but it may not be enforced. Rules are rules, except when they are not rules. But when rules are not rules, when are rules rules? In some courts, separate service is required, and certificates of service are carefully examined to make sure they reflect service on all parties.

Information About Individual Courts

The following narratives present what we learned from each of the seventy-eight clerks' offices participating in this study (a sample size of 41%).

Courts of Appeals

The Court of Appeals for the First Circuit

This court was selected for this study at random from among the courts of appeals.

The United States Court of Appeals for the First Circuit has six judgeships. The clerk's office in Boston is open from 8:30 to 5:00. 1st Cir. I.O.P. ¶ I.B.

Electronic filing is governed by the court's Rule 25.0. Nonprisoner pro se litigants are permitted to register as filers in CM/ECF. *Id.* R. 25.0(c). "Unless otherwise required by statute, rule, or court order, filing must be completed by midnight in the time zone of the circuit clerk's office in Boston to be considered timely filed that day." *Id.* R. 25.0(d)(3).

Pro se litigants can use CM/ECF without advance permission, but only the clerk's office actually opens cases. Direct appeals begin with the submission of records by the district courts or the Bankruptcy Appellate Panel (BAP) following notices of appeal; the staff in the court of appeals uses those submissions to open cases and assign case numbers. In direct appeals, the filing fee is paid to the district court or to the BAP. Electronic filers can submit initial documents using CM/ECF in petitions for review of agency decisions, mandamus actions, and applications to file successive habeas corpus petitions. The clerk's office uses the electronic submissions to open the cases.

Except on rare occasions, the court does not accept submissions from filers by email or fax. Because of office closures during the COVID-19 pandemic, it established a drop box, which is available when the building is open, a few hours longer than regular court hours. There is a time stamp available at the drop box for filers' use, and the drop box is checked by the court's staff at least twice a day.

There is no procedure for prisoners to file electronically.

The Court of Appeals for the Sixth Circuit

This court of appeals was selected for this study because it is the only one with rules forbidding electronic filing by pro se litigants.

The United States Court of Appeals for the Sixth Circuit has sixteen judgeships. The clerk's office in Cincinnati is open from 8:00 to 5:00.

Electronic filing is governed by the court's Rule 25 and the court's Guide to Electronic Filing [hereinafter ECF Guide], *see* 6th Cir. R. 15. "No unrepresented party may file electronically; unrepresented parties must submit documents in paper format. The clerk will scan such documents into the ECF system, and the electronic version scanned in by the clerk will constitute the appeal record of the court as reflected on its docket." 6th Cir. ECF Guide ¶ 3.3. Pro se litigants have occasionally been granted individual exceptions to this proscription. The court is exploring more expansive permission for pro se electronic filing.

Because of the COVID-19 pandemic, the court began permitting nonprisoner pro se litigants to submit filings by email without advance permission. This resulted in some improper emails, such as an article a pro se litigant thought, in the middle of the night, that the court should read. The court is more comfortable with email submission than CM/ECF filing for pro se litigants because it gives the clerk's office a chance to review submissions before they are docketed. As it is, even attorneys sometimes make mistakes with their filings, incorrect docket entries are locked, and attorneys are notified of the errors so that they can correct them.

There is no provision in the circuit for electronic submission by prisoners. Paper submissions by prisoners are sometimes physically filthy.

Signatures in email submissions must be handwritten and scanned.

Paper filers must provide paper service even to parties receiving electronic service. Case managers scrutinize certificates of service.

Fax submissions are not accepted. Nor does the court have a physical drop box.

One challenge of electronic docketing is electronic notice. Sometimes attorneys' email addresses change, such as when they change firms. The clerk's office has to track down new email addresses for those attorneys. Electronic notice to pro se filers could pose similar problems, although litigants' street addresses also could change. Pro se litigants currently receive notice only by regular mail. A temporary difficulty arose when the Ohio Department of Corrections decided that each piece of mail to a prisoner had to be registered electronically and individually in advance. The problem was remedied by granting the federal courts an exception, although they still had to register as recognized senders.

The Court of Appeals for the Ninth Circuit

This court of appeals was selected for this study because of its unusual size and complexity.

The United States Court of Appeals for the Ninth Circuit has twenty-nine judgeships. The clerk's office in San Francisco is open from 8:30 to 5:00.

Electronic filing is governed by the court's Rule 25-5 and the court's CM/ECF User Guide. Instructions in the Guide for pro se filers imply opportunities for pro se litigants to file electronically.

In fact, the court encourages pro se use of CM/ECF. Pro se litigants can register through Pacer to use CM/ECF, and they are not limited to use of CM/ECF in pending cases. The clerk regards litigants as customers, so pro se litigants should be afforded high-quality customer service.

Prisoners who can submit filings to the district courts electronically, generally with the help of prison librarians, can also submit filings electronically to the court of appeals. During the COVID-19 pandemic, the court began to more generally allow pro se filing by email.

The courts of appeals for the Ninth and Second Circuits are developing a new case-management system to replace CM/ECF. Pro se litigants are not yet given filing privileges in the new system.

Electronic filings made by 11:59 p.m. are docketed as filed that day. 9th Cir. R. 25-5(c)(2).

The Court of Appeals for the Tenth Circuit

This court was selected for this study at random from among the courts of appeals with rules stating that pro se litigants can file electronically with permission.

The United States Court of Appeals for the Tenth Circuit has twelve judgeships. The clerk's office in Denver is open from 8:00 to 5:00.

Electronic filing is governed by the court's Rule 25.3 and the court's CM/ECF User's Manual. A pro se litigant may seek permission to file electronically. 10th Cir. CM/ECF User's Man. ¶¶ II.A.2 and .C.2. The court has delegated to the clerk's office authority to grant electronic filing privileges to pro se litigants. It is on a case-by-case basis, and available only in pending cases. The request can be made by motion or more informally by letter. There are no specific form or content requirements. The court looks at prospective electronic filers' litigation history for evidence of vexatious filing.

Electronic filing privileges have not been granted to criminal defendants or prisoners. But during the COVID-19 pandemic, the court did arrange with a medium-security facility in Wyoming for electronic transmission of a prisoner's filings to the court and electronic transmission to the facility of the court's filings.

The court has a new rule in 2022 that relieves paper filers of the obligation of paper service on parties receiving electronic notice. 10th Cir. R. 25.4(C).

The court does not accept filings by email or fax, except in emergencies. It does have a drop box in its Denver courthouse with a time-stamp machine. The drop box was set up because of COVID-19 closures, but it will remain. It is only available during the court's business hours, but it is available to persons who do not wish to comply with the court's COVID-19 vaccination requirement for entry, and they do not have to go through security.

"Electronic filing must be completed before midnight, Mountain Standard Time, as shown on the Notice of Docket Activity, to be considered timely filed on the day it is due." 10th Cir. CM/ECF User's Man. ¶ II.D.1.

The Court of Appeals for the Federal Circuit

This court of appeals was selected for this study because of its unusual jurisdiction.

The United States Court of Appeals for the Federal Circuit has twelve judgeships. The clerk's office in Washington is open from 8:30 to 4:30.

Electronic filing is governed by the court's Rule 25 and the court's Electronic Filing Procedures [hereinafter ECF Procs.]. The court also has a Guide for Unrepresented Parties [hereinafter Pro Se Guide]. Unrepresented parties may register as CM/ECF users, "but new notices of appeal or petitions for review must be filed in paper or by email." Fed. Cir. ECF Procs. ¶ II.A; *see* Fed. Cir. R. 25(a)(1)(B) (permitting the clerk to allow pro se electronic filing); Fed Cir. Pro Se Guide ¶ I.C.

An appeal is initiated by filing a notice of appeal and paying the filing fee in the district court, which transfers to the court of appeals a partial record: the docket sheet, the notice of appeal, and the order being appealed. The clerk's office for the court of appeals then electronically opens the appeal. Counsel can open agency appeals using CM/ECF; they electronically submit initiating

documents to the clerk's office, which then opens the case. Pro se litigants cannot use CM/ECF to initiate cases, but they can initiate agency appeals by email. The court does not otherwise accept filings by email or fax. Currently, pro se litigants who initiate cases by email have the option to continue as either electronic or paper filers.

The court requires courtesy paper copies of all briefs to be delivered or shipped to the court.

"Papers may be deposited until midnight on weekdays in the night box at the garage entrance . . . ." Fed Cir. Pro Se Guide ¶ I.A. Documents are time stamped for the previous day when the clerk's office retrieves them in the morning.

Although the rules technically require paper filers to serve parties receiving electronic service, this is not enforced. Parties, counseled or otherwise, can agree with each other to service by email.

"Unless a time for filing is ordered by the court, filing must be completed before midnight Eastern Time on the due date to be considered timely." Fed. Cir. R. 26(a)(2); *see* Fed. Cir. ECF Procs. ¶ IV.A.16(a) ("Filers in other time zones must account for any time difference to ensure a filing is completed before midnight (Eastern) on the day the document is due.").

Combined District and Bankruptcy Courts

The District and Bankruptcy Courts for the District of Columbia

This district was selected for this study because its district court rules state that pro se electronic filing is allowed with permission in both civil and criminal cases. It is one of the districts where the district court clerk is also the bankruptcy court clerk.

The United States District Court for the District of Columbia has fifteen judgeships and one office code: Washington (office code 1). The United States Bankruptcy Court for the District of Columbia has one judgeship and one office, also Washington.

The clerk's office is open from 9:00 to 4:00.

Electronic filing in the district court is governed by the court's Civil Rule 5.4 and the court's Criminal Rule 49. "A *pro se* party may obtain a CM/ECF user name and password from the Clerk with leave of Court." D.D.C. Civ. R. 5.4(b)(2); *id.* Crim. R. 49(b)(2). Pro se parties cannot open cases electronically, but they can receive permission from the presiding judge to use CM/ECF in pending cases. The court has not experienced much in the way of abuse of the privilege.

Electronic filing in the bankruptcy court is governed by the court's Rule 5005-4 and the court's Administrative Procedures for Filing, Signing, and Verifying Documents by Electronic Means [hereinafter ECF Procs]. "Pro se debtors and other parties (other than creditors and claimants) not represented by counsel may not file electronically; therefore, the Administrative Procedures do not apply to such filers." Bankr. D.C. Administrative Order Relating to

Electronic Case Filing ¶ 2. Pro se creditors and financial management agents can receive limited electronic filing privileges.

Because of the challenges posed by the COVID-19 pandemic, the courts began to allow submissions of filings by email. That option may extend beyond the pandemic.

Attorneys open civil and bankruptcy cases directly with CM/ECF. Criminal cases are opened by the clerk's office from a paper indictment or complaint. Some criminal complaints may be submitted electronically.

Paper filers do not have to separately serve other parties receiving electronic service, except for filings that initiate contested or adversary matters in the bankruptcy court.

The courts' drop box is available at all hours. If the building is closed, a security officer will respond to a buzzer to allow entry for use of the drop box. There is a time stamp present.

In the bankruptcy court, "The 'last day' set for filing a paper ends at midnight in the Court's time zone, unless otherwise specified, whether the filing is an electronic filing or a filing in paper form." Bankr. D.C. R. 9006-1(b); *see* Bankr. D.C. ECF Procs. ¶ II.A.5 ("The deadline for filing, unless otherwise specifically set, is 11:59:59 P.M. of the due date (Eastern Time).").

The District and Bankruptcy Courts for the District of Idaho

This district was selected for this study at random from among the districts where the district court clerk is also the bankruptcy court clerk.

The United States District Court for the District of Idaho has two judgeships. The United States Bankruptcy Court for the District of Idaho also has two judgeships. Both courts have the following four office codes: Boise (office code 1), Pocatello (office code 4), Coeur d'Alene (office code 2), and Moscow (office code 3). The bankruptcy court also has an office in Twin Falls (office code 8).

The clerk's office is open from 9:00 to 4:00. D. Idaho Civ. R. 77.1; Bankr. Idaho R. 1001.2.

Electronic filing in the district court is governed by the court's Civil Rule 5.1, and electronic filing in the bankruptcy court is governed by the court's Rule 5003.1. Electronic filing in both courts is also governed by the courts' Electronic Case Filing Procedures [hereinafter ECF Procs.]. D. Idaho Civ. R. 5.1(b); Bankr. Idaho R. 5003.1(b). According to them, "If the Court permits, a party to a pending action who is not represented by an attorney may register as a Registered Participant in the Electronic Filing System solely for purposes of the action." Bankr. Idaho ECF Procs. ¶ 3.A.4.

In fact, pro se litigants are never granted CM/ECF filing privileges. The court has a substantial pro se caseload, and it does not have the staff to provide pro se CM/ECF filings with adequate quality control. Pro se creditors may receive limited CM/ECF filing privileges to file their proofs of claim.

Detention facilities have acquired scanners, and paralegals there submit a majority of pro se filing from there electronically. About the only filings that

the court receives by regular mail from there are very long evidentiary documents.

Because CM/ECF registration waives the right to paper service, paper filers do not have to separately serve other parties who are already receiving electronic service.

The courts do not have a physical drop box.

"An electronic document is considered timely if received by the Court before midnight, Mountain Time, on the date set as a deadline, unless the judge specifically requires another time frame." D. Idaho ECF Procs. ¶ 2.B.2.

The District and Bankruptcy Courts for the Western District of Missouri

This district was selected for this study at random from among the districts where the district court clerk is also the bankruptcy court clerk.

The United States District Court for the Western District of Missouri has five judgeships, and it shares two additional judgeships with the Eastern District. The United States Bankruptcy Court for the Western District of Missouri has three judgeships. The courts have five office codes: Kansas City (office code 4), Springfield (office code 6), Jefferson City (office code 2), St. Joseph (office code 5), and Joplin (office code 3).

The clerk's office is open from 9:00 to 4:30. *See* Bankr. W.D. Mo. NextGen CM/ECF Procs. ¶ V.A.

Electronic filing in the bankruptcy court is governed by the court's NextGen CM/ECF Administrative Procedures Manual. Electronic filing by pro se debtors is not permitted.

Electronic filing in the district court is governed by the court's Rule 5.1 and the court's CM/ECF Civil and Criminal Administrative Procedures Manual and User's Guide. Pro se filers may use CM/ECF in civil cases but not in criminal cases. *See* W.D. Mo. R. 5.1. They must initiate cases on paper, but the court approves CM/ECF filing privileges for subsequent filings in active cases. Litigants register through Pacer, and their filings immediately appear on the docket. Most pro se litigants still file on paper, but there are currently a little over a dozen electronic filers. Paper filers cannot opt for electronic notice.

Pro se litigants in active civil cases, not bankruptcy cases, can use the court's electronic drop box: Electronic Document Submission System (EDSS). When a litigant begins to use EDSS, the litigant consents to electronic notice and service going forward. Pro se filers are encouraged to either use EDSS or file on paper, but not both. Scanned signatures are adequate; paper signatures are not required. Approximately two dozen pro se litigants are currently using EDSS. Submissions by email or fax are not otherwise accepted.

The court accepts electronic submissions from prisoners in ten state prisons, and in those prisons electronic submission is mandatory. *See* W.D. Mo. Procedures for the Prisoner Electronic Filing Program. Paper submissions are returned. The court has provided scanners, which the prisoners use themselves. Electronic notices of other filings are sent to the prisons, and librarians

or other staff members print out the notices for the prisoners. In the future, the court would like to be able to receive submissions from federal prisoners electronically.

Paper filers are not required to provide paper service on parties receiving electronic service.

The court has a drop box in the clerk's office, which is checked each morning. Submissions are deemed filed on the previous day.

The District Court for the District of the Northern Mariana Islands, Including Its Bankruptcy Division

This district was selected for this study at random from among the districts where the district court clerk is also the clerk of court for bankruptcy cases.

The United States District Court for the District of the Northern Mariana Islands has one judgeship and one office code: Saipan (office code 1). Bankruptcy cases are heard in the district court's bankruptcy division.

The clerk's office is open from 8:00 to 12:00 and from 1:00 to 4:30.

The court's Administrative Procedures for Electronic Filing and Electronic Service for the United States District Court for the Northern Mariana Islands are included as Appendix A to the court's local rules. *See* D.N.M.I. R. 5.1. Pro se parties may register as e-mail filers. *Id.* app. A § 2. The clerk's office converts the emails to filings, and it does not otherwise accept filings by email or fax. Scanned signatures are adequate.

Permission to file by email is granted by the judge based on a written application. Access to technology and fluency in English are considerations. Many pro se litigants are not fluent in English, and they benefit from interaction with court staff when they file. The clerk's office must be careful not to provide the legal advice that litigants often seek.

Even attorneys do not initiate cases in CM/ECF. The clerk's office opens cases on paper filings.

There is no arrangement for electronic submission by prisoners, who are not located on the island.

Paper filers do not have to separately serve other parties who are receiving electronic notice.

The court does not have a drop box.

"Filing must be completed before midnight local time for the Northern Mariana Islands in order to be considered timely filed that day." D.N.M.I. R. app. A § 3.

The District and Bankruptcy Courts for the District of Vermont

This district was selected for this study because its district court rules state that pro se litigants can file electronically. It is one of the districts where the district court clerk is also the bankruptcy court clerk.

The United States District Court for the District of Vermont has two judgeships and two office codes: Burlington (office code 2) and Rutland (office

code 5). The United States Bankruptcy Court for the District of Vermont has one judgeship and one office, in Burlington.

The clerk's office is open from 8:30 to 5:00.

Electronic filing in the district court is governed by the court's Administrative Procedures for Electronic Case Filing [hereinafter ECF Procs.]. D. Vt. R. 5(b). "A non-prisoner who is a party to a civil action and who is not represented by an attorney may register as an ECF user." D. Vt. ECF Procs. ¶ (E)(2); *see also id.* ¶ (Q). Rarely to never have electronic filing privileges been denied or abused. It is possible to register as an ECF user and file on paper but receive electronic service of other parties' filings. There are no provisions for electronic submissions to the court by prisoners.

All cases in the district court are initiated on paper.

In bankruptcy cases, "The Clerk accepts documents by e-mail for filing. The Court prefers attorneys file documents via CM/ECF, rather than e-mailing them to the Clerk for filing, and requires non-attorneys who wish to file documents electronically to transmit their documents to the Clerk via e-mail." Bankr. Vt. R. 5005-4(a)(1). Only once has a pro se debtor ever requested CM/ECF privileges.

Paper filers do not have to separately serve other parties who are receiving electronic notices.

The courts do not accept filings by fax, and they do not have a drop box. The courts never closed during the COVID-19 pandemic.

In the district court, "All electronic transmissions of documents must be completed prior to midnight, Eastern Time, in order to be considered timely filed that day. D. Vt. ECF Procs. ¶ (H).

The District Court for the District of the Virgin Islands, Including Its Bankruptcy Division

This district was selected for this study at random from among the districts where the district court clerk is also the clerk of court for bankruptcy cases.

The United States District Court for the District of the Virgin Islands has two judgeships and two office codes: Charlotte Amalie, St. Thomas (office code 3), and Christiansted, St. Croix (office code 1). The district court has a bankruptcy division.

The clerk's office is open from 8:00 to 5:00.

Electronic filing is governed by Civil Rule 5.4. Electronic filing in bankruptcy cases is governed by the court's Bankruptcy Rule 1002-2 and the court's Electronic Case Filing Procedures [hereinafter ECF Procs.].

Pro se litigants may receive permission to use CM/ECF, but once they become represented by counsel their electronic filing privileges must be terminated. D.V.I. Civ. R. 5.4(b)(2). Permission is granted by the presiding judge on a motion filed in the case, and it is typically granted. Litigants register for CM/ECF through Pacer, complete a Pro Se ECF Registration Form, and then receive training with the clerk's office or online. They typically get the hang of it. It would be possible for a pro se debtor to request CM/ECF privileges, but

the court has few pro se debtors, and none has requested electronic filing privileges.

Attorneys open civil cases directly, but pro se plaintiffs file their complaints on paper. The clerk's office scans and electronically dockets pro se complaints. The clerk's office opens criminal cases from paper indictments, informations, and complaints.

The court does not have an arrangement with a prison facility for electronic submission of prisoner filings.

Paper filers do not have to serve other parties already receiving electronic service.

The court's two locations have drop boxes, which are used during court closures. They are available when the building is open.

In emergencies, the court can accept pro se filings by email. The court does not accept filings by fax.

"Unless otherwise ordered by the Court, a filing must be completed before 11:59 p.m. U.S. Virgin Islands time in order to be considered timely filed that day." *Id.* Civ. R. 5.4(c)(4); *see* D.V.I. Bankr. R. 1002-2.F ("Filing a document electronically must be completed by midnight local time on the applicable deadline for filing."); *see also* D.V.I. Bankr. ECF Proc. 5.

District Courts

The District Court for the Northern District of Alabama

This court was selected for this study at random from among the district courts with rules stating that pro se electronic filing is not permitted.

The United States District Court for the Northern District of Alabama has eight judgeships and seven office codes: Birmingham (office code 2), Huntsville (office code 5), Gadsen (office code 4), Tuscaloosa (office code 7), Anniston (office code 1), Florence (office code 3), and Jasper (office code 6).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by two documents, one for civil cases and one for criminal cases: Administrative Procedures for Filing, Signing, and Verifying Pleadings and Documents in the District Court Under the Case Management/Electronic Case Files System [hereinafter ECF Procs.]. "Pro se litigants shall [conventionally] file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statue." N.D. Ala. Civ. ECF Procs. ¶ III.B (omitting the word "conventionally"); N.D. Ala. Crim. ECF Procs. ¶ III.B (including the word "conventionally"). The court has not granted any exceptions to the proscription on use of CM/ECF by pro se litigants.

Generally, paper filers are required to serve paper copies of their filings on other parties, even parties receiving electronic service. On occasion, a sophisticated pro se litigant has been excused by the presiding judge from paper service on parties receiving electronic service. Pro se litigants themselves may opt

for electronic service, but they often also request paper copies of individual documents, perhaps because they have not saved their one free look.

The court does not accept filings by email or fax. For security reasons, neither does it have a drop box.

"Pleadings or documents will be deemed timely filed on any particular date if filed prior to midnight on that date unless otherwise limited by order of this court." N.D. Ala. Civ. ECF Procs. ¶ II.A.4; N.D. Ala. Crim. ECF Procs. ¶ II.A.3.

The District Court for the Southern District of Alabama

This court was selected for this study because its rules provide for requiring electronic filing by pro se litigants.

The United States District Court for the Southern District of Alabama has three judges and two office codes: Mobile (office code 1) and Selma (office code 2).

The clerk's office is open from 10:00 to 3:00.

Electronic filing is governed by the court's General Rule 5(b) and the court's Administrative Procedure for Filing, Signing, and Verifying Documents by Electronic Means in the United States District Court for the Southern District of Alabama [hereinafter ECF Procs.]. "Any party not represented by an attorney must file conventionally unless specifically allowed by the Clerk's Office or required by court order to file electronically." S.D. Ala. ECF Procs. ¶ I.B.4; *see id.* ¶ III.B ("Pro se filers may . . . register for electronic filing, subject to approval by the Clerk's Office in its discretion."). According to the court's Pro Se Litigant Handbook, "A judge may order that you use CM/ECF to understand what is happening with your case and to file documents. . . . You may also request that the Court grant you filing privileges on the CM/ECF system." *Id.* at 20.

Pro se use of CM/ECF is not common. The judges wanted to be able to order pro se electronic filing, but it does not appear that any has done so. Permission is granted by the clerk's office upon an oral request. It is not possible for prisoners to use CM/ECF.

Attorneys can use CM/ECF to open civil cases. The clerk's office cleans up errors and provides for the reuse of case numbers for cases that were never completely opened. As in other courts, criminal cases are opened by the clerk's office based on paper filings. It has not been the case that a pro se litigant has been able to use CM/ECF to open a case. It is theoretically possible for a pro se criminal defendant to be granted electronic filing privileges, but that has never happened. Pro se defendants have appointed standby counsel.

It may be the case that paper filers technically are required to do paper service on other parties, but in practice paper service on parties receiving electronic service is not necessary. Pro se filers given CM/ECF privileges must understand that the court will not provide them with paper service.

The court does not accept filings by email or fax. Before moving to its new location, the court did have a nighttime drop box, available at all hours, with

a time stamp machine. It was checked every court day. A drop box has not yet been established at the courthouse that the court moved to in 2018.

There is an interest in expanding electronic filing by pro se litigants and ensuring consistency in how the privilege is granted.

"Generally, a document will be deemed timely if electronically filed prior to midnight on the deadline fixed by court order or applicable rule or statute." S.D. Ala. ECF Procs. ¶ II.A.5.

The District Court for the District of Arizona

This court was selected for this study because it is often regarded as a model court with respect to judicial policy initiatives.

The United States District Court for the District of Arizona has thirteen judgeships and three office codes: Phoenix (office code 2), Tucson (office code 4), and Prescott (office code 3).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Electronic Case Filing Administrative Policies and Procedures Manual [hereinafter ECF Procs.]. *See* D. Ariz. Civ. R. 5.5(a); *id.* Crim. R. 49.3.

> *Pro Se Filers.* Unless otherwise authorized by the court, all documents submitted for filing to the Clerk's Office by parties appearing without an attorney must be in legible, paper form. The Clerk's Office will scan and electronically file the document.
>
> A pro se party seeking leave to electronically file documents must file a motion and demonstrate the means to do so properly by stating their equipment and software capabilities in addition to agreeing to follow all rules and policies referred to in the ECF Administrative Policies and Procedures Manual. If granted leave to electronically file, the pro se party must register as a user with the Clerk's Office and as a subscriber to PACER within five (5) days.
>
> A pro se party must seek leave to electronically file documents in each case filed. If an attorney enters an appearance on behalf of a pro se party, the attorney must advise the Clerk's Office to terminate the login and password for the pro se party.

D. Ariz. ECF Procs. § II.B.3.

The court's judges consistently require permission for pro se use of CM/ECF to be by formal motion.

The court's website has an e-Pro Se page that helps pro se litigants fill out complaints, but the complaints are submitted on paper. This option is not available to prisoners. Electronic submission is available at a limited number of state prisons, including the two largest. The court does not otherwise accept filings by email or fax.

Civil cases in this court are not initiated directly by attorneys; complaints are filed in a shell case, and then the clerk's office uses those filings to open new cases.

Paper filers need not serve other parties who receive electronic service.

The court has drop boxes in Phoenix and Tucson, which it set up because of the COVID-19 pandemic. The drop boxes are available from about half an

hour before court hours to about half an hour after court hours. Submissions are retrieved at least twice a day, and they are date stamped when retrieved.

The District Court for the Eastern District of Arkansas

This court was selected for this study because it has a filing deadline relevant to another study.

The United States District Court for the Eastern District of Arkansas has five judgeships and five office codes: Little Rock (Central Division, office code 4, the main courthouse), Jonesboro (Northern Division, office code 3, a clerk's office and courtroom in a federal building), and Helena (Delta Division, office code 2, a courtroom but no clerk's office).

The clerk's office is open from 8:00 to 5:00.

The Eastern and Western Districts of Arkansas share a single set of local rules. Electronic filing in the Eastern District is governed by the Eastern District's CM/ECF Administrative Policies and Procedures Manual for Civil Filings [hereinafter Civ. ECF Procs.] and the court's CM/ECF Administrative Policies and Procedures Manual for Criminal Filings [hereinafter Crim. ECF Procs.]. "A person not represented by an attorney is generally not allowed to electronically file and must submit paper for filing. Electronic filing is only permitted by court order." E.D. & W.D. Ark. R. 5.1; *but see* E.D. Ark. Civ. ECF Procs. ¶ I.B ("Pro se parties shall not be permitted to file electronically."); E.D. Ark. Crim. ECF Procs. ¶ I.B (same). According to the clerk, pro se filings must be made by mail or hand delivery. There is no drop box.

The court has a heavy caseload of prisoner petitions, but also a substantial number of pro se filings by nonprisoners.

"If a document is filed prior to midnight, it shall be docketed on that day. However, time sensitive filings, which are electronically filed on the last day of any given deadline, shall be filed by 5:00 p.m., unless otherwise ordered by the Court." E.D. Ark. Civ. ECF Procs. ¶ III.A.3; E.D. Ark. Crim. ECF Procs. ¶ III.A.3. In practice, "time sensitive" means having a due date, so the 5:00 rule applies quite generally. It was established when the court discontinued use of a drop box at the advent of electronic filing as a matter of equity for attorneys, who can file electronically after hours, and pro se litigants, who cannot.

The District Court for the Western District of Arkansas

This court was selected for this study at random from among the district courts.

The United States District Court for the Western District of Arkansas has three judgeships and six office codes: Fayetteville (office code 5), Hot Springs (office code 6), Fort Smith (office code 2), Texarkana (office code 4), Harrison (office code 3), and El Dorado (office code 1).

The clerk's office is open from 8:00 to 5:00.

The Eastern and Western Districts of Arkansas share a single set of local rules. Electronic filing is governed by the court's Administrative Policies and Procedures Manual for Civil and Criminal Filings [hereinafter ECF Procs.].

"A person not represented by an attorney is generally not allowed to electronically file and must submit paper for filing. Electronic filing is only permitted by court order." E.D. & W.D. Ark. R. 5.1 "All case initiating documents (*e.g.*, civil complaint, notice of removal, criminal complaint, indictment, information, etc.), any pleading or document that adds a party or criminal count (*e.g.*, amended complaint, third-party complaint, superseding indictment, etc.) must be filed conventionally." W.D. Ark. ECF Procs. ¶ III.A.1.a. Electronic submissions, such as by email or on disc, are accepted. *Id.* "Pro se parties may request permission from the presiding judge to submit documents for filing to a designated email address on a case-by-case basis." *Id.* ¶ I.B.

CM/ECF privileges have been granted to pro se litigants quite rarely. The court believes that pro se use of CM/ECF would only work for a sophisticated party without a history of vexatious filing.

There are no procedures for receiving filings by email from prisons; email and fax filings in general are permitted on rare occasions with the judge's permission. Paper filings received from pro se litigants are scanned and shredded.

The court sometimes uses drop boxes at some of its facilities when the clerk's office is closed, such as because of the COVID-19 pandemic. Documents retrieved in the morning are time stamped for the previous day.

"A document will be deemed timely filed if CM/ECF generates an NEF prior to midnight, Central Time, on the date it is due. However, the assigned Judge may order that the document must be filed by a specific time." W.D. Ark. ECF Procs. ¶ III.A.3.

The District Court for the Eastern District of California

This court was selected for this study at random from among the district courts.

The United States District Court for the Eastern District of California has six judgeships and five office codes: Sacramento (office code 2), Fresno (office code 1), Yosemite (office code 6), Bakersfield (office code 5), and Redding (office code 3).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Rules 133(a) and (b) and by its CM/ECF User Manual. *See also* E.D. Cal. R. 400(a) ("Local Rules 100 to 199 and 300 to 399 are fully applicable in criminal actions in the absence of a specific Criminal Rule directly on point."). "Any person appearing pro se may **not** utilize electronic filing except with the permission of the assigned Judge or Magistrate judge." E.D. Cal. R. 133(b)(2). Pro se use of CM/ECF is rare. Permission typically is reviewed by the magistrate judge assigned to the case. Considerations are capable and responsible use.

The procedure for a pro se litigant to become an e-filer has grown more challenging with NextGen CM/ECF.

For prisoners, there is an arrangement with the state prison system for prison librarians to scan and submit by email initiating documents. *See* Stand-

ing Order, *In re Procedural Rules for Electronic Submission of Prisoner Litigation Filed by Plaintiffs Incarcerated at Participating Penal Institutions* (E.D. Cal. Feb. 24, 2016, effective Mar. 1, 2016); Standing Order, *In re Procedural Rules for Electronic Submission of Prisoner Litigation Filed by Plaintiffs Incarcerated at Corcoran and Pleasant Valley State Prisons* (E.D. Cal. Sept. 24, 2014). This option is not currently available for later filings in the case. Over time, the prisons will consider whether the burdens of scanning and emailing are outweighed by the burdens of handling regular mail. Electronic submission of complaints has not opened litigation floodgates.

The court has made arrangements with the California Department of Corrections and Rehabilitation to accept service by email on behalf of prison defendants. This has proved to be much faster than waiting for service by the U.S. marshal.

There are few pro se filings by federal prisoners.

The court does not otherwise accept filings by email, and it does not accept filings by fax. Because of the COVID-19 pandemic, the court established drop boxes at its main offices when the buildings were closed. A difficultly with drop boxes is that court staff cannot review a filing for compliance while the filer is in the building.

"A document will generally be deemed filed on a particular day if filed before midnight (Pacific Time) on that business day." E.D. Cal. R. 134(b).

The District Court for the District of Colorado

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Colorado has seven judgeships and one office code: Denver (office code 1).

The clerk's office is open from 8:00 to 5:00.

Electronic filing is governed by the court's Civil Rule 5.1(a), the court's Electronic Case Filing Procedures for (Civil Cases) [hereinafter Civ. ECF Procs.], and the court's Electronic Case Filing Procedures for the District of Colorado (Criminal Cases) [hereinafter Crim. ECF Procs.]. Nonprisoner pro se parties may use CM/ECF in civil cases after training and the court's approval. D. Colo. Civ. R. 5.1(b)(3); D. Colo. Civ. ECF Procs. ¶ 2.2(b). Before NextGen CM/ECF, parties would request registration from the court. Now they register with Pacer and make a request to the court for a link between their Pacer account and the court's filing system. Approval comes from the clerk's office; judicial approval is not necessary. Approval requires a pending case, so initiating documents are not filed by pro se litigants in CM/ECF.

Attorneys must use CM/ECF, and they initiate civil cases directly. Criminal cases are opened by the clerk's office based on paper indictments. It has probably not been the case that a pro se criminal defendant used CM/ECF. The local rules do not contemplate that.

At the beginning of the COVID-19 pandemic, the court put out a drop box when the intake counter was closed, but it removed the drop box when the

counter opened again. The court also set up an email address for pro se parties to submit filings electronically, and the court is likely to retain this option. Court staff members are pleased to not have to scan or touch the filings that come in this way. The court gave up fax communications years ago.

A few years ago, the court established an arrangement with a state prison for electronic submissions from prisoners. That relationship ended, but now the court has a relationship with another state prison. The court provided the scanner. The prison does not accept electronic notices on behalf of prisoners. Paper filers must serve even parties receiving electronic service.

The clerk's office likes receiving filings electronically. Pro se users of CM/ECF often appreciate immediate confirmation that their filings are part of the court record.

"Unless otherwise ordered, an electronically filed pleading or document shall be filed no later than 11:59:59 p.m. (Mountain Time) on the day required." D. Colo. Civ. R. 77.1; *id.* Crim. R. 56.1; *see also* D. Colo. Civ. ECF Procs. ¶ 4.2(a) (similar); D. Colo. Crim. ECF Procs. ¶ 4.2(a) (similar).

The District Court for the District of Delaware

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Delaware has four judgeships and one office code: Wilmington (office code 1).

The court's office hours are 8:30 to 4:00. D. Del. R. 77.1. The court never closed during the pandemic, and the office hours never changed.

Electronic filing is governed by the court's Administrative Procedures Governing Filing and Service by Electronic Means [hereinafter ECF Procs.]. D. Del. R. 5.1(a). With the court's permission, pro se parties may file using CM/ECF. D. Del. ECF Procs. ¶ N.

Pro se CM/ECF filing privileges are obtained by motion to the presiding judge. Applicants are required to read the court's electronic filing tips and create a Pacer account. Judges almost always grant electronic filing privileges to pro se litigants. The court typically relates multiple cases with the same pro se litigant. Electronic filing privileges terminate when the case is over, or because of problem filings.

Since 2017, pro se prisoners can file by email. There is a scanner in the principal federal prison in Delaware. No other litigants are permitted to file by email. Prisoners can initiate cases by email; nonprisoner pro se litigants cannot. Nor can attorneys.

The court does not have a drop box.

In civil cases, only members of the Delaware bar may submit court filings. In criminal cases, attorneys in good standing with other bars may apply for filing privileges.

> Aside from initial pleadings, all electronic transmissions of documents (including, but not limited to, motions, briefs, appendices, and discovery re-

> sponses) must be completed by 6:00 p.m. Eastern Time, in order to be considered timely filed and served that day. All electronic transmissions of initial pleadings must be completed prior to midnight Eastern Time, in order to be considered timely filed that day.

D. Del. ECF Procs. ¶ F.

The District Court for the Northern District of Florida

This court was selected for this study at random from among the district courts with rules that do not state whether pro se electronic filing is permitted.

The United States District Court for the Northern District of Florida has four judgeships and four office codes: Pensacola (office code 3), Tallahassee (office code 4), Panama City (office code 5), and Gainesville (office code 1). The Panama City intake counter has been closed since it was destroyed by a hurricane.

The clerk's office is open from 8:00 to 4:30 in Pensacola and from 8:30 to 5:00 in Tallahassee.

Electronic filing is governed by the court's Rule 5.4.

Pro se electronic filing is permitted with a judge's permission, but permission has only been granted once, several years ago.

Attorneys open civil cases directly; criminal cases are opened by the clerk's office from paper indictments, informations, or complaints.

Paper filers are required to serve even parties receiving electronic service. The court is looking into whether that rule can be adjusted for prisoners, and the court is interested in cooperating with state and federal facilities for electronic submission of filings.

The court does not accept filings by email or fax, and it only uses drop boxes when the court is closed because of things like the COVID-19 pandemic.

"A filing is made on a date if it is made prior to midnight on that date in local time at the place of holding court in the division where the case is pending." N.D. Fla. R. 5.4(E).

The District Court for the Southern District of Georgia

This court was selected for this study at random from among the district courts.

The United States District Court for the Southern District of Georgia has three judgeships and six office codes: Savannah (office code 4), Augusta (office code 1), Brunswick (office code 2), Waycross (office code 5), Statesboro (office code 6), and Dublin (office code 3).

The clerk's office is open from 8:30 to 5:00.

Electronic filing is governed by the court's General Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means [hereinafter ECF Procs.]. S.D. Ga. R. 5.5.

Pro se litigants may not file using CM/ECF. Filings are accepted by email only in special circumstances ordered by a judge, and not by fax.

Attorneys submit complaints in CM/ECF to a shell case, and after a review the clerk's office uses a shell-case filing to open a civil case. Criminal cases also are opened by the clerk's office, from paper indictments and complaints.

The court used a drop box when the counter was closed because of the COVID-19 pandemic, but it does not use one now.

> The Notice of Electronic Filing reflects the date and time the electronic transmission of a document is completed. Accordingly, a document will be deemed timely filed if the Notice of Electronic Filing reflects a time *prior* to midnight on the due date. However, the assigned judge may order that a document be filed by a certain time, which then becomes the filing deadline.

S.D. Ga. ECF Procs. ¶ II.A.1.c.

The District Court for the Northern District of Illinois

This court was selected for this study because its rules state that pro se litigants can file electronically.

The United States District Court for the Northern District of Illinois has twenty-two judgeships and two office codes: Chicago (office code 1) and Rockford (office code 3).

The clerk's office is open from 8:30 to 4:30.

The court has a general order on Electronic Case Filing. N.D. Ill. Gen. Ord. 16-0020 (Nov. 16, 2004). "A party to a pending civil action who is not represented by an attorney and who is not under filing restrictions imposed by the Executive Committee of this Court, may register as an E-Filer solely for purposes of the case." *Id.* IV(B)(1). "Parties who are in custody are not permitted to register as E-Filers." *Id.* IV(B)(3).

The court is in the process of converting to NextGen CM/ECF. The court permits a nonprisoner pro se litigant to register as a CM/ECF filer in the litigant's existing case after successfully completing an online training module. They are allowed two attempts to complete the training successfully. No judicial approval is required. CM/ECF filing privileges have never been granted to a pro se criminal defendant.

Pro se litigants who are not filing electronically can sign up to receive electronic notice of other parties' filings.

The districts in Illinois have an arrangement with the state prisons for mandatory electronic submission of filings by pro se prisoners. (Electronic submission is not mandatory when a prison is on lockdown.) The court provides the scanners, which scan and email the submissions for filing. Prisoners still receive service of other parties' filings by regular mail. The filers' scanned signatures are adequate.

Paper filers do not have to serve other parties already receiving electronic service.

The court has never accepted filings by fax, but during the COVID-19 pandemic it began to accept filings from pro se litigants by email. The emails must be sent to a designated email address, the subject line and the email text must

contain certain information, and the filing must be in PDF form. The court is considering a move to Box.com.

The Chicago courthouse has a drop box available at all hours in the building lobby, and it is accompanied by a time stamp. The building housing the Rockford courthouse is not open overnight, but it does open a bit before the clerk's office and closes a bit later. The drop box there also has a time stamp.

An aspiration of the court's is a way for pro se litigants to submit digital exhibits.

"Filing must be completed before midnight Central Time in the Northern District of Illinois in order to be considered timely filed that day." N.D. Ill. Gen. Ord. 16-0020 V(G).

The District Court for the Southern District of Illinois

This court was selected for this study because its rules state that pro se litigants can file electronically.

The United States District Court for the Southern District of Illinois has four judgeships and two office codes: East St. Louis (office code 3) and Benton (office code 4).

The clerk's office is open from 9:00 to 4:30.

Electronic filing is governed by the court's Electronic Filing Rules. "Pro se filers *may*, but do not have to utilize the ECF system." *Id.* R. 1. CM/ECF privileges are granted by motion to the chief judge. About 90% of the motions are granted. The court typically has four or five active pro se users of CM/ECF.

The court has an arrangement with several of the state's prisons for electronic submission of prisoner filings. The prisons also accept electronic notice of other parties' filings on behalf of the prisoners, but the notices do not include the actual filings. Those still have to be mailed to the prisoners.

Aside from the arrangement with prisons, the court does not accept filings by email or fax. Earlier in the COVID-19 pandemic, while members of the clerk's staff were working at home, the court accepted pro se filings by email.

Scanned signatures are acceptable.

Criminal cases are opened by the clerk's office on paper filings. It would theoretically be possible for a pro se criminal defendant who is not detained to be granted CM/ECF filing privileges, but it has not happened.

The court does not have an after-hours drop box at either of its locations.

"Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day, unless a specific time is set by the court." S.D. Ill. ECF R. 3.

The District Court for the Southern District of Indiana

This court was selected for this study at random from among the district courts.

The United States District Court for the Southern District of Indiana has five judgeships and four office codes: Indianapolis (office code 1), Evansville (office code 3), Terre Haute (office code 2), and New Albany (office code 4).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Electronic Case Filing Policies and Procedures Manual [hereinafter ECF Procs.]. The court's local rules acknowledge the possibility of pro se electronic filing: "**Electronic Filing by an Unrepresented Person.** If authorized to file electronically pursuant to Fed. R. Civ. P. 5(d)(3)(B), the person's electronic signature . . . ." S.D. Ind. R. 5-3(e). Pro se litigants rarely seek permission from the presiding judge to use CM/ECF. It is theoretically possible for a pro se criminal defendant who is not detained to get CM/ECF privileges.

The court now permits pro se litigants to file by email. General Order, *In re Email Submissions to the Court*, No. 1:22-mc-1 (S.D. Ind. Jan. 14, 2022, D.E. 2). The court converts email submissions to filings. Faxes are not accepted. Pro se litigants can file complaints by email, but not using CM/ECF.

All four courthouses have drop boxes. In Indianapolis and Evansville, each drop box is outside the courthouse in a federal building, outside security and available when the building is open, with somewhat more expanded hours than the clerk's office. Submissions are automatically time stamped.

The court's General Order 2014-1 established an "E-Filing Program" for state prisoners. The program is in place in all of Indiana's state prisons except for the one private prison. There is no similar program for federal prisoners.

Prison librarians scan documents and submit them to the court for filing. The court serves complaints on defendants. Notices of electronic filing are sent to prison librarians. Defendants are required to mail copies of documents that they file to the prisoners.

Prison librarians periodically mail batches of originals to the court, where they are held for three months and then shredded. This permits rescanning if an original scan is bad.

"A document due on a particular day must be filed before midnight local time of the division where the case is pending." S.D. Ind. R. 5-4(a).

The District Court for the District of Kansas

This court was selected for this study because its rules state that pro se litigants can file electronically.

The United States District Court for the District of Kansas has six judgeships and five office codes: Kansas City (office code 2), Wichita (office code 6), Topeka (office code 5), Junction City (office code B), and Leavenworth (office code 3).

The clerk's office is open from 9:00 to noon and from 12:30 to 4:30.

Electronic filing is governed by the court's Rules 5.4.2 through 5.4.13, the court's Criminal Rules 49.1 through 49.13, and the court's Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in the United States District Court for the District of Kansas [hereinafter ECF Procs.], one set of procedures for civil cases and another set of procedures for criminal cases. "A party [in a civil case] who is not represented by an attorney may register as a Filing User in the Electronic Filing System." D. Kan.

R. 5.4.2(d); *see* D. Kan. Civ. ECF Procs. ¶ I.C.5.a. Registration requires a wet signature. Pro se litigants are not permitted to use CM/ECF to open cases; their CM/ECF privileges are limited to the existing case or cases for which they have registered for privileges. A CM/ECF registration form may accompany the complaint. Many pro se litigants register to receive electronic notices without doing electronic filing. They understand that the court cannot provide them with technical assistance using their own equipment.

Pro se litigants are permitted to email or fax filings to the court. Other parties are not, except in extraordinary circumstances. Filers by email or fax must follow up with wet signatures.

Prisoners in state facilities transmit filings to the court through the prison librarian, who scans the filings and emails them to the court. The prison receives electronic notice of other parties' filings, but the court also sends paper copies to the prisoners. Persons in federal facilities and local jails must file on paper.

"A party to a criminal action who is not represented by an attorney may not register as a Filing User in the Electronic Filing System unless the court permits." D. Kan. Crim. R. 49.2. Pro se use of CM/ECF in a criminal case may have never come up. Criminal cases are opened by flash drive from the U.S. attorney's office.

Paper filers are supposed to serve on paper even other parties who receive electronic service, but this requirement is not enforced and probably at least frequently not followed.

Drop boxes were removed several years ago.

"Filing must be completed before midnight central time to be considered timely filed that day." D. Kan. R. 5.4.3(e); *id.* Crim. R. 49.3; *see* D. Kan. Civ. ECF Procs. ¶ II.A.5; *id.* Crim. ECF Procs. ¶ II.A.4.

The District Court for the District of Maine

This court was selected for this study because we thought that its rules state that pro se litigants can file electronically, but we misread the rules. Pro se litigants can receive permission to submit filings electronically.

The United States District Court for the District of Maine has three judgeships and two office codes: Portland (office code 2) and Bangor (office code 1).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Rule 5(c) and the court's Administrative Procedures Governing the Filing and Service by Electronic Means, D. Me. R. app. IV. "A non-prisoner who is a party to a civil action and who is not represented by an attorney may register to receive service electronically and to electronically transmit their documents to the Court for filing in the ECF system." *Id.* app. IV, ¶ (b)(2); *see id.* ¶ (o) ("Non-prisoner pro se litigants in civil actions may register with ECF or may file (and serve) all pleadings and other documents in paper."); *see also* D. Me. Information for Pro Se Parties at 8 ("By registering to file electronically you are also consenting to be served electronically . . . ."). Pro se litigants approved for CM/ECF registration

are permitted to submit filings to a court email address. The court then scans and electronically dockets the submissions. This policy has been in place since the court began using CM/ECF. The "/s/" format for a signature is now acceptable.

Until the COVID-19 pandemic, registration for email submission happened after the complaint was filed on paper. During the pandemic, some litigants were granted permission to email their complaints.

Prisoners still file on paper.

The court has very rarely received and accepted filings by fax.

The court has a drop box at each location, which filers can access when the building is open. There is not a time stamp there. During the COVID-19 pandemic closure, filers were instructed to write the date and time of the deposit on the envelope containing the filing.

"All electronic transmissions of documents must be completed prior to midnight, Eastern Time, in order to be considered timely filed that day." D. Me. R. app. IV, ¶ (f).

The District Court for the District of Massachusetts

This court was selected for this study because it has a filing deadline relevant to another study.

The United States District Court for the District of Massachusetts has thirteen judgeships and three office codes: Boston (office code 1), Springfield (office code 3), and Worcester (office code 4).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Rule 5.4 and the court's CM/ECF Case Management/Electronic Case Files Administrative Procedures [hereinafter ECF Procs.]. *See* D. Mass. R. 5.4(b). Nonprisoner pro se parties may register as CM/ECF filers after training and with the court's permission. D. Mass. ECF Procs. ¶ E.2. The court gets about five dozen requests a year, and a substantial majority of the requests are granted. The court does not have procedures for prisoners to submit filings electronically.

On at least one occasion, the court granted electronic filing privileges to a criminal defendant. It took a bit of research to configure the user's account to make it work.

Complaints must be filed in paper form by pro se litigants. The court does not accept filings by fax or email. It is exploring the possibility of creating a way for pro se litigants to use the court's website to upload a complaint that the court can convert into a filing.

The court is interested in exploring software that asks a litigant questions and then generates a text document that the litigant can edit before filing. The court is also contemplating a kiosk where a pro se litigant could scan and upload a filing.

Filing must be complete by 6:00 p.m. on the date due. D. Mass. R. 5.4(d); D. Mass. ECF Procs. ¶ K. The 6:00 rule was established when the court began using CM/ECF. The court does not have physical drop boxes. During the early

months of the COVID-19 pandemic, the court used drop boxes when the court's hours were curtailed.

The District Court for the District of Minnesota

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Minnesota has seven judgeships and four office codes: Minneapolis (office code 4), St. Paul (office code 3), Duluth (office code 5), and Fergus Falls (office code 6). Cases other than petty offense cases generally are assigned 0 as the office code; infractions on federal property generally are assigned C as the office code.

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Rule 5.1 and the court's civil and criminal Electronic Case Filing Procedures Guides [hereinafter ECF Procs.]. D. Minn. R. 5.1. "Pro se filers (including prisoners) cannot open new cases electronically; they must submit the initiating documents in paper." D. Minn. Civ. ECF Procs. at 7. Nonprisoner pro se parties may apply for permission to use CM/ECF to file other documents in civil cases. D. Minn. Civ. ECF Procs. at 3; D. Minn. Crim. ECF Procs. at 3. Permission is granted by the clerk's office. The court does not generally allow pro se litigants who are not CM/ECF filers to register for electronic notices; judges have ordered a few exceptions. The court has a pro se mailing program that automatically prints out filings by the court, such as judicial orders, with mailing labels for pro se litigants who are paper filers.

The court began granting CM/ECF filing privileges to pro se litigants in 2009, and about 350 pro se litigants have used CM/ECF since then. Some have signed up and then later realized what they got themselves into. For example, some were surprised that they were no longer receiving paper notices. Some pro se CM/ECF filers went back to paper filing. Since the court began using NextGen CM/ECF, the more complicated method for signing up to use CM/ECF—registering as a Pacer user first—weeded out some of the technically unsophisticated.

On one occasion, a pro se criminal defendant sought permission to use CM/ECF. The clerk's office consulted the presiding judge, who denied the request, because the defendant had standby counsel.

The court would like to receive electronic submissions from prisoners, but explorations of that possibility were interrupted by the COVID-19 pandemic.

Attorneys open their civil cases on CM/ECF directly. The clerk's office opens criminal cases, typically from paperless submissions. Some matters, such as pen registers, can be opened directly by the U.S. attorney's office.

Aside from documents opening criminal cases, the court does not accept filings by email or fax.

Paper filers are supposed to serve all other parties, even those receiving electronic service, but that may not always happen.

All four court locations have intake counters. The court only uses a drop box when the counter is closed for weather or the COVID-19 pandemic. Most paper filing comes in by mail.

A document will be deemed to be filed on time if filed electronically before midnight or filed conventionally before 4:30 p.m. on the day that it is due, unless the presiding judge orders otherwise. D. Minn. Civ. ECF Procs. at 2; D. Minn. Crim. ECF Procs. at 2.

The District Court for the District of Nebraska

This court was selected for this study at random from among the district courts. Its rules state that pro se electronic filing is permitted.

The United States District Court for the District of Nebraska has three judgeships and three office codes: Omaha (office code 8), Lincoln (office code 4), and North Platte (office code 7).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's General Rule 1.3, Civil Rule 5.1, and Criminal Rule 49.1. Pro se parties in pending civil cases may register as CM/ECF filers. *Id.* Gen. R. 1.3(b)(1). A pro se party with a pending case can request a login and password in Pacer, and this happens fairly frequently in this court. If a pro se party does not have a pending case, the request is denied. The unsuccessful filing request typically is a mistaken effort to obtain Pacer access. Pro se parties cannot initiate cases electronically; only at the counter, by mail, or using the court's drop box.

Pro se criminal defendants have occasionally been granted CM/ECF filing privileges by presiding judges on a case-by-case basis.

There is no procedure in this district for electronic submissions from prisoners. A document scanned in prison would not provide the court with an original signature.

The court does not generally accept filings by email or fax, but an exception was granted to a litigant with vision issues when CM/ECF vision accommodations were not working.

Paper filers are required to serve their filings on other parties, even parties receiving electronic service, and the court typically does not intervene if it sees service was by email. Parties can work out service among themselves, and motions for failure to serve are rare.

During closures for the COVID-19 pandemic, the court established drop boxes, which have been available during building hours, slightly more expansive than clerk hours. There are time stamps at the drop boxes.

The court maintains a miscellaneous case record for pro se filings that do not appear to relate to pending cases. It creates a record of the filings, which often are meant for other courts.

"A document is considered timely filed if filed before midnight Central Standard Time (or Central Daylight Time, if in effect). However, the assigned judge may order a document filed by a time certain." D. Neb. Civ. R. 5.1(d); *id.* Crim. R. 49.1(d).

The District Court for the Northern District of New York

This court was selected for this study at random from among the district courts.

The United States District Court for the Northern District of New York has five judgeships and seven office codes: Albany (office code 1), Syracuse (office code 5), Plattsburgh (office code 8), Binghamton (office code 3), Utica (office code 6), Watertown (office code 7), and prisoner petitions (office code 9).

The clerk's office is open from 9:00 to 4:00.

The clerk's office is open from 10:00 to 3:00.

Electronic filing is governed by the court's Administrative Procedures for Electronic Case Filing [hereinafter ECF Procs.]. *See* N.D.N.Y. R. 5.1.1; N.D.N.Y. Gen. Order No. 22, *Procedural Order on Electronic Case Filing* (Dec. 10, 2021). Nonprisoner pro se parties may be granted permission by the court to file using CM/ECF. N.D.N.Y. ECF Procs. ¶ 12.1. The motion is reviewed by the magistrate judge assigned to the case. The clerk recommends that the motion be considered after the Rule 16 conference so that the court can assess whether the litigant can handle electronic filing.

The judges were reluctant to allow pro se use of CM/ECF, because they expected a lot of inaccurate filings, but experience has been positive. Electronic filing privileges are infrequently requested.

The court has recently used Microsoft Teams to give litigants a virtual visit to the clerk's office for guidance on how to file. This is expected to be especially useful at the smaller locations where each absence by a member of the clerk's staff can hinder customer service.

Pro se parties cannot open cases in CM/ECF. Attorneys do not open cases directly; they make filings in a shell case.

Pro se filing fees can be paid by cash or check at the counter or by check through the mail.

There is no provision for electronic submissions by prisoners.

Drop boxes at the courthouses are available a few more hours than the counters are. The larger courthouses added them because of the COVID-19 pandemic, but the drop boxes are expected to remain beyond that. There is a time stamp at each box.

The court is exploring the development of an electronic drop box which would require malware scanning.

Paper filers are required to serve even parties otherwise receiving electronic service.

"A document will be deemed timely filed if electronically filed prior to midnight Eastern Time." N.D.N.Y. ECF Procs. ¶ 4.3.

The District Court for the Southern District of Ohio

This court was selected for this study at random from among the district courts.

The United States District Court for the Southern District of Ohio has eight judgeships and three office codes: Columbus (office code 2), Cincinnati (office code 1), and Dayton (office code 3).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's CM/ECF Procedures Guide [hereinafter ECF Procs.]. *See* S.D. Ohio R. 1.1(e). "After making a first appearance, non-incarcerated pro se parties may seek leave of Court to file electronically (e-file) with CM/ECF." S.D. Ohio ECF Procs. § 1.2. The litigant must have a scanner, a printer, and an email address. Electronic filing privileges are revoked on the very rare occasion of repeated improper filings. Pro se litigants may not use CM/ECF to initiate cases.

The court has arrangements with Ohio's five largest state prisons for electronic submission of filings by pro se prisoners. The court provides the prisons with scanners, and the court replaces and updates the scanners regularly. Originally, prison officials would mail the originals to the court so the authenticity of the scans could be verified, but originals are no longer mailed. A big advantage of electronic submission is the elimination of uncertainty about materials delayed or lost in the mail. Prisoners retain the option to file by mail.

The court does not otherwise accept filings by email or fax. Because of the court's shutdown for a few months in 2020 accommodating the COVID-19 pandemic, the court established drop boxes at each of its locations. Even when the court was shut down, there was at least one person in the clerk's office who checked the drop box regularly throughout the day. When the court reopened, the drop box remained useful for persons not adhering to vaccination or mask requirements.

Paper filers are still required to serve other parties on paper, even parties receiving electronic service. Pro se paper filers may request electronic notice.

"Filing must be completed before midnight Eastern Time Zone in order to be considered timely filed that day." S.D. Ohio R. 5.1(e); *see* S.D. Ohio ECF Procs. § 1.1 ("A document will be deemed timely filed if electronically filed prior to midnight on the due date, unless the assigned Judicial Officer has ordered the document to be filed by an earlier time on that date.").

The District Court for the Western District of Oklahoma

This court was selected for this study because although its rules state that pro se electronic filing is not permitted, we observed in the filing-time project pro se electronic filing in 2018.

The United States District Court for the Western District of Oklahoma has six judgeships, and it shares an additional judgeship with the Eastern and Northern Districts. The Western District has one office code: Oklahoma City (office code 5).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Civil Rule 5.1, the court's Criminal Rule 49.1, and the court's Electronic Filing Policies & Procedures Manual [hereinafter ECF Procs.]. The court's electronic procedures specify that pro se

parties may not file electronically. W.D. Okla. ECF Procs. ¶ I.A.1. Some pro se parties, however, have been granted permission by the presiding judge to use CM/ECF, and we observed in a study of 2018 filings permission granted to two plaintiffs in four cases.

Civil cases are opened by electronic submission to the court's new cases mailbox. The court converts the submissions to filed and docketed complaints; at the same time, the court seeks filing fees from the filers. On very rare occasions, pro se parties have been granted permission by presiding judges to submit filings by email, and the submissions would go to the new cases mailbox. Criminal cases are initiated with paper filings, which are scanned and docketed by the clerk's office. The court does not accept filings by fax.

There are no provisions for electronic submissions by prisoners.

Paper filers are obligated to serve other parties, even those receiving electronic service when the court converts paper filings to electronic filings.

The court has a drop box available during building hours. It is rarely used. It is checked every morning, and anything there is deemed filed the night before.

Unless otherwise ordered, a filing must be complete by midnight central time on the day that it is due to be considered filed on time. W.D. Okla. ECF Procs. ¶ II.A.1.f.

Possible things to think about for the future include providing prisoners with access to computers for word processing so that their filings are legible. Provisions for electronic submission would enhance efficiency and mitigate angst caused by delay.

The District Court for the District of Oregon

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Oregon has six judgeships and has four office codes: Portland (office code 3), Eugene (office code 6), Pendleton (office code 2), and Medford (office code 1).

The clerk's office is open from 8:30 to 4:30 Monday through Thursday and from 9:30 to 4:30 on Friday.

Electronic filing is covered by the court's Civil Rule 5-2, the court's Criminal Rule 49, and the court's CM/ECF User Manual. "A *pro se* party who is not incarcerated may apply to the assigned judge for permission to become a Registered [CM/ECF] User . . . ." D. Or. Civ. R. 5-1(a)(2); *id.* Crim. R. 49-4(b). The pro se party must have suitable technical equipment, including the ability to make PDFs. CM/ECF users must show that they have read the rules and completed Pacer training. It is possible for a pro se litigant to receive electronic notices and not electronic filing privileges. Most pro se litigants file on paper. A more user-friendly CM/ECF would make it easier for pro se litigants to use it.

The court has arrangements with two of the state's fourteen prisons—the two with the highest rates of litigation—for electronic submission of pro se

prisoner filings. The court provides the scanners. The prisons accept electronic notices on behalf of the prisoners and print them out for the prisoner litigants. It would be very expensive for the court to provide scanners to all fourteen prisons. Some of the prisons have more than one library, so to provide fair access a scanner would have to be provided to each.

According to the court's Standing Order 2021-1, *In re Inmate Electronic Filing Program* (Jan. 8, 2021), electronic submission is mandatory where available, prisoners are expected to retain originals in case production is later ordered, and the electronic submission procedures cannot be used for discovery requests.

On one occasion, the court granted CM/ECF privileges to a criminal defendant. It was not an especially positive experience, because the filer's not following rules resulted in substantial time spent by the court's staff to untangle and correct filing mistakes.

When the clerk's counter closed because of the COVID-19 pandemic, the court accepted pro se filings by email. The court discontinued that as soon as the counter reopened. Because email submissions are easier to make than paper submissions, the court received even more improper and difficult-to-organize submissions. Fax is a valid way to communicate with the court, but not to submit filings.

The court has a drop box with a time stamp machine at the drop box.

Paper filers must serve other parties, even those receiving electronic service, with some exceptions in social security cases.

"The filing deadline for any document is 11:59 p.m. (Pacific Time) on the day the document is required to be filed." D. Or. Civ. R. 5-3(b).

The District Court for the Eastern District of Pennsylvania

This court was selected for this study at random from among the district courts.

The United States District Court for the Eastern District of Pennsylvania has twenty-two judgeships and two office codes: Philadelphia (office code 2) and Allentown (office code 5).

The clerk's office used to be open from 8:30 to 5:00. Because of reduced foot traffic, the hours are now from 9:00 to 3:00.

Electronic filing in both civil and criminal cases is governed by the court's Civil Rule 5.1.2, *see id.* Crim. R. 1.2, Electronic Case Filing System (ECF) Attorney User Manual for Civil Cases, and Electronic Case Filing System (ECF) Attorney User Manual for Criminal Cases. "Upon the approval of the judge, a party to a case who is not represented by an attorney may register as an ECF Filing User in the ECF System solely for purposes of the action." E.D. Pa. Civ. R. 5.1.2.4(b). Pro se litigants who move for CM/ECF filing privileges tend to be very savvy technologically, and they rarely make mistakes. They must file their complaints on paper or by email.

The court established an email address for pro se litigants to submit filings at the beginning of the COVID-19 pandemic. The court does not accept filings

by fax. The court accepts PDFs, Word documents, and photos of documents in email submissions, and the court converts the submissions to PDFs. It wants to make access to electronic submission as broad as possible. Anyone who provides the court with an email address—even if they are filing on paper—can receive electronic notices of other parties' filings.

The court has tried to make filing as accessible as possible, and it has been pleasantly surprised by how few problems it has encountered. The broader access to the court has been worth the occasional nonsense submission. Individual abusers can be disciplined, but this is rarely necessary.

The court has had some discussions, but it has not yet established relationships with state prisons for electronic submission of prisoner filings. The court sometimes receives prisoner filings by email: either from family members or from prison social workers. The court is pleased to provide such broad access to electronic submission. The prisoner is mailed a paper notice that the court received by email a filing on behalf of the prisoner, and the prisoner is asked to return a signed statement confirming that the submission was a genuine filing on behalf of the prisoner.

The court accepts electronic signatures, copies of signatures, and even typed signatures in email submissions. The court requests a more reliable signature when there is a question whether the filing came from the litigant.

It is probably not the case that a criminal defendant has ever used the court's CM/ECF, but the court has received email filings from criminal defendants after release.

Each office has a drop box available at all hours. The one in Allentown was added during the COVID-19 pandemic. To submit a document after hours, the filer buzzes for entry into the building, and a security guard lets the filer in to submit the filing.

The District Court for the Western District of Pennsylvania

This court was selected for this study at random from among the district courts.

The United States District Court for the Western District of Pennsylvania has ten judgeships and three office codes: Pittsburgh (office code 2), Erie (office code 1), and Johnstown (office coded 3).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Civil Rule 5.5, the court's Criminal Rule 49, the court's Electronic Case Filing Policies and Procedures, and the court's Guide to Working with CM/ECF [hereinafter ECF Guide].

"A party who is not represented by counsel may file papers with the clerk in the traditional manner, but is not precluded from filing electronically." W.D. Pa. ECF Guide at 6. Pro se litigants can register for CM/ECF filing privileges the same way that attorneys can: through Pacer. The court grants pro se litigants CM/ECF filing privileges if they complete training, read the court's policies, and have sufficient technical resources. CM/ECF privileges are granted by the clerk's office, and they can be granted before a case is filed.

Civil cases are opened electronically by uploading a complaint to a shell case, and the clerk's office uses the complaint to open a new case record. Pro se litigants can open cases the same way that attorneys can. Criminal indictments are opened by submission of a paper indictment, but criminal complaints are now opened electronically. It would be theoretically possible for a pro se criminal defendant to use CM/ECF, but they typically are detained, and there are no arrangements with any facility for electronic submissions by prisoners.

The court does not accept filings by fax. It accepts sealed filings by email. Because of the COVID-19 pandemic, the court has from time to time allowed other filings by email on a don't-let-this-happen-again basis. The court does not have a drop box.

Paper filers are not required to do paper service on parties receiving electronic service.

The court expects to expand electronic filing options, such as by allowing attorneys to open civil cases and perhaps establish agreements with prison facilities for electronic submissions.

"Electronic filing must be completed before midnight Eastern Time in order to be considered timely filed that day." W.D. Pa. ECF Guide at 10–11.

The District Court for the District of Puerto Rico

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Puerto Rico has seven judgeships and one office code: San Juan (office code 3).

The clerk's office is open from 8:30 to noon and from 1:00 to 4:45.

Electronic filing is governed by the court's CM/ECF Manual, currently under revision. "Unrepresented parties (*pro se*) shall not file pleadings or other papers electronically unless allowed to do so by court order." D.P.R. R. 5(a)(1). It has been a very rare event for the presiding judge to approve pro se use of CM/ECF.

Filing by email is not permitted. There is no provision for electronic submission by prisoners. There is a transfer facility on the island, but no prison, so prison mail must come from quite a distance away.

Paper filers do not need to serve parties receiving electronic service.

The court has a drop box, with a time stamp, that is available a little bit beyond court hours. It is seldom used. Many pro se filers are not fluent in English, so they benefit from personal contact with court staff.

"Deadlines expire prior to midnight of a pleading's or document's due date, unless otherwise ordered by the Court." D.P.R. CM/ECF Man. ¶ II.B.7.a.

The District Court for the Middle District of Tennessee

This court was selected for this study at random from among the district courts.

The United States District Court for the Middle District of Tennessee has four judgeships and three office codes: Nashville (office code 3), Columbia (office code 1), and Cookeville (office code 2).

The clerk's office is open from 8:00 to 5:00.

Electronic filing is governed by the court's Rule 5.02 and the court's Administrative Practices and Procedures: Electronic Case Filing [hereinafter ECF Procs.]. "A party to an action who is not represented by an attorney may, with the Court's permission, register as a [CM/ECF] Filing User solely for purposes of that action." M.D. Tenn. ECF Procs. § 7. The request is made by formal motion to the presiding judge.

Pro se parties cannot initiate cases in CM/ECF; they can do that by submitting paper documents to the clerk's office. Attorneys do not open cases; they file complaints into a shell case, and the clerk's office opens the case.

Pro se filers must pay filing fees in cash—exact change—or money orders.

Paper filers are required to serve even other parties otherwise receiving electronic service.

The court does not accept filings by email or fax. There is a drop box outside the building that is available at all hours. Submissions are retrieved first thing in the morning and time stamped for the previous work day.

"In order for a document to be considered timely filed on a deadline date, the filing must be completed on the deadline date before midnight (local time at the Court's location)." M.D. Tenn. ECF Procs. § 6.

The District Court for the Eastern District of Texas

This court was selected for this study at random from among the district courts.

The United States District Court for the Eastern District of Texas has eight judgeships and six office codes: Sherman (office code 4), Marshall (office code 2), Tyler (office code 6), Beaumont (office code 1), Lufkin (office code 9), and Texarkana (office code 5).

The clerk's office is open from 8:00 to 5:00.

Electronic filing is governed by the court's Rules CV-5 and CR-49. In civil cases, "[w]ith court permission, a *pro se* litigant may register as a Filing User in the Electronic Filing System solely for purposes of the action." *Id.* R. CV-5(a)(2)(B). A pro se litigant cannot initiate a case electronically, but the litigant can seek permission to file subsequent documents electronically at the time that the complaint is filed. The presiding judge decides. Electronic filing by pro se litigants is seldom denied, but it is also seldom requested. Suitable equipment is required.

Some judges allow pro se litigants to receive electronic notices without CM/ECF filing privileges. A motion is required.

To minimize the need for travel and contact during the COVID-19 pandemic, the court issued General Order 20-05, which allowed pro se litigants to submit documents to the court for filing by email and fax as well as by regular mail. "It is not necessary to mail the original paper to the Court after it is

emailed or faxed. It is, however, important for pro se parties to retain the original signed copy of the paper and present it to the Court upon request." *Id.* The order has now expired, and the court deactivated the email address. Some pro se filers were scanning very large or irrelevant documents, and the court is unlikely to allow email filing in the future.

Prisons in Texas have not been interested in setting up electronic submission possibilities for prisoners.

Theoretically it would be possible for a pro se criminal defendant to file electronically if not detained, but that combination is quite rare.

Paper filers do not have to serve their filings on parties receiving electronic service, but they do have to submit a certificate of service.

The court discontinued physical drop boxes when it started accepting electronic filing.

"Filing must be completed before midnight Central Time in order to be considered timely filed that day." E.D. Tex. R. CV-5(a)(3)(D).

The District Court for the Northern District of Texas

This court was selected for this study because its rules state that pro se litigants can file electronically.

The United States District Court for the Northern District of Texas has twelve judgeships and seven office codes: Dallas (office code 3), Fort Worth (office code 4), Amarillo (office code 2), Lubbock (office code 5), Abilene (office code 1), Wichita Falls (office code 7), and San Angelo (office code 6).

The clerk's office is open from 8:30 to 4:30. Offices other than Dallas, Fort Worth, and Wichita Falls close for an hour at noon.

Electronic filing is governed by the court's ECF Administrative Procedures Manual. N.D. Tex. R. 3.1. The court's Pro Se Handbook for Civil Suits instructs pro se litigants as follows: "you must file a Complaint on paper but must file any other pleading, motion, or other paper by electronic means, unless you have been excused from this requirement for cause by the presiding judge." *Id.* § 4.G; *see* N.D. Tex. R. 5.1(e). This rule has been in place for several years. Some pro se litigants file on paper. Pro se electronic filers have the same burden as attorneys to retain originals signed by another party until a year after the case is over.

One challenge for pro se litigants using CM/ECF is that CM/ECF gives them one free look at other parties' filings, but after that they have to pay Pacer fees, and log in separately to Pacer, to see the documents if they have not saved them. Attorneys face the same challenge, but they typically acclimate to it.

When a pro se litigant files something on paper, the court's staff converts it to an electronic filing, and parties who are CM/ECF users receive electronic service.

All prisoners file on paper. The court has explored arrangements with state and federal facilities for electronic submission of prisoner filings to the court, but nothing has yet been approved. One possibility explored but not yet

adopted was a dedicated fax machine that would convert scans directly to electronic submissions to the court, and then the court's staff would docket the submissions in CM/ECF.

The court's website has a page on Emergency Filing Procedures that describes how emergency filings may be emailed to the court after hours when CM/ECF is unavailable for any reason. The court does not accept filings by fax. It no longer uses physical drop boxes, except when the court is briefly closed, such as for an annual staff development gathering.

"A pleading, motion, or other paper that is filed by electronic means before midnight central time of any day will be deemed filed on that day." N.D. Tex. R. 6.1; *id.* Crim. R. 45.1.

The District Court for the District of Utah

This court was selected for this study at random from among the district courts.

The United States District Court for the District of Utah has five judgeships and three office codes: Central Region (office code 2), Northern Region (office code 1), and Southern Region (office code 4). The court's only intake counter is in Salt Lake City.

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's CM/ECF and E-Filing Administrative Procedures Manual [hereinafter ECF Procs.]. D. Utah Civ. R. 5-1(a). For some time, pro se parties could seek permission from the court to submit filings by email. *See* D. Utah ECF Procs. ¶ I.A.4. Judicial permission is no longer required. On the court's website is an "Email Filing and Electronic Notification Form for Unrepresented Parties." Pro se parties can register for email filing and electronic notification or judge electronic notification. Scanned signatures in email filings are sufficient. Pro se parties may not use CM/ECF. The court does not accept filings by fax.

The court does not currently have anything set up to receive electronic submissions from prisoners. Nothing precludes pro se criminal defendants from registering as email filers.

Attorneys do not open civil cases directly on CM/ECF; they email the complaint and the civil cover sheet to the clerk's office, which then opens the case. Criminal cases are opened on paper indictments. Informations are usually received by email.

Attorneys do not have electronic access to sealed filings. Filings in sealed cases, such as criminal cases before the defendants have appeared, must be emailed to the court. CM/ECF can be used to file sealed filings in cases not otherwise sealed, but the filers will not be able to see the filings on CM/ECF.

Paper and email filers do not have to serve other parties who are already receiving electronic service.

The court does not have a drop box. The assistant marshals asked the court to stop using one when the court moved to its new building.

Concerns about allowing pro se litigants to use CM/ECF include proper use of event codes, proper formatting of PDFs, and adherence to redaction requirements.

The District Court for the Eastern District of Virginia

This court was selected for this study because although its rules state that pro se electronic filing is not permitted, we observed in the filing-time project pro se electronic filing in 2018.

The United States District Court for the Eastern District of Virginia has eleven judgeships and four office codes: Alexandria (office code 1), Richmond (office code 3), Norfolk (office code 2), and Newport News (office code 4).

The clerk's office is open from 8:30 to 5:00.

Electronic filing is governed by the court's Electronic Case Filing Policies and Procedures. E.D. Va. Civ. R. 1(A); *id.* Crim. R. 1(A). Pro se litigants are prohibited from filing documents electronically. E.D. Va. Electronic Case Filing Policies and Procedures at 12; E.D. Va. Pro Se Reference Handbook at 7. On some occasions, judges have granted exceptions to this rule and allowed pro se litigants to use CM/ECF. Their permissions are set so that they can file only in their cases.

Filing by email or fax is not permitted.

More expansive opportunities for electronic filing by pro se litigants would save court staff a lot of time spent scanning documents.

Attorneys in this district can open cases directly in CM/ECF.

Paper filers are required to serve other parties on paper, even parties receiving electronic service. Case managers scrutinize certificates of service.

The courthouses have drop boxes outside the clerk's offices but inside the buildings. The buildings are open until 6:30, but members of the public generally are not admitted after 5:00, closing time for the clerk's office. Sometimes a security officer will allow someone access to the drop box after 5:00. At the drop box is a time stamp and a telephone connection to the clerk's office. The drop boxes were put in place to mitigate personal contact during the COVID-19 pandemic.

The District Court for the Eastern District of Washington

This court was selected for this study because its rules state that pro se electronic filing is possible for prisoners.

The United States District Court for the Eastern District of Washington has four judgeships and three office codes: Spokane (office code 2), Yakima (office code 1), and Richland (office code 4).

The clerk's office is open from 9:00 to 4:30.

Electronic filing is governed by the court's ECF Administrative Procedures [hereinafter ECF Procs.]. E.D. Wash. Civ. R. 3(b)(1). "Self-represented filers (pro se) may, but are not required to, electronically file documents and register in the System." E.D. Wash. ECF Procs. ¶ III.B.3.

> A non-prisoner who is a party to a civil action and who is not represented by an attorney may file a motion to obtain a ECF Filing Authorization on a form prescribed by the clerk's office. Only after the court has granted such a motion may a pro se party attempt to register for ECF.

Id. ¶ IV.A.2.a. Electronic filing privileges are granted by the presiding judge on a case-by-case basis for pending cases.

> A prisoner who is a party to a civil action, is not represented by an attorney and resides in a correction facility that participates in the prison electronic filing initiative is required to adhere to the procedures established in General Orders 15-35-1 and 16-35-1, absent a court order to the contrary.

Id. ¶ IV.A.3.a. All state prisoners must present pro se filings to their prison librarian, who scans them and submits them electronically to the court. The librarian receives electronic notice of other parties' filings and prints them out for the pro se prisoners. There is no federal facility in the state, and county jails do not participate in the electronic submission program.

The court does not receive original signatures this way, but neither does the court retain original signatures with paper filings.

Paper service by paper filers is not required on parties who have agreed that electronic service is enough.

"At this time, pro se filers are not permitted to electronically file new cases. Only prisoners assigned to facilities participating in the prison electronic filing initiatives are permitted to file new cases electronically." E.D. Wash. ECF Procs. ¶ V.B.2.

The court has a pro se criminal defendant who is not detained, who does not have standby counsel, and who has been granted use of CM/ECF.

The court does not accept filings by email or fax, aside from electronic submissions by prisoners. The court uses a physical drop box only when the court is closed, such as because of COVID-19.

"Unless otherwise ordered by the court, filing deadlines shall be Midnight Pacific Time on the day the documents are required to be filed." E.D. Wash. ECF Procs. ¶ II.E.

The District Court for the Western District of Washington

This court was selected for this study because its rules state that pro se litigants can file electronically.

The United States District Court for the Western District of Washington has seven judgeships and two office codes: Seattle (office code 2) and Tacoma (office code 3).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Electronic Filing Procedures for Civil and Criminal Cases [hereinafter ECF Procs.]. *See* W.D. Wash. Civ. R. 5(d). Pro se parties may register to use CM/ECF, but they may not initiate cases electronically. W.D. Wash. R. 5(d); W.D. Wash. ECF Procs. §§ I.A, III.B. The litigant registers as a Pacer user, and then the court grants the user filing

privileges for a specific case. The pro se user cannot use CM/ECF to file complaints the way that attorneys can, because the privileges are tied to an existing case number. Pro se litigants can, however, email their complaints to the court. The court has allowed pro se use of CM/ECF since the beginning, and privileges have seldom been revoked.

One challenge with pro se electronic filing is that the filings sometimes include personal information that should be sealed. The court staff could catch that before filing when documents were presented on paper. Now corrections are made after filing.

The court has established a Prisoner E-Filing Initiative for prisoners to submit filings to the court electronically. W.D. Wash. ECF Procs. § III.B. All prisoners in Washington's state facilities submit filings to the court electronically. Prison librarians scan and email the filings. Prison librarians also receive electronic notices for the prisoners and convert them into paper documents. There is no such process for federal or local facilities. Before the E-Filing Initiative, there were complaints about prison mail, and electronic submissions mitigate that issue.

Criminal cases are opened by the court staff on paper filings. On a couple of occasions, judges have granted pro se criminal defendants CM/ECF filing privileges.

Aside from submissions from prisoners and other pro se complaints, the court does not accept filings by email.

There is a drop box at each of the court's intake counter locations. The drop boxes are available when the buildings are open, and they facilitate social distancing. There is a date stamp at each.

This is one of the courts that no longer accepts cash for filing fees.

"Unless otherwise ordered by the court, filing deadlines shall be 11:59 PM Pacific Time on the day the pleadings are to be filed." W.D. Wash. ECF Procs. § I.B.

The District Court for the Western District of Wisconsin

This court was selected for this study at random from among the district courts. It is one of the district courts with rules stating that pro se litigants can file electronically.

The United States District Court for the Western District of Wisconsin has two judgeships and one office code: Madison (office code 3).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Electronic Filing Procedures for the United States District Court for the Western District of Wisconsin. The procedures define filing user as "a lawyer or pro se party who has a registered username and password to file documents electronically in this court." *Id.* § I. The court's pro se guide explicitly tells pro se litigants, "You can file your documents electronically." W.D. Wis. Guide for Litigants Without a Lawyer at 38.

Nonprisoner pro se litigants do not need special permission to register as CM/ECF users in existing cases, just an email address and an ability to create PDFs. Their obligation to retain originals is the same as attorneys'.

Pro se litigants are not permitted to use CM/ECF to open cases, however. Nor are criminal defendants permitted to use CM/ECF; there are too many background features and schedules that would be adversely affected if something was filed incorrectly.

Some of the prisons have a way for a pro se litigant to present a filing to a prison librarian who will scan and email the filing to the court. The court generally does not otherwise accept filings by email or fax. The court would be amenable to procedures that allowed prisoners to file electronically pro se from the prisons.

The court does not have a drop box. It had one briefly during a COVID-19 shutdown.

Bankruptcy Courts

The Bankruptcy Court for the Northern District of Alabama

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Northern District of Alabama has five judgeships and four office codes: Birmingham (office code 2), Decatur (office code 8), Tuscaloosa (office code 7), and Anniston (office code 1). *See* Bankr. N.D. Ala. R. 1071-1. Each office has an intake counter.

The clerk's office is open from 8:00 to 4:00.

Electronic filing is governed by the court's Administrative Procedures for Filing, Signing, Retaining, and Verification of Pleadings and Papers in the Case Management/Electronic Case Filing (CM/ECF) System. Bankr. N.D. Ala. R. 5005-4. The court does not permit pro se use of CM/ECF. Pro se creditors can use the court's electronic proof of claim (ePOC) portal.

During the COVID-19 pandemic, the court accepted filings by email and suspended the requirement for original signatures. But the court is again accepting pro se filings only on paper. When it accepted filings by email, the court sometimes received improper submissions, such as redundant pleadings or legal questions.

The court no longer accepts cash for filing fees, and it does not have a drop box. In an emergency, a party can contact the court by telephone and make special arrangements for filing.

The court is considering use of the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court, but the court does not have a very large pro se debtor caseload.

The Bankruptcy Court for the Central District of California

This court was selected for this study because it is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Central District of California has twenty-one judgeships and five office codes: Los Angeles (office code 2), Riverside (office code 6), Santa Ana (office code 8), San Fernando Valley (office code 1), and Santa Barbara (Northern Division, office code 9).

The clerk's office is open from 9:00 to 4:00. Bankr. C.D. Cal. Ct. Man. § 1.1.

Electronic filing is governed by the court's Rule 5005-4 and the court's CM/ECF Procedures, which are section 3 of the Court Manual.

On rare occasions, the court has permitted electronic filing by pro se litigants. In one case, the litigant already had successfully filed electronically in the district court with the district court's permission, and the presiding bankruptcy judge granted the litigant permission to file electronically in a bankruptcy case.

The court's website offers an Electronic Self-Representation (eSR) Bankruptcy Petition Preparation System for Chapter 7 and Chapter 13. Originally, the court offered eSR only for chapter 7 cases, because chapter 13 cases are much more likely to fail without attorney representation. During the COVID-19 pandemic, when the courthouse was closed, the court began to allow the use of eSR for chapter 13 cases, and it kept the chapter 13 option with cooperation of the local bar in linking chapter 13 debtors with attorneys. The court tries to balance the promotion of electronic tools for pro se litigants with the encouragement of qualified legal representation.

Using eSR requires registration with an email address and a password. It results in a petition that is submitted electronically to the court. Filing requires the additional preparation of local forms and payment, which are returned in person or by mail. The local forms for chapter 13 cases are more complex than the local forms for chapter 7 cases. The court no longer accepts cash, and it does not accept personal checks or credit cards from pro se debtors.

When pro se debtors submit petitions either in person or using eSR, they are asked to provide identification, but they are not required to. It is permissible for family members or close friends to assist debtors' use of eSR, but the court is vigilant against the use of eSR by professional filing assistants, who often have words like "legal," "paralegal," or "notary" in their email addresses.

Once a case is open, the court will accept pro se filings by email.

Four of the five courthouses—all except Santa Ana—have physical drop boxes in the building lobbies outside the clerk's offices. The court discontinued the use of drop boxes after September 11, 2001, but it resumed their use when the courts were closed for the COVID-19 pandemic. The drop boxes are available after court hours, but only until the building closes to the public. Documents are date stamped when retrieved by the court's staff. Documents retrieved first thing in the morning, before the clerk's office opens, are stamped with the previous day's date.

The court also uses an Electronic Drop Box, and its website states the following:

> The Electronic Drop Box (EDB) is a tool available to self-represented litigants that enables them to upload court documents for filing electronically in bankruptcy cases and adversary proceedings pending in this District. Once you are determined to be eligible to use the Electronic Drop Box, the court will provide you with a link to upload your documents. After the court reviews the uploaded document it will be filed with the court.

"Filing must be completed before midnight, Pacific Standard or Daylight Saving Time, whichever is then in effect, to be considered timely filed that day." Bankr. C.D. Cal. Ct. Man. § 3.3(b).

The Bankruptcy Court for the District of Delaware

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Delaware has eight judgeships and one office code: Wilmington (office code 1).

The clerk's office is open from 8:00 to 4:00. Bankr. Del. R. 5001-2(a).

Electronic filing is governed by the court's Rule 5005-4 and the court's Administrative Procedures for Electronically Filed Cases. "[T]he District Court's standing order dated October 2, 2014, requiring that all electronic filings be submitted by 6:00 p.m. Eastern Time will not apply to filings that are made in the Bankruptcy Court." *Id.* R. 1001-1(f). Filings in bankruptcy cases are much more of a twenty-four-hour enterprise.

Pro se litigants are not permitted to file electronically. During the court's COVID-19 closure, the court established a web page that allowed a pro se filer to initiate a case online; the website emailed the petition to the clerk's office. Only one filer took advantage of that process, and the court discontinued it when the office opened again.

There is a twenty-four-hour drop box in the lobby of the commercial building where the court sits. There is a time stamp at the drop box. Filings are retrieved every morning.

A big challenge for permitting debtors to file petitions online is proof of identity. Payment is also a challenge, because once the petition is filed, the debtor's personal checks and credit cards are no longer usable.

The Bankruptcy Court for the Middle District of Georgia

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Middle District of Georgia has three judgeships and six office codes: Macon (office code 5), Albany (office code 1), Valdosta (office code 7), Athens (office code 3), Columbus (office code 4), and Thomasville (office code 6). There are intake counters in Macon and Columbus. The Thomasville location closed several years ago.

The clerk's office is open from 8:30 to 5:00.

Electronic filing is governed by the court's Rule 5005-4 and the court's Clerk's Instructions, especially "II. Filing Information and Requirements." Pro se parties whom the clerk determines file frequently can register as CM/ECF users. Bankr. M.D. Ga. R. 5005-4(a)(2). Judges have granted permission in approximately two cases. In those cases, the debtors were able to use CM/ECF to file their petitions. One of the debtors overused the privilege and tried to file excessive appeals. Most requests are declined after determining that the debtors are unsuitable candidates.

The court is considering the use of the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court, but the court is concerned about the technical sophistication required to use it. The court is also concerned about the amount of staff time that might be required to fix faulty submissions.

Pro se creditors can receive limited CM/ECF privileges, or they can use the court's electronic proof of claim (ePOC) portal.

The court has traditionally accepted filings be email if travel to the court would be a hardship or regular mail would be too slow. During the COVID-19 pandemic, the court began accepting filings by email more generally. A concern with email submissions is identification verification.

The court does not have a drop box.

Paper filers are not required to serve other parties receiving electronic service.

The Bankruptcy Court for the District of Hawaii

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Hawaii has one judgeship and one office code: Honolulu (office code 1).

The clerk's office is open from 8:30 to noon and from 1:00 to 4:00.

Electronic filing is governed by the court's Rule 5005-4. "The clerk may authorize [individuals other than attorneys] to be ECF Users with full or limited participation in the CM/ECF system, including an unrepresented individual." *Id.* R. 5005-4(b)(1). Creditors and pro se litigants have limited CM/ECF menus. Pro se litigants' electronic filing privileges are limited to the cases for which they receive permission, and the privileges expire at the end of their cases. The single bankruptcy judge in the district delegated approval responsibilities to the clerk's office; pro se CM/ECF filing privileges are obtained by written application. Pro se litigants cannot open cases electronically.

Pro se litigants who file on paper have to serve on paper only parties who do not receive electronic service. Certificates of service are supposed to detail who gets service electronically and who gets service on paper.

The court transitioned to NextGen CM/ECF in November 2021, and NextGen makes granting electronic filing privileges to pro se litigants more complicated.

Electronic filing is regarded as a privilege. An attorney's electronic filing privileges were revoked when the attorney opened a case that was not supported by a signed petition.

On rare occasions, the judge has granted permission for some litigants to submit filings to the court by email or fax. The court does not have a drop box.

"Filing must be completed by 11:59 p.m. Hawaiian Standard Time as recorded by the court's CM/ECF server in order to be considered timely filed that day." Bankr. Haw. R. 5005-4(c)(3).

The Bankruptcy Court for the Central District of Illinois

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Central District of Illinois has three judgeships and three office codes: Peoria (office code 1), Springfield (office code 3), and Urbana (office code 2).

The clerk's office is open from 8:00 to 5:00.

The district court's local rules govern cases in the district's bankruptcy court. Electronic filing is governed by the district court's Civil Rules 5.2 through 5.9 and by the bankruptcy court's Administrative Procedures for the Case Management/Electronic Case Filing System. "Pro se parties are not required to register for electronic filing but may apply to the court for leave to file electronically." C.D. Ill. Civ. R. 5.2. One pro se debtor has requested and received CM/ECF filing privileges in the past several years.

The court also accepts electronic submissions through its Electronic Documents Submission System (EDSS). Pro se debtors can submit both petitions and later filings this way. The court allows the "/s/" format for signatures. Payment of the filing fee would have to be delivered to the court promptly, but all users have requested fee waivers or installments.

The COVID-19 pandemic showed how important electronic forms of communication are. The court borrowed code from another court to set up its EDSS, which took several hours to install and test.

Pro se creditors can be granted limited filing privileges in CM/ECF after training, or they can use EDSS. Pro se creditors can also use the court's electronic proof of claim (ePOC) portal.

The court does not accept filings by email or fax.

The court has a drop box at each of its locations, just inside the front door on the ground floor. The intake counter is on the second floor, so the drop box helps to maintain social distancing.

The court still accepts cash at the counter, but exact change is required. Cash should not be put in the drop box.

"A document filed electronically by 11:59 p.m. central standard time will be deemed filed on that date." C.D. Ill. Civ. R. 5.7(A)(3); *id.* Crim. R. 49.6(B)(4).

The Bankruptcy Court for the Northern District of Indiana

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Northern District of Indiana has three judgeships and four office codes: Hammond (office code 2), Fort Wayne (office code 1), South Bend (office code 3), and Lafayette (office code 4). The clerk has an intake counter at all four locations.

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Seventh Amended Order Authorizing Electronic Case Filing, *In re Electronic Case Filing* (Jan. 14, 2022) [hereinafter ECF Order]. Pro se debtors are not permitted to use CM/ECF. Pro se creditors, especially frequent filers, can receive limited CM/ECF privileges.

The court does not accept filings by email or fax. It uses drop boxes only when the staff is not present for some occasional reason. The court will accommodate requests for emergency filings.

Paper filers do not have to separately serve parties already receiving electronic service.

Currently, about 2% of the court's cases have pro se debtors. Because of the low number of pro se filings, the court does not have a formal program to assist pro se filers, but neither does it discourage them. Access to representation may be more important than ease of pro se filing given the long-term consequences of a bankruptcy petition. Making pro se filing easier without also ensuring debtors have a sufficient opportunity to determine if bankruptcy is really the right choice may not be the best approach. The court's local practice and procedures committee has looked into this question on several occasions and concluded that programs sponsored by the various county bar associations and legal service organizations adequately balance these concerns, so no formal court-sponsored program is necessary.

"Filing in the Northern District of Indiana must be completed before midnight in South Bend, Indiana, where the court's ECF server is located, to be considered filed that day." ECF Order ¶ 7.

The Bankruptcy Court for the District of Kansas

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the District of Kansas has four judgeships and three office codes: Kansas City (office code 2), Wichita (office code 6), and Topeka (office code 5).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Rule 5005.1 and the court's Administrative Procedures for Filing, Signing, and Verifying Pleadings and Documents by Electronic Means [hereinafter ECF Procs.], which is appendix 1-01 to Rule 5005.1. "If the court permits, a party to a pending action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action." Bankr. Kan. ECF Procs. ¶ II.B. In

practice, pro se debtors have not been granted CM/ECF filing privileges, but some pro se creditors have been granted limited CM/ECF filing privileges.

The court accepts filings from pro se debtors by email as well as by regular mail, and this includes the bankruptcy petition. The court's "How to File" webpage under "Filing Without an Attorney" provides an email address for each of the three court offices.

For creditors, the court offers several KASBFastFile options for uploading filings without the need for a CM/ECF account: electronic proof of claim (ePOC), electronic reaffirmation agreement (eReaf), and electronic request for notice.

During the COVID-19 pandemic, the court relaxed requirements for wet signatures. A local rule amended on March 17, 2022, keeps in place some relaxation. D. Kan. Bankr. R. 9011.4. A copy of a handwritten signature is sufficient for pro se debtors. For a filing by an attorney that includes someone else's signature, an electronic signature using something like DocuSign suffices if the attorney vouches for the authenticity of the signature. DocuSign signatures are not sufficient for pro se parties.

Paper (or email) filers do not have to separately serve other parties already receiving electronic service.

The court does not have a drop box, but it does have a mail slot at each location that is available when the building is open. Also, if a filer were to knock on the door and there was someone in the office, a filing would be accepted.

The court accepts cash, but exact change is required.

"Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day." Bankr. Kan. ECF Procs. ¶ III.D.

The court is considering use of the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court. The court would like to see improvements in electronic noticing so that all parties can receive electronic notices instantaneously. A way for pro se debtors to pay filing fees electronically also would be helpful.

The Bankruptcy Court for the Eastern District of Kentucky

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Eastern District of Kentucky has two judgeships and six office codes: Lexington (office code 5), Covington (office code 2), London (office code 6), Pikeville (office code 7), Frankfort (office code 3), and Ashland (office code 1). The court relinquished its space in Frankfort to the district court and now hears Frankfort cases in Lexington, about forty-five minutes away. The court's intake counter is in Lexington.

The clerk's office is open from 9:00 to 3:00.

Electronic filing is governed by the court's Rule 5005-4 and the court's Administrative Procedures Manual [hereinafter ECF Procs.]. The court does not permit either debtors or other parties appearing pro se to use CM/ECF. Because of the COVID-19 pandemic, the court set up an email address for electronic submissions by pro se parties. The court is very pleased with how this has worked and plans to keep this option. Counter traffic has dropped substantially since virtual filing was adopted.

Virtual filings received after the clerk's office closing time of 3:00 p.m. generally are regarded as received on the following day. Paper originals are required within two weeks, and they will include wet signatures. For filing fees, the court accepts cash and money orders, but not electronic payments. There is a bank in the same building as the court, which facilitates both payment by money order and depositing of cash by the court. The court does not make change.

The court is considering the use of the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court. The court has adopted the courts' electronic submission modules for proofs of claim, requests for service, and reaffirmation agreements. These submission modules provide for electronic signatures.

The court otherwise does not generally accept filings by email or fax. The court does not have a drop box.

Use of CM/ECF by attorneys, which is required, generally constitutes waiver of separate service, so paper servers do not generally have to separately serve parties receiving electronic service. Bankr. E.D. Ky. ECF Procs. § V.

The court is very interested in expanded opportunities for electronic submissions.

The Bankruptcy Court for the Eastern District of Louisiana

This court was selected for this study because it is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Eastern District of Louisiana has two judgeships and one office code: New Orleans (office code 2).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Rule 2014-1(D) and the court's Administrative Procedures Manual.

The court does not allow pro se use of CM/ECF. Pro se debtors can submit petitions electronically using the court's online tool: Electronic Self-Representation (eSR) Bankruptcy Petition Preparation System for Chapter 7 and Chapter 13. Within ten days of submission, the debtor must provide in paper form a signed declaration, a Social Security statement, and a credit counseling form as well as payment of the filing fee. The case is opened upon initial submission, but it is dismissed if not completed. Users of eSR can receive electronic notice of other parties' filings; pro se debtors who do not use eSR cannot.

Pro se creditors can file claims using the court's electronic proof of claim (ePOC) portal.

Pro se debtors can file emergency petitions by fax (or email during the COVID-19 pandemic) outside of the court's operating hours, but then must file the originals by noon on the next court day.

When the court closed because of the COVID-19 pandemic, it established a drop box with a time stamp available. When the court reopened, the drop box was available only for persons declining to comply with the building's vaccination and testing requirements. When those requirements were lifted, the drop box was removed.

The Bankruptcy Court for the District of Massachusetts

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Massachusetts has five judgeships and three office codes: Boston (office code 1), Worcester (office code 4), and Springfield (office code 3).

The clerk's office is open from 8:30 to 5:00.

Electronic filing is covered by the court's Electronic Filing Rules [hereinafter ECF R.], Bankr. Mass. R. app. 8; *see id.* R. 9036-1, and the court's ECF User Manual.

Pro se parties are not permitted to file using CM/ECF, but to accommodate the COVID-19 pandemic the court now accepts filings from pro se litigants by email and fax. If an emailed petition does not come with a request for a fee waiver or installment payments, then the court issues a notice of deficiency and payment can follow. A scanned signature is required within thirty days, and an original must be produced if requested.

The court uses drop boxes only when the court is closed for some reason, such as during the COVID-19 pandemic.

"[W]here the Court orders that filing must be completed by a specific date but does not specify the time, entry of the document into the ECF System must be completed before 4:30 Eastern Standard (or Daylight, if applicable) Time in order to be deemed timely filed." Bankr. Mass. ECF R. 3(c)(2).

The Bankruptcy Court for the Eastern District of Missouri

This court was selected for this study at random from among the bankruptcy courts. It is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Eastern District of Missouri has three judgeships and three office codes: St. Louis (office code 4), Cape Girardeau (office code 1), and Hannibal (office code 2). The court's only intake counter is in St. Louis.

The clerk's office is open from 8:30 to 4:30.

Pro se debtors can file petitions using the court's eSR module. This facilitates the filing of a petition, statements, schedules, and the creditor matrix, but not any filings after a case's opening. Users of eSR must submit a signed dec-

laration and payment separately, and the petition is not filed until that happens. The court has had two dozen users since it began offering eSR in April 2021. On a few occasions, someone began to use it, but they did not go all the way through to complete the petition.

The court does not otherwise accept filings by email or fax, except in the occasional emergency.

The court accepts cash as a payment option, retaining that option to promote access to justice. But exact change is required. The court lets debtors know this in advance.

Pro se debtors may not register for CM/ECF filing privileges. Institutional and professional pro se creditors may receive limited CM/ECF filing privileges; other pro se creditors can use the court's electronic proof of claim (ePOC) portal.

Paper filers must file certificates of service showing service on other parties, even if the other parties receive electronic service.

The eSR portal facilitates the filing of a petition, but not anything else. An electronic drop box for later filings would be cost prohibitive, because of the security protections it would have to include. It would be an easier option for a court with more cases, and that difference presents an access-to-justice issue.

It is not common for debtors to proceed pro se in this court. The local bar has worked hard to make representation affordable.

"All documents filed by an attorney shall be filed electronically in accordance with the procedures for electronic case filing set forth in the Procedures Manual." Bankr. E.D. Mo. R. 5005.A; *see* Bankr. E.D. Mo. Procs.

The Bankruptcy Court for the District of Nebraska

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Nebraska has two judgeships and two office codes: Omaha (office code 8) and Lincoln (office code 4).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Rule 5005-1.A.

The court is not in a big hurry to implement the electronic self-representation (eSR) module for submission of bankruptcy petitions used by some other courts. Pro se creditors can receive limited CM/ECF privileges for specific filings.

The court's local rules permit fax submissions of filings in an emergency. Bankr. Neb. R. 5005-1.B. Email submissions are accepted on a very limited basis.

Because of the COVID-19 pandemic, the court established a drop box, which is available when the federal building is open. There is a time stamp at the drop box. The filing fee cannot be submitted there; it must be mailed.

The Bankruptcy Court for the District of New Jersey

This court was selected for this study because it is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the District of New Jersey has eight judgeships and three office codes: Newark (office code 2), Camden (office code 1), and Trenton (office code 3).

The clerk's office was open from 8:30 to 4:00 before the COVID-19 pandemic. Now the counter has limited hours: from 10:00 to 2:00. (Until March 21, 2022, the court's counter hours were further limited to Tuesday through Thursday.) Many members of the court's staff frequently work remotely now.

Electronic filing is governed by the court's Rule 5005-1. The court does not permit pro se litigants to use CM/ECF.

The court, however, is one of the courts that offers pro se debtors a way to submit their petitions electronically: a web page dedicated to Submitting a Bankruptcy Package Electronically (eSR). After the debtor submits the petition, the debtor receives an email requesting additional documents, including the social security number declaration, which is filed separately and restricted from public view.

The filing fee must be paid conventionally, either in person or by mail. Only money orders and certified checks are accepted; the court has not accepted cash for more than fifteen years.

The courthouses have drop boxes that are available outside of the clerk's office hours, but only when the buildings are open. Entry to the buildings requires proof of COVID-19 vaccination or a recent negative test. (The wearing of a face mask also was required until March 16 of this year.) Sometimes members of the clerk's staff have met debtors outside the building to receive documents. Although the counter has limited hours, counter service is available outside those hours by appointment.

The predecessor to eSR was called Pathfinder; New Jersey was a pilot court for that project. It was discontinued when the court moved to NextGen CM/ECF because of incompatibility. The court adopted eSR when the NextGen-compatible eSR module was developed.

A great benefit of eSR is that court staff members do not have to decipher handwriting. But sometimes there is a lot of back and forth with a debtor to get the papers prepared properly. Sometimes face-to-face contact is more efficient than remote contact.

The Bankruptcy Court for the District of New Mexico

This court was selected for this study at random from among the bankruptcy courts. It is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the District of New Mexico has two judgeships and one office code: Albuquerque (office code 1).

The clerk's office is open from 8:30 to 4:00.

Electronic filing is governed by the court's Rule 5005-2. Pro se parties may be granted permission to use CM/ECF. *See id.* R. 5005-3.

Electronic submission of bankruptcy petitions by chapter 7 pro se debtors is possible using the court's eSR portal, but that is used only rarely. The local bar is concerned about eSR's impact on their practice. A user of eSR must separately submit a paper signature page and pay the filing fee.

The court developed an electronic drop box (EDB) for use by pro se litigants, with the permission of the presiding judge. The clerk's office reviews the electronic submissions and transfers them to the case record. Scanned signatures are accepted.

Since the beginning of the COVID-19 pandemic, the court has accepted personal checks for filing fees, because of the difficulties during the pandemic of getting money orders. The court accepts cash, but it discourages cash payments because of the difficulties sometimes of making change. The court accepts debit card payments, but not credit card payments, from pro se debtors.

Paper filers are not required to separately serve other parties receiving electronic service.

The bankruptcy court and the district court jointly used a drop box during the COVID-19 pandemic closure, but they do not use it now that the courts are open again.

Interest in joining the local bankruptcy bar is mitigated by low bankruptcy filing rates. The U.S. trustees' decision to start doing section 341 creditor meetings by Zoom has made out-of-state attorneys more interested in practicing in New Mexico.

"Unless otherwise ordered, any paper filed electronically must be filed before midnight local time to be considered timely filed that day." Bankr. N.M. R. 5005-2(b).

The Bankruptcy Court for the Southern District of New York

This court was selected for this study because it has a filing deadline relevant to another study.

The United States Bankruptcy Court for the Southern District of New York has nine judgeships and three office codes: Manhattan (office code 1), Poughkeepsie (office code 4), and White Plains (office code 7).

The clerk's office is open from 8:30 to 5:00. Bankr. S.D.N.Y. R. 5001-1.

"This Court has authorized the limited use of the [electronic filing system] by non-attorneys who obtain a limited-access account." Bankr. S.D.N.Y. Procedures for the Filing, Signing, and Verification of Documents by Electronic Means ¶ I.A.2; *see id.* ¶ I.B. This does not include pro se debtors. With a very large caseload, the court already has to manage CM/ECF accounts for more than twenty thousand attorneys.

Because of the COVID-19 pandemic, the court has accepted filings using an online uploader. Scanned signatures are treated as originals. The court is exploring using the electronic self-representation (eSR) portal used by some other courts for the electronic submission of pro se bankruptcy petitions to

the court, but because eSR only provides a way to submit the petition, other electronic submissions would have to be received a different way. The court is concerned that having to use two different methods to file would be confusing. The court is looking for the best way to expand electronic submission.

Cash, cashier's checks, and money orders are accepted for filing fees. The challenge with using Pay.gov is disabling payment methods, such as credit cards, that the court does not accept from pro se debtors.

The courthouses have drop boxes. In Manhattan, documents can be left in the district court night box, which is available at all hours. There are time stamps at the drop boxes.

Because email notification does not always constitute service, paper filers generally must still serve other parties with their filings, even if the other parties receive electronic service.

Unless an earlier deadline is set, filings are due at midnight on the day due. But motion replies generally must be received by 4:00 p.m. three days before the hearing. Bankr. S.D.N.Y. R. 9006-1(b).

The Bankruptcy Court for the Western District of New York

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Western District of New York has three judgeships and two office codes: Buffalo (office code 1) and Rochester (office code 2).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Amended Administrative Procedures for Filing, Signing and Verifying Pleadings and Papers Electronically [hereinafter ECF Procs.]. "Parties proceeding *pro se* . . . will not be permitted to file electronically and must follow all filing requirements of the Bankruptcy Rules and Local Rules." *Id.* § 1.A.3. Even individual creditors appearing pro se must file on paper. Institutional creditors can receive limited CM/ECF filing privileges.

Over the past five years, the percentage of cases that are pro se has ranged from 2% to 4%.

There are drop boxes with time stamps at the clerk's two locations, in buildings that open a little earlier and close a little later than the clerk's offices do. The drop boxes are infrequently used. The clerk's offices never closed altogether for the COVID-19 pandemic. A filer who comes to the court usually comes to the counter.

"Filings are considered timely if received by the Court before midnight on the date set as a deadline, unless the presiding Judge specifically requires an earlier filing, such as by the close of business." Bankr. W.D.N.Y. ECF Procs. § 3.D.2.

The Bankruptcy Court for the Western District of North Carolina

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Western District of North Carolina has two judgeships and five office codes: Charlotte (office code 3), Statesville (office code 5), Shelby (office code 4), Asheville (office code 1), and Bryson City (office code 2).

The clerk's office is open in Charlotte from 8:30 to 12:30 and from 1:30 to 4:30.

The court's Rule 5005-1 governs electronic case filing. *See also* Administrative Order Adopting Electronic Case Filing Procedures, *In re Order in Aid of Case Administration: Electronic Case Filing Procedures* (Feb. 2, 2001).

The only time that the court ever accepted pro se filings electronically was by email earlier in the COVID-19 pandemic.

The Bankruptcy Court for the Northern District of Oklahoma

This court was selected for this study at random from among the bankruptcy courts with rules stating that pro se electronic filing is not permitted.

The United States Bankruptcy Court for the Northern District of Oklahoma has two judgeships and one office code: Tulsa (office code 4).

The clerk's office is open from 8:30 to 4:30, except that it closes at 3:00 on Tuesdays.

Electronic filing is governed by the court's CM/ECF Administrative Guide of Policies and Procedures [hereinafter ECF Procs.], the first appendix to the court's local rules. "Generally, parties proceeding pro se will not be authorized to file electronically." *Id.* ¶ III.B.

Pro se debtors cannot receive notices electronically. The court does not use the Bankruptcy Noticing Center for service of orders and notices on pro se debtors, because the BNC is not required to notify the court when notices are returned as undeliverable. The court does use the BNC for pro se creditors.

The court plans to use the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court, but setting that up is not currently a high priority.

Creditors can use the court's electronic proof of claim (ePOC) portal. Creditors who file many transfers of claims pro se may be granted limited CM/ECF privileges.

Paper filers must serve even parties receiving electronic service.

The court does not have a drop box. The counter did not close during the COVID-19 pandemic. The Department of Homeland Security advised against a drop box outside the courthouse building.

"Filing must be completed before midnight Central Time in order to be considered timely filed that day." Bankr. N.D. Okla. ECF Procs. ¶ II.B.

The Bankruptcy Court for the Western District of Oklahoma

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Western District of Oklahoma has three judgeships and one office code: Oklahoma City (office code 5).

The clerk's office is open from 8:30 to 4:30.

Electronic filing is governed by the court's Administrative Guidelines for Electronic Case Filing, appendix A of the court's Rules, Bankr. W.D. Okla. R. 1001-1.E, 5005-1.A, and the court's CM/ECF Style Guide. "Pro se parties and bankruptcy petition preparers will not be Registered [CM/ECF] Participants, unless permitted by the Court." Bankr. W.D. Okla. R. app. A § 5.A.

In practice, pro se debtors do not use CM/ECF. Until recently, the court did not use the electronic self-representation (eSR) portal that some other courts use; instead, it developed during the COVID-19 pandemic its own Electronic Document Submission System (EDSS). The court developed three pages of EDSS administrative procedures. Only pro se filers can use EDSS. A scanned signature is sufficient, but the original must be retained for one year beyond final resolution of the case. Electronic submissions are faster for debtors than regular mail, and they do not require taking time off work to visit the courthouse.

In practice, EDSS submissions frequently require work by the court's staff to put in order. Documents may not be in the correct sequence, and file sizes may be excessive.

The court recently decided to offer eSR as an option for filing pro se petitions, and the court will continue to accept subsequent pro se filings in EDSS. Most pro se debtors still file on paper.

Filing fees can be paid using Pay.gov, and they must be paid by midnight or the filing will not be docketed.

Filers without CM/ECF filing privileges cannot receive electronic notices through CM/ECF, but they can through the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN). Few do.

Paper and EDSS filers must serve other parties, even those receiving electronic service.

The court does not accept filings by fax. There is a drop box outside the clerk's office, which is seldom used. There used to be a time stamp at the drop box, but there is not one there now.

"The deadline for filing, unless otherwise specifically set, is midnight of the due date, Central Time." Bankr. W.D. Okla. R. app. A § 4.G.

The Bankruptcy Court for the District of Oregon

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission. It is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the District of Oregon has five judgeships and two office codes: Portland (office code 3) and Eugene (office code 6).

The clerk's office is open from 9:00 to 4:30.

Electronic filing is governed by the court's Rule 5005-4 and the court's Administrative Procedures for Electronically Filing Case Documents [hereinafter ECF Procs.]. Parties other than attorneys, trustees, and creditors "may also be eligible to request a login for possible ECF participation upon approval of the chief bankruptcy judge." Bankr. Or. ECF Procs. ¶ II.A.

On very few occasions, presiding judges have granted CM/ECF privileges to pro se debtors. One was a former attorney. Another previously clerked for a court. For one chapter 11 debtor, it was easier to let the debtor use CM/ECF so that the court's staff did not have to figure out how to docket the filings.

The court has several alternatives to paper submission of bankruptcy petitions. The court uses the eSR module. Some users find it intimidating. The court also has a Public Document Upload (PDU) page that can be used both for the petition and for later filings. PDU submissions are often out of order or complex, with large documents broken into separate uploads. The court accepts submissions by fax, but not by email.

Written signatures are not required for uploaded submissions. Submission entails an agreement that the submitter is the filer and has signed the documents. Faxes must include copies of written signatures, but the original signatures do not need to be submitted.

Pro se debtors not using CM/ECF do not get electronic notice. The court does not use the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN).

Creditors can receive limited CM/ECF privileges, or they can use the court's electronic proof of claim (ePOC) portal.

The court brought back the drop box during the COVID-19 pandemic. It is available when the building is open. It does not have a time stamp. Documents are retrieved each morning.

"Electronic filing must be completed before midnight Pacific time to be considered filed on that day." Bankr. Or. R. 5005-4(f)(1).

The Bankruptcy Court for the Eastern District of Pennsylvania

This court was selected for this study at random from among the bankruptcy courts. It is one of the bankruptcy courts with rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Eastern District of Pennsylvania has five judgeships and two office codes: Philadelphia (office code 2) and Reading (office code 4).

The clerk's office is open from 8:00 to 4:30 in Reading and from 8:30 to 5:00 in Philadelphia.

Electronic filing is governed by the court's Rules 5005-1 through 5005-8 and by the district court's Rule 5.1.2, Bankr. E.D. Pa. R. 8011-1. According to

Rule 5005-3(c), the court may grant pro se parties permission to use CM/ECF in their cases. In practice, pro se bankruptcy petitions are always filed on paper. The court has considered electronic submission, but it is concerned about legal issues, including issues related to original signatures. A challenge for electronic submission is the heavy use of mobile devices for access to the internet, and filers may have more access to a phone camera than to a scanner.

Creditors and trustees who are not attorneys can apply to use CM/ECF.

The court does not accept filings by email or fax. There is a drop box in the building with hours somewhat longer than the court's. Documents are scanned at the drop box and time-stamped on the spot.

"The electronic filing of a document must be completed before midnight prevailing Eastern Time, to be timely filed on that day." Bankr. E.D. Pa. R. 5005-2(f).

The Bankruptcy Court for the Middle District of Pennsylvania

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Middle District of Pennsylvania has two judgeships and three office codes: Harrisburg (office code 1), Wilkes-Barre (office code 5), and Williamsport (office code 4). (The district court also has offices in Scranton and Lewisburg.)

The clerk's office is open from 9:00 to 4:00 in Harrisburg and Wilkes-Barre. Bankr. M.D. Pa. R. 5001-1.

Electronic filing is governed by the court's CM/ECF Administrative Procedures. They and the court's local rules state that pro se parties may be given permission by the court to file electronically. *See id.* ¶ I.C. "The Filing must be completed before midnight Eastern Standard Time to be considered timely filed that day." *Id.* ¶ III.B.

> **Rule 5005-1** *Filing and Transmittal of Papers.*
> (a) *Electronic Filing and Signing.*
> (1) *By a Represented Entity.* An entity represented by an attorney must file documents by using the Court's Electronic Case Filing system ("ECF" or "CM/ECF") in accordance with the CM/ECF Administrative Procedures available on the court's website (www.pamb.uscourts.gov). However, nonelectronic filing may be allowed for good cause, or as otherwise provided for by these rules;
> (2) *By a Self-Represented Individual.*
> (A) *Using the Electronic Document Submission System ("EDSS").* A self-represented individual may file documents (other than proofs of claim) electronically using the EDSS. . . .
> (B) *Using the Court's Electronic Case Filing ("CM/ECF") system.* An individual not represented by an attorney:
> (i) may file electronically using CM/ECF only if allowed by court order or through compliance with the conditions authorizing same as set forth in the CM/ECF Administrative Procedures adopted by this District; and

(ii) may be required to file electronically only by court order or as otherwise provided for in the CM/ECF Administrative Procedures adopted by this District.

Bankr. M.D. Pa. Bankr. R. 5005-1.

Although the court has received a few requests for use of CM/ECF by pro se debtors, the requests have always been denied. The risk of error is considered too great. A pro se debtor with a law degree was once given permission to read documents in CM/ECF but not file them.

The court created an Electronic Document Submission System (EDSS). Submissions are converted into electronic filings by the court's staff. Scanned signatures are regarded as sufficient, but originals must be retained for up to seven years. Payment must follow within a week. The court does not use Pay.gov. Most pro se debtors use EDSS now. Because EDSS allows for the filing of all documents, the court does not intend to use the electronic self-representation (eSR) portal that some other courts use. For electronic notifications, pro se debtors can sign up for the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN).

The court does not accept filings by email. Fax is still an option for after-hour filings and emergency petitions, but EDSS has displaced the use of fax in practice.

Creditors can use the court's electronic proof of claim (ePOC) portal. Some file on paper.

Because of security concerns, the court does not have a drop box.

The Bankruptcy Court for the Western District of Pennsylvania

This court was selected for this study because it has rules stating that pro se litigants can file electronically with permission.

The United States Bankruptcy Court for the Western District of Pennsylvania has four judgeships and three office codes: Pittsburgh (office code 2), Erie (office code 1), and Johnstown (office code 7).

The clerk's office is open from 9:00 to 4:30. Bankr. W.D. Pa. R. 1002-1(b).

Electronic filing is governed by the court's Rules 5005-1 through 5005-14 and 5005-21. "The Court may grant a *pro se* party to a pending action permission to apply for registration as a Filing User, subject to attending CM/ECF System training provided by the Clerk." *Id.* R. 5005-2(c). The court's debtors are seldom pro se, and it is possible that none has ever sought CM/ECF filing privileges.

Creditors and other unrepresented parties can register as limited users of CM/ECF. Pro se creditors can also file claims using the court's electronic proof of claim (ePOC) portal.

The court uses an Electronic Document Submission System (EDSS), an electronic drop box. Attorneys can use the electronic drop box to submit declarations of emergency filing at case initiation, but they have to use CM/ECF after that.

Pro se debtors can initiate cases using EDSS. The scanned signature is adequate, but filers must retain originals. The court also posted on its COVID-19 web page a link to a fillable "Emergency Petition" that has a submit button at the bottom.

Submissions otherwise by email and fax are not allowed, but the court still receives them, and if they are proper filings the court will accept them. The court has drop boxes with time stamps in Pittsburgh and Erie.

Paper filers do not have to separately serve parties receiving electronic service.

The court is interested in the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN), but the court has not set that up yet.

The Bankruptcy Court for the District of Rhode Island

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Rhode Island has one judgeship and one office code: Providence (office code 1).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Rule 5005-4 and the court's Electronic Filer User Manual.

The only pro se debtors who have used CM/ECF are attorneys who already had electronic filing privileges and who were representing themselves in bankruptcy cases.

At the beginning of the COVID-19 pandemic, the court set up a Self Represented Party Electronic Drop Box (EDB). They acquired the code from another court and set it up in a month or two. The court also began accepting filing fees through Pay.gov.

The court's website provides an email address for submission of an application to use the EDB. The application includes a copy of identification, and there is a separate application for the petition and for later documents. When the court's staff approves the application, the debtor receives by email a unique link for uploading documents for filing. Original paper documents, including wet signatures, must follow within two weeks.

EDB is not used to receive electronic notices of others' filings. Debtors can sign up for the Bankruptcy Noticing Center's debtor electronic bankruptcy noticing (DeBN).

As a small court, with only one judge, they decided not to offer the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court, because it would be too resource intensive.

Creditors can receive limited CM/ECF privileges, or they can use the court's electronic proof of claim (ePOC) portal.

The court can receive emergency filings by email or fax, but it has been years since anyone has used fax.

The court has had a drop box for a few decades, but after the Oklahoma City bombing, it was moved inside the building. It is useful when the clerk's office is closed for weather or pandemic. It does not have a time stamp. Users of the drop box must contact the court to let them know when they have deposited something.

Paper filers do not have to serve parties otherwise receiving electronic service.

"The deadline for filing, unless otherwise specifically set, is 11:59 P.M. (E.S.T.)." Bankr. R.I. R. 5005-4(f).

The Bankruptcy Court for the District of South Carolina

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of South Carolina has three judgeships and three office codes: Columbia (office code 3), Charleston (office code 2), and Greenville (office code 6). The Spartanburg court (office code 7) recently moved to Greenville.

The clerk's office is open from 9:00 to 5:00 in Columbia.

Electronic filing is governed by the court's Rule 5005-4.

Pro se debtors are not permitted to use CM/ECF. Pro se creditors can register as limited filers in CM/ECF. Most creditors are pro se.

Because of the COVID-19 pandemic, the court has been accepting pro se debtor submissions by email or fax. Original signatures must follow on paper. The court has looked at the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court, but that does not allow for the electronic submission of filings after the petition. When the court receives a bankruptcy petition by email or fax, it issues a notice to pay the filing fee. The court still accepts cash.

Walk-in filings are accepted in Columbia. There are drop boxes in the other two locations; the office staff mails submissions to Columbia. There is a drop box in the Columbia clerk's office for use when the office only has a skeleton crew, or by filers who wish to avoid personal contact. Materials submitted in drop boxes are retrieved immediately, so there is no need for a time stamp.

The Bankruptcy Court for the District of South Dakota

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of South Dakota has two judgeships and four office codes: Sioux Falls (office code 4), Rapid City (office code 5), Aberdeen (office code 1), and Pierre (office code 3).

The clerk's office is open from 8:00 to 5:00.

Electronic filing is governed by the court's Electronic Case Filing Administrative Procedures [hereinafter ECF Procs.]. Bankr. S.D. R. 5005-4, 7001-1. "A debtor not represented by an attorney shall either mail documents to the Clerk or deliver them in person to the Clerk's office . . . ." Bankr. S.D. R. app.

1A. The clerk cannot recall a pro se debtor who was able to file electronically. Filings cannot be submitted by email or fax. Petition fees must be paid by cash, cashier's check, or money order.

Paper service by paper filers is not required for persons receiving electronic service.

The court offered a drop box during the COVID-19 pandemic, but it was seldom used. Filers in divisions not staffed can leave filings with the district court.

The court is interested in the electronic self-representation (eSR) module used by some other courts, with which pro se debtors can submit petitions to the court electronically, and the District of South Dakota is watching the District of North Dakota's exploration of that resource.

"Unless the Court sets a different deadline, filing must be completed before midnight (Central Standard Time or Central Daylight Time, whichever is in effect) on the last day to file to be considered timely filed with respect to any such filing deadline." Bankr. S.D. ECF Procs. ¶ VI.D.

The Bankruptcy Court for the Eastern District of Tennessee

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Eastern District of Tennessee has four judgeships and five office codes: Chattanooga (office code 1), Knoxville (office code 3), Greenville (office code 2), Winchester (office code 4), and Johnson City (office code 5).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Rule 5005-4.

It does not appear that a pro se debtor has ever filed using CM/ECF. Pro se creditors can register for limited use of CM/ECF. They receive a very limited menu of filing options.

The court does not accept filings by email or fax, and it does not have a drop box. Earlier during the COVID-19 pandemic, the court accepted filings by fax, but it does not now. When the court converted to NextGen CM/ECF recently, it accepted filings from attorneys by email during a period when the system was down. The court is considering the use of the electronic self-representation (eSR) module used by some other courts for the electronic submission of pro se bankruptcy petitions to the court.

Filing fees can be paid by cashier's check, money order, or cash, with exact change. Attorneys can use Pay.gov.

"An electronic filing is timely if it is entered into ECF before midnight of the due date, [Eastern Time]." Bankr. E.D. Tenn. R. 5005-4(f).

The Bankruptcy Court for the Western District of Tennessee

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Western District of Tennessee has four judgeships and two office codes: Memphis (office code 2) and Jackson (office code 1).

The clerk's office is open from 8:30 to 4:00.

Electronic filing is governed by the court's Electronic Case Filing Guidelines. *See* Bankr. W.D. Tenn. R. 1001-1(b), 1001-2(7). The court does not permit electronic filing by pro se litigants. Nor does the court accept any filings by email.

Each courthouse has a drop box.

The Memphis courthouse is in leased space. The drop box serves only the court, and it is only available when the building is open. The building opens about one-and-a-half hours before the court does, and it closes about two hours later than the court does. It also has Saturday morning hours. Materials retrieved from the drop box are marked received on the business day that they are retrieved. During the COVID-19 shutdown, the drop box was the only way to file hard copies in person.

The Jackson courthouse is in a federal building that also houses the district court, and the drop box there serves the building, not just the bankruptcy court. It also is only available when the building is open. It was reopened during the COVID-19 pandemic after being closed for some time because of security concerns related to issues such as anthrax. The drop box facilitates contact-free filing.

Two important challenges posed by allowing pro se litigants to file electronically—an advancement that also would provide many benefits—are (1) establishing a procedure for retention of original documents, especially signatures, by pro se litigants, and (2) establishing a form of payment, because pro se litigants are currently not permitted to pay the initial filing fee with a personal check or a credit card, just cash, money order, or cashier's check.

A procedure that probably would work well would involve online forms that generate PDFs. There is some concern about developing procedures for electronic filing by pro se litigants, even by modeling what some other courts do, ahead of the development of national standards and procedures.

The Bankruptcy Court for the Eastern District of Texas

This court was selected for this study at random from among the bankruptcy courts. It is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Eastern District of Texas has two judgeships and six office codes: Sherman (office code 4), Tyler (office code 6), Beaumont (office code 1), Lufkin (office code 9), Marshall (office code 2), and Texarkana (office code 5).

The clerk's office is open from 8:00 to 4:00. Bankr. E.D. Tex. External Operating Procedures ¶ II.A.

Electronic filing is governed by the four Texas districts' Administrative Procedures for the Filing, Signing, and Verifying of Documents by Electronic

Means in Texas Bankruptcy Courts [hereinafter Tex. Bankr. ECF Procs.]. Bank. E.D. Tex. R. 1001-1(b)(4), 5005-1. Electronic submission of bankruptcy petitions by pro se debtors is possible using the court's eSR portal, which the court adopted early during the COVID-19 pandemic. Because the court is using NextGen CM/ECF, it was just a matter of turning on that option.

Pro se litigants are not permitted to make subsequent filings using either eSR or CM/ECF, but the court does have an electronic drop box. Within two days of a debtor's submitting a petition using eSR, the debtor must upload a copy of a signed declaration, a Social Security statement, and government identification. A wet signature is due within two weeks.

The court worked with Pay.gov to establish an electronic payment option that supports only the types of payment permitted by the court. This court accepts pro se payments by debit card or ACH.

The court does not have a physical drop box, because of security concerns. Before the court established an electronic drop box, the court accommodated the pandemic with an email option, but the electronic drop box gives the court greater control over what can be submitted, such as by requiring PDFs.

"A document is filed on a particular day if the transmission of the document is completed prior to midnight in the Central time zone." Bankr. Tex. ECF Procs. ¶ III.F.

The Bankruptcy Court for the Eastern District of Virginia

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the Eastern District of Virginia has six judgeships and four office codes: Richmond (office code 3), Norfolk (office code 2), Alexandria (office code 1), and Newport News (office code 4).

The clerk's office is open from 9:00 to 4:00.

Electronic filing is governed by the court's Rule 5005-2 and the court's CM/ECF Attorney Users' Guide. The court has very recently adopted NextGen CM/ECF.

It is possible for a pro se debtor to make a formal motion to use CM/ECF, and the motion receives careful screening by the presiding judge to determine whether the debtor has sufficient technical ability. These motions are rarely granted.

The court plans to adopt an electronic proof of claim (ePOC) portal for pro se creditors. Pro se creditors sometimes receive limited CM/ECF privileges.

Even attorneys do not currently open cases directly in CM/ECF. Petitions are filed in a shell case.

The court temporarily accepted filings by email during the COVID-19 pandemic.

The court has drop boxes, which it established during the COVID-19 pandemic and which the court plans to keep. They are available when the buildings are open, a little beyond counter hours. At each drop box is an electronic

time stamp and a telephone connection to the clerk's office. Filing fees paid in cash must be delivered directly to the counter rather left in a drop box.

The Bankruptcy Court for the Western District of Virginia

This court was selected for this study at random from among the bankruptcy courts. It is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Western District of Virginia has three judgeships and three office codes: Lynchburg (office code 6), Roanoke (office code 7), and Harrisonburg (office code 5).

The clerk's office is open from 8:00 to 4:30.

Electronic filing is governed by the court's Rule 5005-4 and the court's Amended Administrative Procedures for Filing, Signing, Retaining and Verification of Pleadings and Papers in the Case Management/Electronic Case Filing (CM/ECF) System. *See* Bankr. W.D. Va. R. 1002-1.D.

The court does not permit pro se debtors to use CM/ECF, but it is thinking about it for the future. Institutional pro se creditors can register as limited filers in CM/ECF.

Pro se debtors have very successfully used the court's eSR portal. Because the program is designed so that all questions must be answered before the petition can be submitted, the court receives complete and legible petitions. A filing fee and a wet signature must follow. Most are mailed. Only the Roanoke location accepts cash.

During the COVID-19 pandemic, the court has allowed pro se debtors to submit their filings to the court by email. Fax submissions would be permitted, but they have not happened. Because email submission of a petition includes only a photocopy of a signature, the court will not continue the email option once the pandemic is over.

The court does not have drop boxes.

The court's biggest challenge with respect to eSR is getting the word out that it is an option for pro se debtors.

The Bankruptcy Court for the Northern District of West Virginia

This court was selected for this study because it is one of the bankruptcy courts that has an electronic self-representation (eSR) portal.

The United States Bankruptcy Court for the Northern District of West Virginia has one judgeship and four office codes: Martinsburg (office code 3), Clarksburg (office code 1), Wheeling (office code 5), and Elkins (office code 2).

The clerk's office in Wheeling is open from 8:30 to noon and from 1:00 to 4:00. The clerk's office in Clarksburg is open Tuesdays through Thursdays from 9:30 to 3:00 but closed for lunch.

Electronic filing is governed by the court's Rule 5005-4. The rule states that pro se parties may file electronically using the Clerk's Pro Se Party E-Filing

Program. *Id.* R. 5005-4(b). The court may require electronic filing for pro se parties so long as that would not create a hardship or denial of access to the court. *Id.* R. 5005-4(a)–(b). This program allows a pro se litigant to use CM/ECF to electronically submit a filing to the court. After a review and proper classification, the court administrator converts the submission to a public docket entry. Pro se litigants do not use CM/ECF to create docket entries.

The court's website has an Electronic Self-Representation (eSR) Bankruptcy Petition Preparation System for Chapter 7. The petition is filed after the debtor submits to the court in paper form, by mail or in person, (1) a declaration of electronic filing, which includes the debtor's wet signature, (2) a certificate of credit counseling, and (3) a copy of identification, such as a driver's license. The court accepts payment by money order, cashier's check, or credit card. Payment can be made through the court's website pursuant to an order to pay the fee in installments.

Pro se filers must serve on other parties motions that initiate contested matters or adversary complaints, but for other filings service is complete upon filing if the other parties receive electronic service. Parties who receive electronic service of filing might not be inclined to enforce a requirement of separate service by paper filers.

Email filing in general would only be permitted in an emergency, followed by prompt submission of originals, including original signatures. The court does not have a drop box.

A document is timely if filed before midnight on the day that it is due. Bankr. N.D. W. Va. R. 5005-5(b)(1).

The Bankruptcy Court for the District of Wyoming

This court was selected for this study at random from among the bankruptcy courts.

The United States Bankruptcy Court for the District of Wyoming has one judgeship and one office code: Cheyenne (office code 2).

The clerk's office is open from 8:30 to noon and from 1:00 to 4:00.

Electronic filing is governed by the court's Rule 5005-2.

The court had about two dozen pro se debtors in 2021. In earlier years, it would have been one hundred or so. Pro se debtors typically file their petitions on paper and do not again interact with the court: "one and done."

Pro se debtors occasionally email or fax their petitions. Faxed petitions are converted into emails. The court accepts electronic submissions of petitions so long as the filing fee is addressed. If the petition includes an application for a waiver or an installment plan, then there is no problem. Otherwise the submission must be followed by payment, and the court may ask for an emailed copy of a money order or cashier's check. Rule 5005-1 provides for email or fax submissions with clerk permission, and originals are required seven days later.

What the court is most concerned about with electronic submissions is payment. The court does not use Pay.gov because of the credit card option.

Pro se debtors can arrange with the Bankruptcy Noticing Center for debtor electronic bankruptcy noticing (DeBN), and in a few cases the debtors have been granted electronic noticing in CM/ECF.

Because pro se debtors' interaction with the court after the petition is filed is so limited, there is not much motivation to enhance electronic filing and noticing.

The court does not use an electronic proof of claim (ePOC) portal for pro se creditors. They use CM/ECF.

There is a drop box available when the building is open. It does not have a time stamp; when members of the court's staff retrieve documents in the morning, they time-stamp the documents for the previous day.

Electronic Self Representation Confirmation Letter

This is an automatically generated email. Please do not reply to this message.

Electronic Self Representation
United States Bankruptcy Court (Central District of California)

Dear _____,

This email confirms the electronic receipt of the bankruptcy petition submitted to the Court as of the date of this email. Please note that the bankruptcy petition has NOT been filed and has NOT been assigned a case number, until the items listed below are received by the Bankruptcy Court. The Court will file this submission if it contains all that we require to file a bankruptcy case. Please note that the minimum items listed below must be received by the Bankruptcy Court within 10 days of the date of this confirmation email. These items must be either hand-delivered or mailed to the court.

To determine where you must submit the items listed below, please visit the Court Locator section of our website. The specific location of where to file for bankruptcy is determined by the zip code of a debtor's residential address.

You may view or print your submitted bankruptcy petition paperwork by logging in to the Electronic Self-Representation (eSR) Bankruptcy Petition site with the password you previously created. The information that you enter in the bankruptcy petition cannot be changed once it is submitted to the Court.

FILING FEE. Payable to "U.S. Bankruptcy Court," the full amount of the filing fee must be MAILED or HAND-DELIVERED by one of the following methods:

- Cashier's check issued by an acceptable financial institution, or
- U.S. Postal money order

NOTE: If you are applying for a fee waiver [CHAPTER 7 CASES ONLY] or fee installments, you must hand-deliver the remaining documents in person to the court.

LIST OF MINIMUM ITEMS REQUIRED WITHIN 10 DAYS:

1. A signed Declaration Regarding Electronic Filing (Self-Represented Individual) [SEE ATTACHED PDF]
2. A signed Statement About Your Social Security Numbers (Form 121) [SEE ATTACHED PDF]
3. A photocopy of your government-issued photo identification such as your driver's license or passport.
4. Copy of the Certificate of Credit Counseling for each Debtor(s) (or printed copy of electronic version).

NOTE: The electronically submitted petition will expire within 10 days of the date of this confirmation email. If you do not provide the items listed above before the expiration date, your case information will be removed from the system and you will not receive a bankruptcy case number.

Additional items may be submitted either by mail or through the Electronic Drop Box. In order to submit documents that do not require a signature or don't include a fee, you may request access to the Court's Electronic Drop Box: https://www.cacb.uscourts.gov/request-access-electronic-drop-box.

Complete, print and sign these additional required documents:
1. Statement of Related Cases F 1015-2.1.STMT.RELATED.CASES
2. Disclosure of Compensation of Bankruptcy Petition Preparer (Form B2800) (if applicable)
3. Bankruptcy Petition Preparer's Notice, Declaration and Signature (Form 119) (if applicable)
4. Verification of Master Mailing List of Creditors (F 1007-1.MAILING.LIST.VERIFICATION)
5. Declaration By Debtor(s) as to Whether Income Was Received From An Employer Within 60 Days of the Petition Date [Include Paystubs (if applicable)]
6. Initial Statement About an Eviction Judgment Against You (Form 101A) (if applicable)
7. Statement About Payment of an Eviction Judgment Against You (Form 101B) (if applicable)
8. Chapter 13 Plan [For Chapter 13 Cases Only]

DISMISSAL OF BANKRUPTCY CASE:

If the petition filing fee is not received within 10 days from the date of filing, your case will be dismissed. Additionally, if any of the required documents are not received by the Court by the deadline, your case will be dismissed.

ONCE YOUR CASE HAS BEEN FILED BY THE COURT:

The official time of filing is when a document is entered and docketed in the case management/electronic case filing system (CM/ECF), regardless of the filing method (in person, electronically through CM/ECF, through eSR or EDB, or placed in a physical drop box).

Once your case has been filed and issued a case number, a Notice of Bankruptcy Case Filing with your bankruptcy case number will be handed, mailed, or emailed to you. The case number is proof of your official bankruptcy filing. You may access the Court's automated Voice Case Information System (VCIS) 24 hours/7 days a week, toll free at (866) 222-8029.

You may request electronic notification for orders and court-generated notices by visiting the Debtor's Electronic Bankruptcy Noticing (DeBN) page and completing a request form: https://www.cacb.uscourts.gov/debtor-electronic-bankruptcy-noticing-debn.

FREE OR LOW COST ASSISTANCE:

If you cannot afford an attorney, the Court offers Help Desks at each court location with volunteer attorneys who may assist you. Visit the Court's Don't Have an Attorney web page for a complete listing of court resources. For information on low cost assistance in a chapter 13 case, view the following link to see the Chapter 13 Panel information: https://www.cacb.uscourts.gov/local-and-county-bar-associations-lawyer-referral-options.

SURVEY:

Please participate in a brief survey to share your experience using eSR. Your responses will be anonymous. You may reach the eSR survey at the following link: https://www.surveymonkey.com/r/CW2W363

Did you access any of the Court's Help Desks for free legal assistance? If so, please participate in a survey regarding your experience, using the following link: https://www.surveymonkey.com/s/CACBSelfHelp

Regards,
The eSR Team

Access the Bankruptcy Court in Person or Using Remote Access

eSR
electronic Self-Representation

To file petitions electronically, use eSR. eSR is a free online tool for self-represented debtors to use to prepare the bankruptcy forms.

How to find an attorney or access free/low cost help:

Find an attorney at www.cacb.uscourts.gov
Local and County Bar Associations & Lawyer Referral Options

Intake Appointment Scheduling System

This service provides debtors the ability to schedule online appointments with our Intake offices at each Division.

For appointments with the Self Help Desk, please visit our For Debtors page and locate the information under "Free or Low Cost Bankruptcy Help".

Pay.gov

Free online payment for copies, certified copies and installment payments after the first installment. Visit Online Payments for Self-Represented Litigants for details.

eDB

To submit non-fee documents electronically, use the Electronic Drop Box. The Electronic Drop Box is for self-represented litigants only.

https://www.cacb.uscourts.gov/request-access-electronic-drop-box

To file documents by mail, send to:

(Mail to the division assigned, based on the bankruptcy case. See website for additional details.)

U.S. Bankruptcy Court
Attention: Intake Department
255 E Temple St.
Los Angeles, CA 90012

U.S. Bankruptcy Court
Attention: Intake Department
411 West Fourth Street
Santa Ana, CA 92701

U.S. Bankruptcy Court
Attention: Intake Department
3420 Twelfth Street
Riverside, CA 92501

U.S. Bankruptcy Court
Attention: Intake Department
1415 State Street
Santa Barbara, CA 93101

U.S. Bankruptcy Court
Attention: Intake Department
21041 Burbank Boulevard
Woodland Hills, CA 91367

Have a question?

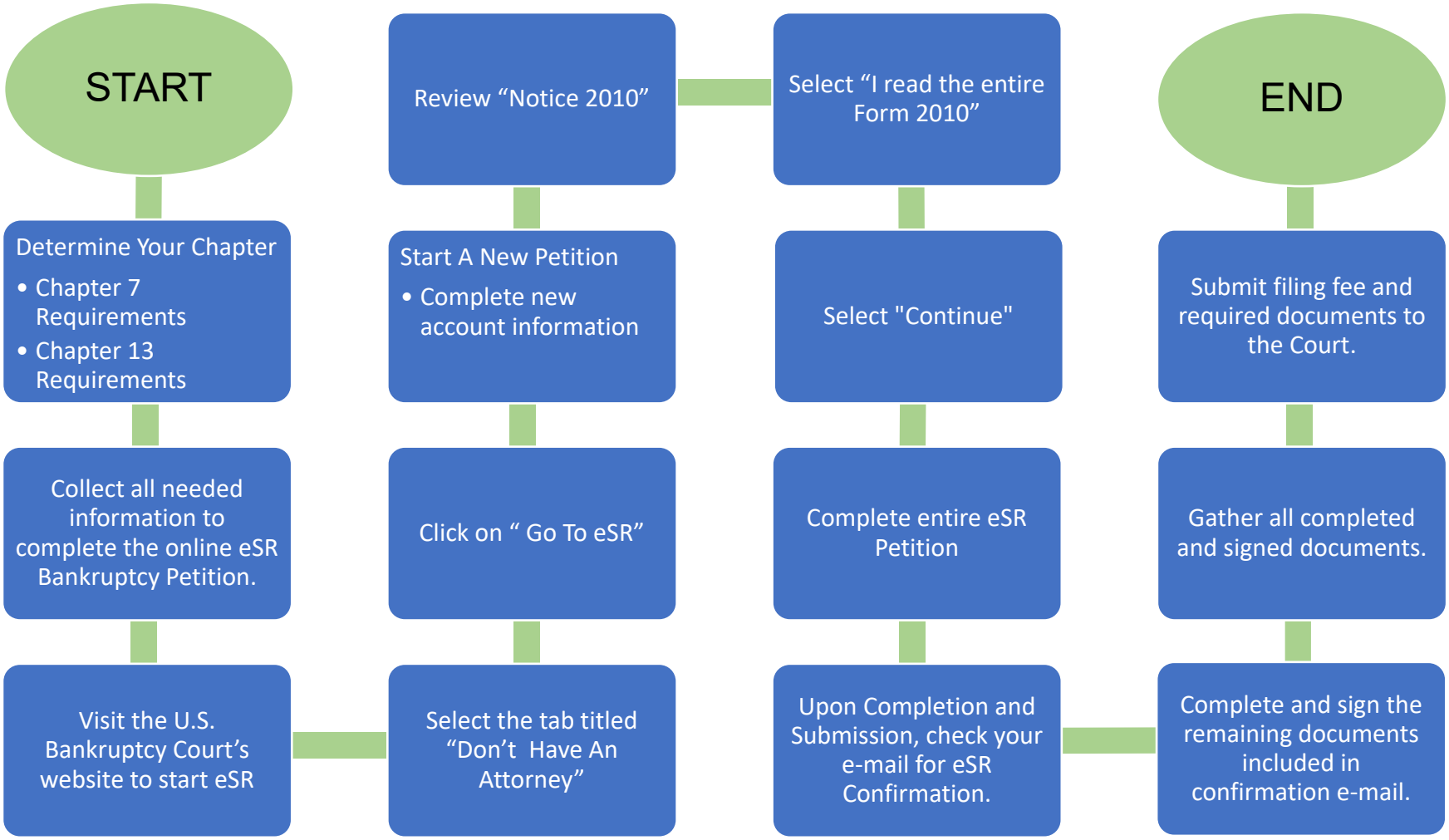
Call toll free
(855) 460-9641

www.cacb.uscourts.gov

Chat Live!
9am-4pm PST
Online

U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI

HOW TO PREPARE A PETITION USING eSR



Thomas F. Eagleton U.S. Courthouse
111 S. 10th Street, 4th Floor
St. Louis, MO 63102

(314) 244-4500
www.moeb.uscourts.gov
Office Hours: Mon – Fri, 8:30 AM – 4:30 PM

TAB 11

11. Rule 45(b)(1) -- hand delivery of subpoenas

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 not the first time this provision of Rule 45(b)(1) has been raised. Included in this agenda book are the following submissions:

> 22-CV-I (from Judge McEwen)

> 16-CV-B (State Bar of Michigan)

> 09-CV-C (William Callahan, president of Unitel)

> 05-CV-H (New York State Bar Association 20-page memo supporting clarification of the meaning of "delivering" in Rule 45(b)(1))

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 marshal, a deputy marshal, 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.

At present, a key question is whether the current provision causes difficulties sufficient to support an amendment.

2009-2013 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 Discovery Subcommittee 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.[1]

[1] 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

Ongoing debates about manner of service

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:

> **(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. Devising an appropriate description for service by neither in-hand delivery or U.S. mail could prove challenging.[2]

---

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."

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

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).[3])

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 be 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 . . ."[4] 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.

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 nonelectronic 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 first 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."

[3] 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.

[4] 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."

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 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 a 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:

> 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, it 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."

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.

Additional provisions of Rule 4 deal with serving corporations, 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 the 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.

It is also worth mentioning that the Standing Committee approved our proposed 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 on 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.

More generally, however, 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 raise 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.

22-BK-G
22-CV-I

From: Catherine McEwen
To: RulesCommittee Secretary
Cc: Scott Myers; Dennis Dow
Subject: Suggestions for amendment to Fed. R. Bankr. P. 9016 (and possibly Fed. R. Civ. P. 45) regarding method of service of subpoena
Date: Tuesday, July 12, 2022 3:11:52 PM

Rules at issue:

1. Fed. R. Bankr. P. 9016 reads:

   Rule 9016. Subpoena

   Rule 45 F.R.Civ.P. applies in cases under the Code.

2. Fed. R. Civ. P. 45 reads, in part:

   (b) Service.
   (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. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

There is a split of authority on what "delivering" means in Rule 45(b)(1). Some courts require personal service. Some courts hold service by U.S. Mail or other means is okay. See, e.g., a couple examples of the latter from my judicial district: SEC v. Rex Venture Group, LLC, 2013 U.S. Dist. LEXIS 44564; Codrington v. Anheuser-Busch, Inc., 1999 U.S. Dist. LEXIS 19505. Copies of these cases are attached.

I propose that, at least in bankruptcy cases and adversary proceedings (if not for all purposes under Rule 45), service by U.S. Mail or overnight courier be included as a permissible means of service of a subpoena.

Support for the relaxed service rule for subpoenas in bankruptcy cases and adversary proceedings may be found in the relaxed service option under Fed. R. Bankr. P. 7004, which permits service of initial process and the complaint by mail. Arguably, the consequences of a failure of mail service of a summons is more severe than a failure of mail service of a mere subpoena (which can be cured easily with another means of service if a motion to compel is filed). With today's sometimes unreliable mail service, service of initial process might not hit its mark. And if that mail doesn't hit its mark, the defendant might suffer a default judgment and ensuing post-judgment collection activities. Juxtaposed against Rule 7004, then, it makes little sense to require personal service of a subpoena. (And let's not forget Fed. R. Bankr. P. 1001's mandate to ensure the inexpensive determination of disputes.)

Suggested revision to Rule 9016:

Rule 45 F.R.Civ.P. applies in cases under the Code. Delivery of the subpoena may be made in any manner permitted by Rule 7004.

Some related Rules Committee history: The Civil Rules Committee considered the issue of service of subpoenas under Rule 45 in November 2016 under 16-CV-B. 16-CV-B is flagged on uscourts.gov as retained on the agenda for further research. See discussion at Agenda Item 5(c) – page 187 of the agenda book: https://www.uscourts.gov/sites/default/files/2016-11-civil-agenda_book_0.pdf.

If submission of my suggestion can be considered separately from an amendment to Rule 45, I hope that it will.

Thank you for your consideration.

Catherine Peek McEwen
U.S. Bankruptcy Judge
Middle District of Florida
801 N. Florida Avenue, Chamber 8B
Tampa, FL 33602

2013 WL 1278088
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Ocala Division.

SECURITIES and EXCHANGE COMMISSION, Plaintiff,
v.
REX VENTURE GROUP, LLC, d/b/a ZeekRewards.com, and Paul Burks, Defendant.

No. 5:13–MC–004–WTH–PRL.
|
March 28, 2013.

Attorneys and Law Firms

Nathaniel Woods, Ocala, FL, pro se.

Jeffrey S. York, Melissa W. Nelson, McGuire Woods, LLP, Jacksonville, FL, for Defendant.

ORDER

PHILIP R. LAMMENS, United States Magistrate Judge.

*1 This cause is before the Court on Rex Venture Group, LLC's Court–Appointed Receiver's Motion to Compel Non–Party Nathaniel Woods' Compliance with Rule 45 Subpoena (Doc. 1), filed on January 25, 2013. Pursuant to Rule 45(c)(2)(B)(i), Fed.R.Civ.P., Rex Venture asks the Court to compel non-party Mr. Nathaniel Woods' compliance with the Receivers' Rule 45 subpoena and require Mr. Woods to produce the documents listed in the subpoena.

I. *BACKGROUND*

The issues in the instant Motion arise out of an action pending in the United States District Court for the Western District of North Carolina ("N.C.Case").[1] In the N.C. Case, the Securities and Exchange Commission ("SEC") alleges that Paul Burks used Rex Venture Group, LLC to operate an illegal Ponzi and pyramid scheme, which allegedly took more than $600 million from hundreds of thousands of individuals in dozens of countries. (Doc. 1, ¶ 1). On August 17, 2012, the District Judge in the N.C. Case appointed a Temporary Receiver and gave him the power to "issue subpoenas for documents and testimony consistent with the Federal Rules of Civil Procedure[.]" (Doc. 1, ¶ 2, 4 & Exh. 1, ¶ 7(H)). Subsequently, on October 30, 2012, the Receiver issued to Mr. Woods a Rule 45 subpoena for production of documents (from the Western District of North Carolina) (Doc. 1, ¶ 6). In response, Mr. Woods filed a Motion to Quash the Subpoena (Doc. 1, ¶ 7 & Exh. 2), arguing various procedural and jurisdictional issues; as such, he did not produce any documents. (Doc. 1, ¶ 7).

Thereafter, on November 27, 2012, the Receiver issued a new subpoena from the United States District Court for the Middle District of Florida, wherein the Receiver narrowed the scope of the requested documents. (Doc. 1, ¶ 8 & Exh. 3). The Receiver served Mr. Woods with the subpoena (issued by this Court) via certified mail and federal express. (Doc. 1, ¶ 10 & Exh. 4). Subsequently, on January 16, 2013, the District Judge in the N.C. Case denied Mr. Woods' Motion to Quash the October 30, 2012 subpoena as moot because the Receiver "re-issued [the subpoena] through different procedures and [the Receiver is now] requiring a different scope of documents to be produced." (Doc. 1, ¶ 11 & Exh. 7).

Further, the record before this Court demonstrates that the Receiver's counsel has contacted Mr. Woods in attempts to obtain the subpoenaed documents without the Court's intervention to no avail. (*See e.g.*, Doc. 1, Exh. 8). Accordingly, the instant Motion to Compel (Doc. 1) was filed in accordance with Rule 45, Fed.R.Civ.P.

Upon initial review of Rex Venture's Motion (Doc. 1), the Court had concerns with whether Mr. Woods was properly served with the subpoena; accordingly, the Court entered an Order to Show (Doc. 3); to which Rex Venture responded. (Doc. 5). In addition, Rex Venture notified the Court that Mr. Woods had filed what appeared to be an objection to Rex Venture's Motion to Compel, but had done so in a different case.[2] (Doc. 2). Based on this Notice, the Court ordered Mr. Woods to notify the Court whether the document titled "Objection to Receiver's Motion to Compel Nathaniel Woods, a Non–Party" was intended to be filed in this action in response to Rex Venture's Motion to Compel. (Doc. 6). In response, Mr. Woods filed a Motion for Clarification (Doc. 7) and his Objection to Receiver's Motion to Compel (Doc. 8). Finally, the Court granted Rex Venture's leave to file a reply, which it has done. (Docs. 10 & 12). This matter is now ripe for review.

II. *DISCUSSION*

Mr. Woods' Motion for Clarification

***2** As an initial matter, Mr. Woods seeks clarification as to where he "should submit pleadings and motions as well as clarification as to the case number which is to be used in the matter." (Doc. 7, at 4). Mr. Woods represents that he was served with a copy of Rex Venture's Motion to Compel (Doc. 1) without a case number, and thus, he did not know where to file his objection. (Doc. 7). As such, Mr. Woods submits that he filed his Objection in the N.C. Case.

This Court has jurisdiction over enforcing the Rule 45 subpoena issued by this Court, which is dated November 27, 2012. *See Great American Ins. Co. v. General Contractors & Const. Mgmt., Inc.*, 2008 WL 4372884, at *1 (S.D.Fla. Sept.24, 2008) (finding that "The Advisory Committee note to the 1991 Amendment to Fed.R.Civ.P. 45(a)(2) states that the court in whose name the subpoena issued is responsible for its enforcement."). Accordingly, Mr. Woods' Motion for Clarification (Doc. 7) is **granted** to the extent that this Court has jurisdiction over enforcing the subpoena issued by this Court (dated November 27, 2012), which is attached as Exhibit 3 to Rex Venture's Motion to Compel (Doc. 1). To avoid any confusion, the Court has attached to this Order (as "Exhibit A") the subpoena subject to this Order and the Court's jurisdiction. The case number for this action is indicated on the first page of this Order. Thus, any documents that Mr. Woods would like to file pertaining to the Rule 45 subpoena *issued by this Court* and dated November 27, 2012 ("Exhibit A"), should be filed in this action.

Service of the Subpoena

Next, the Court must address its concerns (*see* doc. 3) regarding whether Mr. Woods was properly served with the Rule 45 subpoena issued by this Court. Rex Venture represents that it served Mr. Woods with this subpoena via certified mail and federal express, and argues that this service is proper under Rule 45. *See* *TracFone Wireless, Inc. v. Does*, 2011 WL 4711458, at *4 (S.D.Fla. Oct.4, 2011) (finding that "service of a Rule 45 subpoena need not be effectuated by personal delivery on the person being subpoenaed."); *In re Falcon Air Exp., Inc.*, 2008 WL 2038799, at *4 (Bkrtcy.S.D.Fla. May 8, 2008) (finding that a Rule 45 subpoena does not require personal service, rather service is sufficient where it is "reasonably calculated to insure receipt of the subpoena by the witness."); *Codrington v. Anheuser–Busch, Inc.*, 1999 WL 1043861, at *1–2 (M.D.Fla. Oct.15, 1999) (finding that "nothing in the plain language of the Rule requires personal service").

It does not appear the Eleventh Circuit has addressed this particular issue and the Court finds these cases persuasive, especially since it is clear that Mr. Woods received the subpoena both by federal express and certified mail. Indeed, Mr. Woods specifically states that he "received [two subpoenas] sequentially on November 28th and 29th, 2012, via FedEx and [c]ertified mail." (Doc. 8, at 2 & 11). Accordingly, the purpose of service—i.e., that Mr. Woods was put on notice—has been effectuated.

Mr. Woods' Compliance with the Subpoena

***3** Rule 45(c) (2)(B), Fed.R.Civ.P., provides (in relevant part) that, in the event the person upon whom a subpoena is served objects, the party serving the subpoena may, at any time, file a motion to compel production. Here, the Receiver has done just that. On November 27, 2012, this Court issued a subpoena (*see* Doc. 1, Exh. 3), which Mr. Woods acknowledges he received on November 28, 2012 and November 29, 2012 by federal express and certified mail (*see* Doc. 1, Exh. 6(b) & Doc. 8, at p. 11). Mr. Woods then objected to this subpoena. (*See* Doc. 1, Exh. 6(b) & Doc. 8, at pp. 11–14). Notably, the Receiver disclosed Mr. Woods' objection to the Court.[3] (*See* Doc. 1, at ¶ 12 & Exh. 6). Subsequently, on December 19, 2012, the Receiver's counsel emailed Mr. Woods to discuss any objections that he may have (Doc. 1, Exh. 1), to which Mr. Woods responded (Doc. 1, Exh. 9). The Court will now address Mr. Woods' objections. (Doc. 8).

Mr. Woods objects contending that he has received three subpoenas, which are redundant and serve as harassment. The Court disagrees. As a point of clarification, the subpoena issued on October 30, 2012, in the N.C. Case was found moot because the Receiver "re-issued [the subpoena] through different procedures ...." (*See* Doc. 1, ¶ 11 & Exh. 7). The subpoena issued by this Court, which is dated November 27, 2012, and located in the record at Doc. 1, Exh. 3, *is* the subpoena at issue here. It is clear from the record that this subpoena (Doc. 1, Exh. 3) was merely provided to Mr. Woods *both* by certified mail and federal express to ensure his receipt of it.

Mr. Woods also argues that he did not receive prior notice of the subpoena as required by Rule 45. Rule 45(b)(1) requires prior notice to each ***party*** "[i]f the subpoena commands the

production of documents, electronically stored information, or tangible things or the inspection of premises before trial ...." Here, Mr. Woods is *not* a party. Accordingly, Rule 45(b)(1) does not contemplate that he should get prior notice.

Mr. Woods' other arguments include that the Receiver's requests are overly broad, irrelevant, create an undue burden and expense, that the Receiver already has the information, and that some of the information is privileged. (Doc. 8).

At the outset it is important to note that the scope of discovery is broad "in order to provide parties with information essential to the proper litigation of all relevant facts, to eliminate surprise and to promote settlement." *Coker v. Duke & Co., Inc.*, 177 F.R.D. 682, 685 (M.D.Ala.1998). The Federal Rules of Civil Procedure "strongly favor full discovery whenever possible." *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir.1985). Federal Rule of Civil Procedure 26(b)(1) allows parties to "obtain discovery regarding any nonpriviledged matter that is relevant to any party's claim or defense." Relevance is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). A discovery request "should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." *Roesberg v. Johns–Manville Corp.*, 85 F.R.D. 292, 296 (E.D.Pa.1980); *see also* *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir.1984).

***4** Objections to discovery must be "plain enough and specific enough so that the court can understand in what way the [discovery is] alleged to be objectionable." *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir.1985) (quoting *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir.1981)). Objections to discovery on the grounds that it is over broad and not relevant are not sufficient, the objecting party should state why the discovery is overly broad or not relevant. *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir.1982).

Mr. Woods' objections to the Receiver's requests 1, 2, and 4–10, are similar, so the Court will address them together. (Doc. 8, at 8–9, 12–14). Specifically, Mr. Woods suggests that these requests are "overly broad" and create an "undue burden" because he does not have any information and that the Receiver already has this information. The Court overrules Mr. Woods' objections. The Receiver's requests all appear to be aimed at ascertaining Mr. Woods' involvement with Rex Venture, which seems to be a relevant issue in the N.C. Case. To the extent that Mr. Woods has information in his possession pertaining to these requests, Mr. Woods *must* produce such information. To the extent that Mr. Woods does not have information, he *must* respond to the Receiver's subpoena and notify the Receiver whether he *ever* had the information, provide a description of the information, and explain what happened to the information.

Mr. Woods objects to the Receiver's request 3 and contends that the Receiver has this information because the Receiver has called and emailed him.[4] (Doc. 8, at 8 & 12). The Court overrules Mr. Woods' objections. Simply because the Receiver has emailed and called Mr. Woods does not mean that the Receiver has the information that it seeks.[5] Mr. Woods *must* provide the Receiver with information responsive to this request. At this time, however, Mr. Woods is not required to disclose any of his passwords. If the Receiver still seeks Mr. Woods' passwords, the **Receiver shall** file a supplemental brief with this Court within **twenty-one (21) of the date of this Order** providing legal authority which would authorize the Court to compel Mr. Woods to disclose his passwords.

Mr. Woods objects to the Receiver's requests 11–13, contending that these requests are irrelevant. (Doc. 8, at 9 & 14). The Court disagrees and overrules Mr. Woods' objections. The Receiver's requests all appear to be aimed at ascertaining Mr. Woods involvement with Rex Venture, which seems to be a relevant issue in the N.C. Case. Accordingly, Mr. Woods shall produce documents and other information responsive to these requests. Lastly, Mr. Woods contends that the documents responsive to the Receiver's request 12–13 are privileged. (Doc. 8, at 4). Due to the nature of the case, the Court disagrees, overrules Mr. Woods' objection, and requires Mr. Woods to provide the requested information to the Receiver.

Attorney's Fees

***5** Finally, Rex Venture seeks "the Receiver's attorneys' fees incurred in preparing, filing[,] and pursing this Motion be taxed to Mr. Woods ...." (Doc. 1, at 5–6). However, Rex Venture is not entitled to such an award. "Although Rule 45(c)(2)(B)(i) authorizes the serving party to 'move the issuing

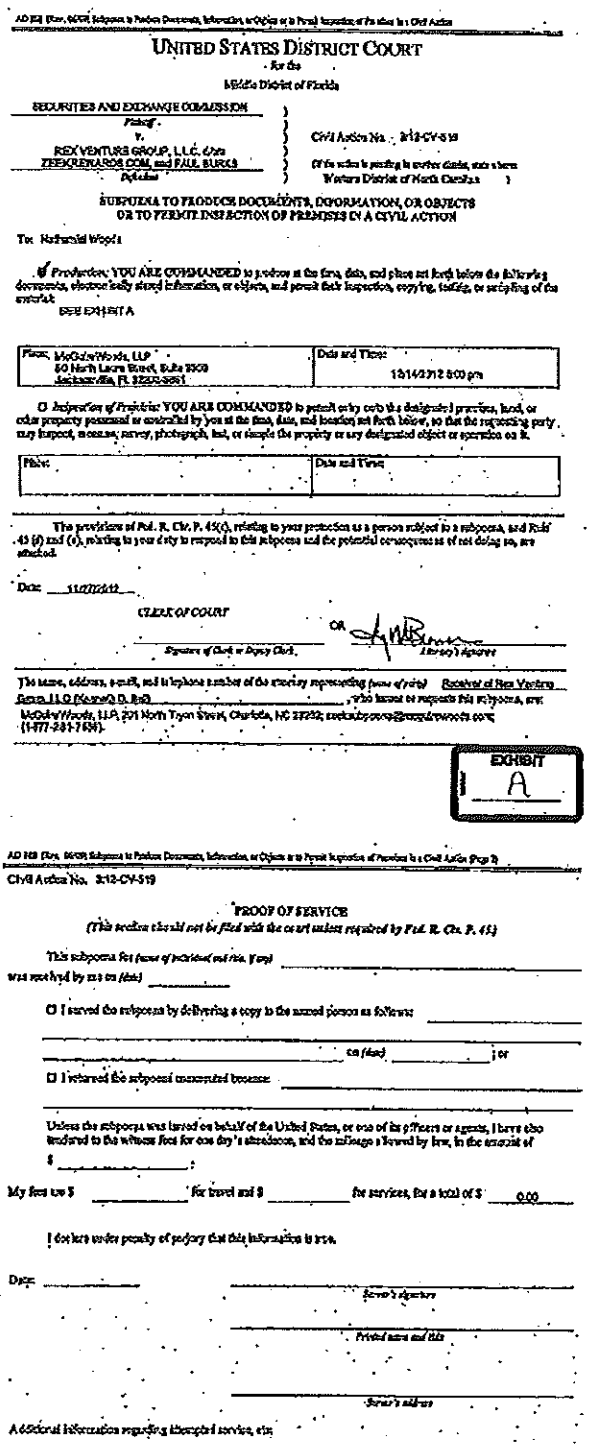
court for an order compelling production or inspection,' there is no provision in Rule 45 for an award of expenses for bringing such a motion." *See Bailey Industries, Inc. v. CLJP, Inc.*, 270 F.R.D. 662, 672 (N.D.Fla.2010) (citing Fed.R.Civ.P. 45). In addition, although Rule 37(a)(5)(A), authorizes an award of "the movant's reasonable expenses incurred in making [a] motion [to compel], including attorney's fees," courts in this circuit have held that Rule 37(a) "does not appear to govern motions to compel production of documents made pursuant to Rule 45." *See id.; see also Kona Springs Water Distrib., Ltd. v. World Triathlon Corp.*, 2006 WL 905517, at *2 (M.D.Fla. Apr.7, 2006) (court granted in part and denied in part motion to compel compliance with subpoena under Rule 45 and denied motion for sanctions, finding "to the extent that Defendant seeks sanctions under Rule 37, ... the rule [is] inapposite") (citations omitted). Accordingly, Rex Venture's request for fees is due to be **denied.**

III. *CONCLUSION*

In light of the foregoing, Mr. Woods' Motion for the extent set forth herein. Rex Venture's Motion to Compel (Doc. and **DENIED IN PART.** The Motion is **granted** to the extent ordered to comply with the subpoena issued by the United States District of Florida ("Exhibit A") on or before **April 11, 2013,** to the the Motion is **denied** to the extent that Rex Venture seeks fees. The copy of this Order to Mr. Nathaniel Woods at 216 SW 11th Avenue, Ocala, Florida 34471.

IT IS SO ORDERED.

DONE and **ORDERED.**



UNITED STATES DISTRICT COURT

For the

Middle District of Florida

SECURITIES AND EXCHANGE COMMISSION

Plaintiff

v.

REX VENTURE GROUP, LLC d/b/a ZEEKREWARDS.COM, and PAUL BURKS

Defendant

Civil Action No. 3:12-CV-519

(If the action is pending in another district, state where: Western District of North Carolina)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Nathaniel Woods

✓ *Production:* YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: SEE EXHIBIT A

Place: McGuireWoods, LLP 50 North Laura Street, Suite 3300 Jacksonville, FL 32202-3661	Date and Time: 12/14/2012 5:00 pm

☐ *Inspection of Premises:* YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 11/27/2012

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Receiver of Rex Venture Group, LLC (Name of D. Rob, who issues or requests this subpoena, are: McGuireWoods, LLP, 201 North Tryon Street, Charlotte, NC 28202; [illegible]; (1-877-881-7456).

EXHIBIT A

Civil Action No. 3:12-CV-519

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45)

This subpoena for (name of individual and title, if any) _____ was received by me on (date) _____

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____ on (date) _____ ; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

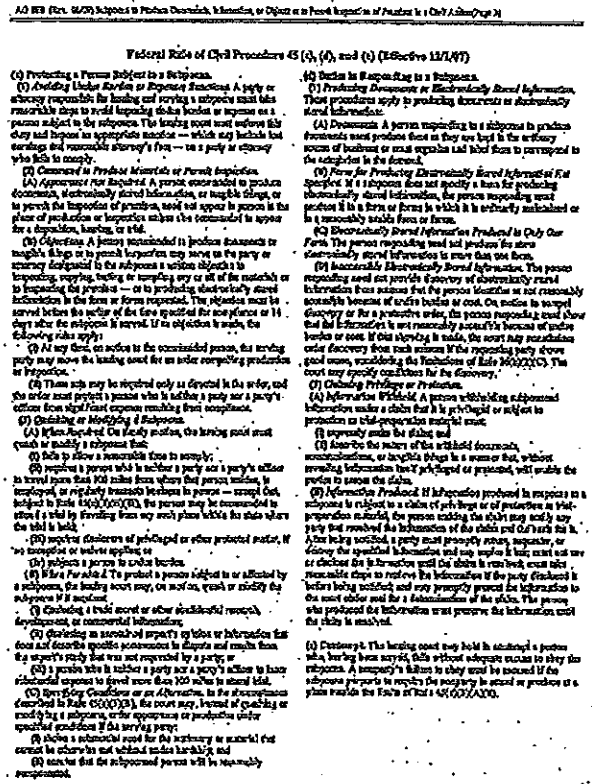
_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:



AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 3)

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

CIVIL ACTION NO.: 3:12-cv-519 (Western District of North Carolina)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

REX VENTURE GROUP, LLC d/b/a ZEEKREWARDS.COM, and PAUL R. BURKS

Defendant.

EXHIBIT A

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

On August 17, 2012, the United States District Court for the Western District of North Carolina issued an Agreed Order in the matter of Securities and Exchange Commission against Rex Ventures Group, LLC d/b/a ZeekRewards.com and Paul Burks, (Civil Action No. 3:12 cv 519) appointing Ken Bell as the Receiver for and over the assets, rights, and all other interests of the estate of Rex Ventures Group, LLC, d/b/a ZeekRewards.com, any of its subsidiaries, and any businesses or business names under which it does business (the "Receivership Defendants"). In that Order the Court granted the Receiver the powers and duties to investigate, pursue and recover all potential claims and other assets of the receivership estate, recover and take into possession from third parties all receivership property and relevant records and prevent the dissipation or concealment of receivership property. Further, the Receiver was granted the power to issue subpoenas for documents and testimony in connection with those efforts. This subpoena and request for documents and things is issued pursuant to that grant of authority.

INSTRUCTIONS

In responding to each of the following requests please provide all requested information in your possession, custody or control or within the possession, custody or control of your attorneys, representatives, or other agents. If requested documents or things are readily available to you or your attorneys, representatives or agents, but you contend that they are not within your possession, custody or control you should describe where the documents can be obtained if you are unwilling to produce them.

In the event you are unable to respond completely to any of these requests, you must respond to each to the fullest extent possible, specifying the reason or reasons for your inability to respond to the remainder of the request.

If you assert a privilege or otherwise decline to provide an answer on the basis of some other legal objection, then:

(a) Identify and describe the document or communication in question, including its title, its general subject matter, its date, and its author;

(b) describe the basis for the asserted privilege or objection;

(c) Identify every person to whom the document was sent, or every person present when the communication was made; and

(d) Identify the present custodian of the document, if any, and include sufficient facts for the court to make a full determination of whether the claim or objection is valid.

If you contend that any one or more of these requests is objectionable on the grounds of privilege, over breadth, vagueness or any similar ground, you are to respond to such such request as narrowed to conform with the objection.

Unless otherwise indicated in a specific interrogatory or request, the relevant time period for all requests is January 1, 2010 to the present.

DEFINITIONS

A. "You," "your," and "yourself" shall mean the individual or entity to whom the subpoena is issued, all entities controlled by that individual or entity and all other agents, attorneys, representatives and Persons acting or purporting to act on behalf or under the control of the individual or entity subpoenaed.

B. "RVG" shall mean Rex Venture Group, LLC; any businesses or business names under which it does business or are related to its business, including but not limited to ZeekRewards.com and Zeekler.com; and all entities it controls or in which it has an ownership interest, including but not limited to all subsidiaries, partnerships, and related or affiliated unincorporated entities, including business lines or businesses operated via internet websites.

C. "Person" or "persons" shall mean all natural persons and entities, including without limitation corporations, companies, partnerships, limited partnerships, joint ventures, trusts, estates, associations, public agencies, departments, bureaus, and boards.

D. In addition to bearing its customary and colloquial meaning, the word "document(s)" shall include all items subject to discovery pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, including any responsive electronic data and electronic mail, as well as the original files and or containers in which said "document(s)" are maintained and any and all drafts of responsive "documents."

E. "Communication" shall mean every manner or means of disclosure, transfer or exchange, and every disclosure, transfer, or exchange of information whether orally or face-to-face or by telephone, mail, electronic mail, personal delivery, document, computer transmission, interactive medium transmission, or other means.

F. "Relating to" or "concerning" shall mean relating to, referring to, concerning, constituting, comprising, identifying, dealing with, containing, embodying, illustrating reflecting, stating, commenting on, describing, discussing, responding to, supporting, evidencing, analyzing, or pertaining in any way to.

G. "Belonging to" shall mean owned by you, in your possession, or for your benefit, whether now or in the future.

DOCUMENTS REQUESTED

1. All documents constituting or relating to any communication involving or related to RVG.

2. All documents constituting or related to any communication to any affiliate, vendor, customer or client of RVG related to RVG.

3. Documents sufficient to show all user names, passwords, email addresses and accounts used by you in connection with RVG. (This request is not meant to include passwords to third party financial accounts used in connection with RVG; however, documents sufficient to show the location and account number of such accounts should be included in your response).

4. All documents relating to your performing any work or giving any assistance, advice or counsel to RVG as an employee, independent contractor, vendor or agent of RVG.

5. All documents constituting or related to any employment or other contract or agreement between you and RVG and any salary or compensation received from RVG.

6. All documents constituting or related to any contract or agreement or governing rules or terms between you and RVG as a customer, affiliate, agent or vendor.

7. All documents relating to any financial transactions of any kind between you and RVG, Including documents sufficient to show all payments made to and received from RVG and the account and user name to which each payment relates. These documents should include, without limitation, all money or other consideration paid to RVG and money or other consideration received from RVG in connection with anyone's participation as a ZeekRewards "affiliate"; participation in the ZeekRewards "Retail Profit or Points Pool"; participation in a "matrix" in connection with ZeekRewards; enrollment in a ZeekRewards subscription plan; participation in ZeekRewards or Zeeker.com penny auctions; and the purchase or sale of Zeekler.com bids and/or ZeekRewards VIP bids or any other bids in connection with ZeekRewards or Zeekler.com. (This request is not meant to include passwords to third party financial accounts used in connection with RVG; however, documents sufficient to show the location and account number of such accounts should be included in your response).

8. All documents related to any sale, gift, transfer or assignment of "bids" to be used in connection with ZeekRewards.com or Zeekler.com, or the placement of advertisements for Zeekler.com or ZeekRewards.

9. All documents related to the recruitment of any Persons to join or otherwise participate in ZeekRewards or Zeekler.com.

10. All documents that describe ZeekRewards or Zeekler.com, including their activities, programs, subscriptions or potential income opportunities.

11. Documents sufficient to describe your interest in any partnerships, joint ventures, or limited liability companies during the period from January 1, 2012 or the date you first became involved in RVG (whichever is earlier) to the present.

12. Your bank, savings or credit union account; investment or brokerage account; credit card and other financial account statements during the period from July 1, 2012 to the present.

13. All documents constituting any current financial statement (since January 1, 2012) or other statement describing your financial assets or liabilities, including any statements prepared in connection with seeking a loan, mortgage or other form of financing or credit.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1278088

Footnotes

1 *Securities and Exchange Commission v. Rex Venture Group, LLC d/b/a ZeekRewards.com and Paul Burks,* No. 3:12–cv–519 (W.D.N.C.2012).

2 In its Notice (Doc. 2), Rex Venture represents that it takes no position as to whether this document should have been filed in this case; rather, Rex Venture submits that it is simply filing the Notice "so as not to prejudice" Mr. Woods, who is acting *pro se.* (Doc. 2, ¶¶ 5–6).

3 Mr. Woods contends that the Receiver did not notify the Court of his objections. This is simply not the case. The Receiver specifically states that Mr. Woods filed a " 'Request for Judicial Notice' objecting to the [s]ubpoenas that had issued from the Middle District of Florida and again refused to produce any documents." (*See* Doc. 1, at 12 & Exh. 6). Moreover, the objections attached to the Request for Judicial Notice (Doc. 1, Exh. 6) are identical to the objections that Mr. Woods attached to his Objection to Receiver's Motion to Compel (Doc. 8).

4 Request 3 seeks "[d]ocuments sufficient to show all user names, passwords, email addresses, and accounts used by Mr. Woods in connection with [Rex Venture]. (This request is not meant to include passwords to third party financial accounts used in connection with [Rex Venture]; however, documents sufficient to show the location and account number of such accounts should be included in your response.)" (*See* Doc. 1, Exh. 3, ¶ 3).

5 Notably, Mr. Woods also argues that the Receiver's attorney contacted him by email in violation of the Federal Rules. (Doc. 8, at 5). The Court disagrees and finds no apparent violation of the Federal Rules.

End of Document

1999 WL 1043861
United States District Court,
M.D. Florida.

Courtney C. CODRINGTON, et al., Plaintiffs,
v.
ANHEUSER–BUSCH, INC., a
foreign corporation, Defendant.

No. 98–2417–CIV–T–26F.
|
Filed Nov. 25, 1998.
|
Oct. 15, 1999.

Attorneys and Law Firms

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Thomas W. Dickson, for Daniel Hernandez, plaintiff.

Thomas W. Dickson, for Harold W. Shepherd, plaintiff.

Thomas W. Dickson, for James W. Smith, plaintiff.

Thomas W. Dickson, for Lenzo R. Canty, plaintiff.

Thomas W. Dickson, for Henry Marks, plaintiff.

Thomas W. Dickson, for Robert B. Houghton, plaintiff.

Thomas W. Dickson, for George Harrison, plaintiff.

Thomas W. Dickson, for Edgar Giles, plaintiff.

Thomas W. Dickson, (See above), for Benito Canto, plaintiff.

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C. Felix Miller, Equal Employment Opportunity Commission, St.Louis District Office, St.Louis, MO, for EEOC, movant.

ORDER

SCRIVEN, Magistrate J.

*1 THIS CAUSE comes on for consideration of Plaintiffs' Motion to Compel (Dkt.12) and the EEOC's memorandum in opposition thereto (Dkt.13).

Plaintiffs, former employees of Defendant, Anheuser–Busch, filed this action on November 25, 1998. Plaintiffs claim that Defendant discriminated against them on the basis of Plaintiffs' age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

On June 14, 1999, Plaintiffs served the EEOC, a non-party to this action, with a subpoena *duces tecum* requiring the EEOC to produce documents relating to approximately 25 charges brought by other employees against Defendant. Plaintiffs also requested that the EEOC produce any and all charges or records of any other charge of discrimination filed against the Defendant, originating in Tampa, Florida, from December 1, 1995 to the present. The subpoena advised that the EEOC could comply by "providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production."

On June 24, 1999, the EEOC served its objection to the subpoena. The EEOC contends as follows: (1) the subpoena is procedurally defective in that it was not personally served on the EEOC Record's custodian, but rather was served by U.S. Mail; (2) the subpoena is procedurally defective in that the Plaintiffs did not include a check for attendance fees and mileage; (3) certain of the documents requested are confidential pursuant to Section 107(a) of the ADA and pursuant to Title VII; and (4) certain documents are not discoverable under the Freedom of Information Act, 5 U.S.C. § 552. Plaintiffs now move to compel the EEOC to comply with the subpoena. The Court addresses each of the EEOC's objections in turn below.

I. The Alleged Procedural Defects

As indicated, the EEOC contends that the subpoena is procedurally defective in that Plaintiffs did not personally serve the subpoena on the EEOC, but served the subpoena via first class U.S. Mail and, further, the subpoena did not include a check for attendance and mileage. After a review of Rule 45 and the case authority cited by the parties, the Court rejects the EEOC's arguments.

Rule 45(b)(1), Fed.R.Civ.P., provides in pertinent part as follows: "Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law...." The Undersigned respectfully disagrees with the court's decision in *In re Nathurst,* 183 B.R. 953, 955 (M.D.Fla.1995), in which the court found that "a subpoena cannot be effectively served by mail even if sent by certified mail." Instead, the Court finds that nothing in the plain language of the Rule requires personal service. *See* *King v. Crown Plastering Corp.,* 170 F.R.D. 355, 356 (E.D.N.Y.1997)(no need for personal service of Rule 45 subpoena "so long as service is made in a manner that reasonably insures actual receipt of the subpoena by the witness"); *Doe v. Hersemann,* 155 F.R.D. 630, 630–631 (N.D.Ind.1994) ("The plain language of the rule requires only that the subpoena be delivered to the person served by a qualified person").

***2** Furthermore, the EEOC has not demonstrated any prejudice resulting from Plaintiffs' service of the subpoena by mail. Specifically, it is undisputed that the EEOC received actual notice of the subpoena, as evidenced by the EEOC's timely objection to the subpoena. At this point, requiring the Plaintiffs to personally serve the subpoena would result in mere undue delay.

Additionally, the Court rejects the EEOC's contention that the subpoena is defective in that Plaintiffs did not include a check for fees and mileage. As indicated, the subpoena notified the EEOC that it could comply with the subpoena by merely mailing the documents to Plaintiffs' counsel. Thus, an EEOC representative was not required to travel to Tampa, Florida, to personally deliver the documents. Moreover, Plaintiffs state that they will reimburse the EEOC for its copying costs upon notification of the amount.

Having found that the subpoena is not procedurally defective, the Court turns to the EEOC's substantive arguments.

II. Confidentiality

A. Information Relating to Charges Under Title VII or the ADA

The EEOC contends that some of the requested documents relate to Title VII and ADA charges by persons who are not parties to the instant lawsuit, and, as such, the documents cannot be disclosed. The EEOC specifically relies on 42 U.S.C. § 2000e–8(e), which provides that it is unlawful for an officer or employee of the EEOC "to make public in any manner whatever information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information...." This provision is also applicable to cases brought pursuant to the ADA. *See* 42 U.S.C. § 12117(a). Plaintiffs respond that the prohibition of 42 U.S.C. § 2000e–8(e) does not forbid an officer or employer of the EEOC from disclosing materials to a charging party if the documents relate to other charges against the same respondent that are like and related to the charging party's allegations of discrimination. (Dkt.12, p. 5.)

The EEOC correctly points out, however, that the Supreme Court rejected such an argument in *Equal Employment Opportunity Commission v. Associated Dry Goods Corp.,* 449 U.S. 590, 101 S.Ct. 817, 66 L.Ed.2d 762 (1980). Specifically, while the Court found permissible the disclosure of EEOC investigative information in a charging party's file to the party himself, the Court also found that "nothing in the statute or its legislative history reveals any intent to allow the Commission to reveal to that charging party information in the files of other charging parties who have brought claims against the same employer." *Id.* at 603 (footnote omitted). The Court continued that "there is no reason why the charging party should know the content of any other employee's charge, and he must be considered a member of the public with respect to charges filed by other people. With respect to all files other than his own, he is a stranger." *Id.*

***3** Thus, given the limited disclosure of certain EEOC files permitted by *Associated Dry Goods,* this Court DENIES the Plaintiffs' motion to the subpoena to the extent that Plaintiffs request the files of persons who are not parties to this action and who claimed violations of Title VII or the ADA against his Defendant. If it has not already done so, the EEOC shall produce, however, any files and/or documents relating to the named Plaintiffs. Furthermore, if there is information contained in files of charging parties other than the named Plaintiffs that is generally relevant to the named Plaintiffs and the Defendant in this case and is used by the agency in consideration of the Plaintiffs' charge, but due to administrative convenience is not contained in the named Plaintiffs' files, it too shall be produced. *See EEOC v. Associated Dry Goods Corp.,* 499 U.S. 590, 604 (1981). In

Associated Dry Goods, the Court specifically noted that by including information about an employer's general practices that would be relevant to each charging party in each party's file, the Commission can fully comply with the statute while giving each party the information necessary to evaluate the strength of his or her case. *Id.*

B. Charges Under the ADEA Only

Both Plaintiff and the EEOC recognize that the ADEA does not contain a similar confidentiality provision to that contained in Title VII and the ADA. The EEOC argues, however, that to the extent that Plaintiff requests information relating its investigation of charges filed under the ADEA, the disclosure of such information would constitute an unwarranted invasion of privacy under the Freedom of Information Act and should not be required. *See* 5 U.S.C. § 552(b)(7)(C) (exempting from disclosure to the public "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy....") Plaintiffs respond that this exemption of the FOIA provides that requests for open EEOC case files are exempt from public disclosures as investigatory records but does not apply to closed files. Plaintiffs contend that they do not seek any information from open files and, as such, the documents must be produced. Neither party points this Court to any authority in support of its position.

First, the Court rejects Plaintiffs' claim that § 552(b)(7)(C) applies solely to open files. As indicated, Plaintiffs fail to point this Court to any authority supporting their contention. Nothing in the plain language of § 552(b)(7)(C) suggests that the exemption is limited to "open" files. Furthermore, this Court's own research has failed to locate any authority suggesting such a limitation. While the exemption located at § 552(b)(7)(*A*) appears to apply solely to pending investigations, *see Frito–Lay v. U.S. Equal Employment Opportunity Commission,* 964 F.Supp. 236, 238 (W.D.Ken.1997), there simply is no similar limitation with regard to § 552(b)(7)(*C*). The Court therefore turns to the EEOC's contention that the information is not subject to disclosure because it would likely result in an unwarranted invasion of privacy.

*4 As the philosophy behind the FOIA is to allow broad disclosure, the courts interpret the exemptions of the FOIA narrowly. *See Nadler v. U.S. Department of Justice,* 955 F.2d 1479, 1484 (11th Cir.1992). The government agency seeking to withhold the information requested has the burden of proving the applicability of an exception to the FOIA. *Id.* In this case, the EEOC must demonstrate that the information sought was compiled for law enforcement purposes and that its disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *See Rosenglick v. Internal Revenue Service,* No. 97–747–Civ–Orl–18A, 1998 WL 773629, *2 (M.D.Fla. March 10, 1998). "The determination of whether the agency has met its burden is difficult, so several tools have been developed to aid the courts. Available methods for determination include a Vaughn index, ex parte in camera review of the requested documents in their unredacted form, or fact-specific affidavits of the parties. The trial court must find an adequate factual basis to support a finding or privilege, but the use of the described methods is discretionary." *Cappabianca v. Commissioner, United States Customs Service,* 847 F.Supp. 1558, 1561 (M.D.Fla.1994)

Plaintiffs do not appear to dispute that the information sought was compiled for law enforcement purposes. Thus, the Court turns to whether its disclosure would constitute an unwarranted invasion of personal privacy. In meeting its burden with respect to this prerequisite, the government agency need not demonstrate "to a certainty that release will lead to an unwarranted invasion of personal privacy...." *Id.* at 1448 (citation omitted). Rather, the EEOC need only demonstrate a "reasonable expectation" of such an invasion. *Id.*

To determine whether the disclosure of documents will result in an unwarranted invasion of privacy, the court must balance the individual's privacy interest against the public interest in disclosure of the information. *O'Kane v. United States Customs Service,* 169 F.3d 1308, 1309 (11th Cir.1999); *Nadler,* 955 F.2d at 1487. "Only the interest of the general public, and not that of the private litigant, is relevant to [the court's] inquiry." *Id.* at 1489. "Disclosure of the requested information is in the public interest only if it furthers the public's statutorily created right to be informed about what their government is up to." *Id.* (citation omitted).

I. Individuals' Privacy Interests

While this Court is unaware of any published or unpublished opinion where a court found that EEOC files relating to ADEA claims were exempt from disclosure under § 552(b)(7)(C), courts have found information relating to other investigations is exempt. For instance, information gathered during an internal investigation relating to allegations of harassment and retaliation has been found to be exempt from disclosure. *See Cappabianca v. Commissioner, United States Customs Service,* 847 F.Supp. 1558 (M.D.Fla.1994). Similarly, information relating to an OSHA investigation has been afforded protection. *See L & C Marine Transport,* 740 F.2d at 922.

***5** The Eleventh Circuit has found that an individual has a substantial privacy interest where disclosure would lead to the type of harm, embarrassment and possible retaliation. *L & C Marine Transport,* 740 F.2d at 922 (names and other identifying information related to an OHSA investigation exempt from disclosure). The court explained that, "[t]here can be little doubt that an employee will feel more free to talk with federal law enforcement officials about possible employer violations if he feels his name will not be attached to his statements. *Id.* The court further found that an individual does not lose his/her privacy interest simply because his identity may be discovered through other means. *L & C Marine Transport,* 740 F.2d at 922. *See Lloyd & Henniger v. Marshall,* 526 F.Supp. 485 (M.D.Fla.1981) (home addresses of witnesses and employees interviewed by OSHA could be withheld under § 552(b)(7)(C) where disclosure of home addresses would subject the persons to precisely the harm the exemption was intended to prevent).

ii. Public Interest

"In order to compel release of materials, there must be a public interest because 'something, even a modest privacy interest outweighs nothing every time.' " *Cappabianca v. Commissioner, United States Customs Service,* 847 F.Supp. 1558, 1564 (M.D.Fla.1994) (citation omitted).

The court in *Nadler* found that the government properly utilized the exemption under 552(b)(7)(c) where disclosure of identities of FBI witnesses would disclose virtually nothing about the conduct of the government. *Id.* The court explained, "Enabling the public to learn about the conduct of private citizens is not the type of public interest the FOIA was intended to serve." *Id.* Similarly, the court in *L & C Marine Transport* found that information, including the names of employee witnesses of an accident who were interviewed by OSHA, fells within the 7© exemption where there was no public interest in the identities of the witnesses. 740 F.2d at 922. The court acknowledged the plaintiff's contention that it needed the information to use as evidence in pending litigation, but explained that the private needs of a company plays no part in the determination of whether disclosure is appropriate. *Id. Accord Cappabianca v. Commissioner, United States Customs Service,* 847 F.Supp. 1558 (M.D.Fla.1994). *See Lloyd & Henniger v. Marshall,* 526 F.Supp. 485 (M.D.Fla.1981) ("[T]he disclosure provisions of FOIA are not a substitute for discovery, and a party's asserted need for documents in connection with litigation will not affect, one way or the other, a determination of whether disclosure is warranted under FOIA.") (citation omitted).

Like in *L & C Marine Transport,* Plaintiffs fail to present any evidence as to how disclosure of the information will serve the public interest. Rather, it appears that Plaintiffs seek the requested information solely for use in the instant litigation.

***6** It is ORDERED as follows:

The Plaintiffs' Motion to Compel (Dkt.12) is DENIED, except as set forth on page five (5) herein, in accordance with the foregoing. Production required by this order shall be made within (15) days of the date of this order. Each party shall bear its own fees and costs associated with the filing of this motion.

All Citations

Not Reported in F.Supp.2d, 1999 WL 1043861, 81 Fair Empl.Prac.Cas. (BNA) 263, 80 Empl. Prac. Dec. P 40,461

End of Document

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March 8, 2016

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

RE: **Proposed Amendment to Federal Rule of Civil Procedure 45(b)(1)**

To the Committee:

The State Bar of Michigan Committee on United States Courts ("Committee") respectfully submits the following proposed amendment to FRCP 45(b)(1) for consideration:

(b) Service.

(1) By whom and How; Tendering Fees.

(A) Any person who is at least 18 years old and not a party may serve a subpoena.

(B) A subpoena shall be effectively served if it is served in accordance with Rule 4, section (e), (f), (g), (h), (i), or (j), as applicable to the particular subpoenaed person, or by alternate means expressly authorized by the Court.

(C) If the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

For service of a subpoena to be effective, the current Rule "requires delivering a copy to the named person." "Delivering," however, is nowhere defined or clarified in the Rule. As discussed in detail in the accompanying memorandum, this ambiguity has led to piecemeal and inconsistent interpretations of the Rule by the courts and, concomitantly, to a large volume of motion practice relating to the service of discovery and trial subpoenas. This has led, in turn, to substantial delays in the progress of litigation and to unnecessary added costs of litigation, as well as to additional burden on the courts' dockets.

The proposed amendment to Rule 45(b)(1) brings the requirements for effective service of a subpoena in line with the requirements for service of process under Rule 4. The rationale for this change is also explained in detail in the accompanying memorandum, but of critical importance is the principle that service of a discovery subpoena should not be more difficult or restrictive than service of the summons and complaint, given the obviously heightened potential liability to which a defendant in a lawsuit is subjected.

The Committee is a standing committee of the State Bar of Michigan comprised of seventeen members appointed by the President of the State Bar of Michigan. Its mission is to make recommendations concerning the administration, organization, and operation of the United States Courts for the purpose of securing the effective administration of justice. The Committee's members are federal judges, clerks of the court, and attorneys who work in and are familiar with the federal court system.

The State Bar of Michigan has authorized the Committee to submit these comments to the Committee on Rules of Practice and Procedure. This Federal Civil Rule amendment proposal represents the position of the Committee on the United States Courts and shall not be considered a position of the State Bar of Michigan.

Thank you for your consideration, and please feel free to contact the Committee with any questions you may have.

Sincerely,

Jan Meir Geht
Chair, Committee on United States Courts

Attachment

PC: U.S. Courts Committee:
Thaddeus E. Morgan, Member
Michael W. Puerner, Member
Peter M. Falkenstein, Advisor

PROPOSAL TO REVISE FED. R. CIV. P. 45(b)(1) TO CLARIFY ACCEPTABLE METHODS OF SERVING A SUBPOENA ON A NON-PARTY WITNESS

I. Background:

Rule 45(b)(1) of the Federal Rules of Civil Procedure (the "Rule"), relating to service of a subpoena, provides in relevant part:

> 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 . . . .

(Underscore added.) Nowhere, however, does the Federal Rules clarify what constitutes effective "delivery" to the subpoenaed party, be it an entity or an individual. In contrast, other provisions of the Federal Rules specify in greater detail what methods of service of documents are acceptable. *See, e.g.,* Rule 4(e) and (f), specifying acceptable methods of service of a summons and complaint on an individual or a corporate entity; *see also* Rule 5(b), specifying acceptable methods of serving pleadings and other papers on all parties.

The failure of the Federal Rules to define "delivering" in Rule 45(b) has led to inconsistent rulings from Circuit to Circuit and from District to District as to what constitutes effective service of a subpoena. Moreover, this uncertainty as to the requirements for service plagues both litigation counsel for the parties and in-house or outside counsel for subpoenaed non-parties as to how to serve a subpoena and how to respond to the ostensible "service." This uncertainty has led to vast inefficiencies and delays in federal litigation, as (i) subpoenas are regularly challenged by objections and motions to quash, based on uncertainty as to the effectiveness of service; (ii) counsel seeking to serve a subpoena often has to move for an order permitting alternate methods of service; and (iii) discovery and trial schedules are often delayed, as motions relating solely to the effectiveness of service of a subpoena are briefed and heard.

Ultimately, it is often several months before the validity of service of the subpoena is upheld or, if it is deemed ineffective, re-service can be effected. In addition to delaying litigation unnecessarily, the confusion as to methods for serving a subpoena drives up the costs of litigation and unduly burdens court dockets with motions related to a procedural issue that can be better clarified by a revision to the Rule. Based on the clear problem currently plaguing our federal system and the analysis of the issues as addressed below, the Committee proposes to amend Rule 45(b)(1) in the manner attached as Exhibit 1 to this memorandum.

II. The Split Among Courts in Setting Forth Acceptable Methods of "Delivering" a Subpoena to a Non-Party Witness

A majority of courts have adopted the position that "delivering" a subpoena requires personal service. *See, e.g., OceanFirst Bank v. Hartford Fire Ins. Co.,* 794 F. Supp. 2d 752,

753 (E.D. Mich. 2011) ("The Sixth Circuit has not addressed whether Rule 45 requires personal service; however, the Fifth, Ninth, and D.C. Circuits have held that personal service is required.") *citing Robertson v. Dennis (In re Dennis),* 330 F.3D 696, 705 (5th Cir. 2003); *Chima v. United States Dep't of Defense,* 23 Fed. App'x. 721, 724 (9th Cir. 2001); *FTC v. Copmagnie De Saint-Gobain-Pon-A-Mousson,* 636 F.2d 1300, 1312-13 (D.C. Cir. 1980). "A majority of lower also have held that Rule 45 requires personal service." *OceanFirst Bank,* 794 F. Supp. 2d at 753 (numerous citations omitted).

"There is no consensus on that point, however. A number of courts 'have permitted service by certified mail and other means if the method of service is made in a manner designed to reasonably insure actual receipt of the subpoena by the witness.'" *Id.* For example, the court in *Doe v. Hersemann,* 155 F.R.D. 630 (N.D. Ind. 1994), held that service of a subpoena via certified mail is sufficient under Rule 45, particularly when the subpoenaed party does not deny actual receipt. In adopting and further clarifying that position, a Maryland district court subsequently explained:

> The courts that have embraced the minority position have in common a willingness to acknowledge that Rule 45 itself does not expressly require personal in-hand service, and a practical appreciation for the fact that the obvious purpose of Rule 45(b) is to mandate effective notice to the subpoenaed party, rather than slavishly adhere to one particular type of service.

Hall v. Sullivan, 229 F.R.D. 501, 504 (D. Md. 2005). Building upon the reasoning in *Doe v. Hersemann,* the *Hall* court continued:

> 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."

Id. Furthermore,

> In further support of its conclusion that personal, in-hand service is not required by rule 45, the *Doe* court looked to Rule 4(e)(1), which addresses the type of service required for a summons and complaint. . . . Rule 4(e)(1), in relevant part, states that "service may be effected by delivering a copy of the summons and of the complaint to the individual *personally* . . .(emphasis added). . . . [W]hen the drafters of the Federal Rules wanted to require "personal service" of a pleading or paper, they were capable of doing so unambiguously. . . . [T]o read the word "personally" into Rule 45 would render the use of "personally" in Rule 4(e)(1) "pure surplusage," a practice not advocated.

Id. citing Doe v. Hersemann, 155 F.R.D. at 631. A growing number of courts have thus adopted the position that service by means other than personal service is permitted, if designed to

reasonably give notice of the subpoena to the subpoenaed party, or where the subpoenaed party acknowledges receipt of the subpoena. Such means may include service by certified mail, first class U.S. mail, delivery to non-party's office, or delivery to non-party via Federal Express as well as non-party's counsel. *See, e.g. Green v. Baca*, 2005 WL 283361 at *5 n.1 (C.D. Cal. Jan. 31, 2005) (unpublished opinion) (permitting service by leaving subpoena at witnesses' offices); *Cordius Trust v. Kummerfeld*, 2000 WL 10268 at *2 (S.D. N.Y. Jan. 3, 2000) (unpublished opinion) (permitting service by certified mail); *Windsor v. Martindale*, 175 F.R.D. 665 (D. Colo. 1997) (service by certified mail sufficient); *Codrington v. Anheuser-Busch, Inc.*, 1999 WL 1043861 at *1-2 (M.D. Fla. Oct. 15, 1999) (unpublished opinion) (permitting service by first class U.S. mail); *Western Resources, Inc. v. Union Pacific R. Co.*, 2002 WL 1822432 at *1-2 (D. Kan. July 23, 2002) (unpublished opinion) (permitting service via Federal Express with a signature release waiver and upon non-party's counsel); *OceanFirst Bank*, 794 F. Supp. 2d at 754 (E.D. Mich. 2011) (first-class mail accompanied by posting at known residence sufficient)(in dictum). And, certainly, in any case in which the subpoenaed party or its counsel contacts the attorney for the subpoenaing party to acknowledge receipt, but also to object to the method of service, the service will be deemed effective. *See, e.g., Ott v. City of Milwaukee*, 274 F.R.D. 238, 241-42 (E.D. Wis. 2011); *Jorden v. Steven J. Glass, MD*, 2010 WL 3023347 at *4 n.1 (D.N.J. July 23, 2010) (unpublished opinion).

Other courts have staked out a middle ground between the most restrictive majority view requiring personal service, and the most permissive minority view, authorizing a variety of alternate methods of service. This middle ground is essentially a hybrid position, adopting the majority view as the default position, but permitting alternative methods of service upon motion to the court; but only upon a showing that diligent efforts to personally serve the subpoena have failed. *See, e.g., OceanFirst Bank,* 794 F. Supp. 2d at 754:

> "Courts that have sanctioned alternative means of service under Rule 45 often have done so only after the party requesting the accommodation diligently attempted to effectuate personal service." (Citation omitted.) . . . The Court is persuaded by and adopts the reasoning of the courts that interpret Rule 45 to allow service of a subpoena by alternate means once the party seeking evidence demonstrates an inability to effectuate service after a diligent effort. The alternate means must be reasonably calculated to achieve actual delivery. (Citations omitted.)

The *OceanFirst* court then noted that "[m]ailing by first-class mail to the actual address of the intended recipient generally will suffice, (citation omitted), especially when the mailing is accompanied by posting at the known address of the prospective witness." *Id. See also Bland v. Fairfax County, Va.*, 275 F.R.D. 466, 471-72 (E.D. Va. 2011) (permitting service "where [subpoenaed] witnesses agreed to testify, actually received the at-issue subpoenas in advance of trial, and the non-personal service was effected by means reasonably sure to complete delivery.").

Thus, the current judicial landscape comprises three wholly different interpretations of what constitutes effective delivery of a subpoena under Rule 45 – (i) the majority view, requiring personal service; (ii) the growing minority view, authorizing a variety of alternate means of service; and (iii) the hybrid view, authorizing alternate service only upon motion and a showing

that diligent attempts at personal service have been unavailing. As illustrated by the large number of opinions devoted to this issue, valuable resources are being wasted in trying to interpret a rule that could be easily clarified and settled by an amendment to Rule 45(b).

III. Evaluating the Various Approaches

In evaluating the various approaches taken by the courts, the Committee has taken into account the evolving views as to the purpose of the Federal Rules, as exemplified by the Duke Conference of 2010, along with amendments to the Federal Rules emanating from that conference. The Duke Conference examined problems in federal civil litigation, particularly excessive costs and delay and the adequacy of the Federal Rules of Civil Procedure to address them. As emphasized in the aftermath of the Duke Conference, and exemplified by the amendment to Rule 1: the Rules will be "construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The Committee thus views the various approaches to Rule 45(b)(1) with a critical focus on whether each promotes the just, speedy, and inexpensive determination of the action.

With respect to Rule 45(b)(1) in particular, the Committee also is cognizant of the overview taken by the respected treatise Moore's Federal Practice, as summarized in *Hall v. Sullivan*, 229 F.R.D. at 505:

> Moore's Federal Practice provides insight into the position of the courts following the minority rule that personal service . . . is not required by Rule 45:
> (1) The actual language of the rule does not require personal service;
> (2) As Rule 4(e) demonstrates, the drafters of the Federal Rules knew how to require personal service when they wanted it;
> (3) The cases holding that personal service is required by Rule 45 do not provide meaningful analysis, but instead, simply quote the rule; and
> (4) There is absolutely no policy distinction that would justify permitting "lesser" forms of service for a summons and a complaint – which actually commence a lawsuit – but not for a subpoena. [Moore's Federal Practice – Civil ¶ 45.03(b)(1).]
>
> This last reason is the most persuasive. It is illogical to permit a person to be brought into a lawsuit, with all its attendant risks of personal liability, on less than personal service, but to require personal service of a discovery or trial subpoena. The objective should be to ensure fair notice to the person summoned and an opportunity to challenge the subpoena, without unnecessarily imposing on the party seeking the discovery an unnecessarily cumbersome or expensive service requirement.

A. The Majority Approach (Personal Service Requirement).

The Committee views the majority approach, requiring personal service of a discovery or trial subpoena to be inefficient, overly restrictive, and not justified by sound policy. As noted in

Moore's Federal Practice, nothing in Rule 45 itself requires personal service – the requirement is simply a gloss on the rule, manufactured by the courts themselves. Thus, this approach is more restrictive than the actual language of the rule requires.

It also is illogical from a policy perspective. Subjecting an individual or a company to a lawsuit should clearly require the most effective forms of notice, given the liability to which the putative defendant may be subjected. And Rule 4, while taking this into account, provides for a variety of acceptable means for service of the summons and complaint. It makes no sense to sharply narrow the acceptable methods of service of a discovery or trial subpoena, where the risk to the subpoenaed party is not nearly as great as that of a putative defendant.

Finally, the majority approach does not serve the goals of the speedy and inexpensive determination of litigation. Attempts to personally serve a subpoena, particularly where the subject may wish to avoid service, can be extremely time consuming and drive up litigation costs. And, where personal service cannot be obtained at all, the goal of a "just determination" of the litigation is ill-served, as material witnesses may never be examined and critical documents may never be produced.

Therefore, the Committee finds that the majority approach is the least appropriate of the approaches currently taken by the courts.

B. The Hybrid Approach (Alternate Service Upon Motion After Diligent Personal Service Attempts Fail)

The hybrid approach, permitting various alternate methods of service, but only upon motion to the court and a showing that diligent attempts at personal service have failed, is an improvement upon the majority approach in one regard – it better promotes the "just determination" of the litigation by ultimately permitting less restrictive service methods; thereby increasing the likelihood that material witnesses and documents will ultimately be made available to the litigants. This is accomplished via the discretion of the court, upon motion, to authorize alternate methods of service.

The hybrid approach, however, in no way promotes the "speedy and inexpensive determination" of the litigation. Parties attempting to serve a subpoena are still required to go through the motions of diligently trying to personally serve the subpoena, thereby incurring the same costs and delays inherent in the majority approach. Moreover, once those attempts fail, the serving party must suffer the expense of filing a motion with the court and, if successful, then following through on the alternate means of service authorized by the court. The delays inherent in this approach are onerous, particularly where discovery deadlines or a trial date are looming. It can often be two months or more from the time a party recognizes that it cannot effect personal service until the time it is able to obtain an order for substitute service via motion, and then effect service through alternative means.

Neither does the hybrid approach serve legitimate policy concerns any better than the majority approach. There is no more basis in Rule 45 itself, or the policy relating to service of various documents as discussed in Moore's, that would justify establishing a default position of

first requiring attempts at personal service, than would justify only permitting personal service. By taking a position that is highly congruous with the majority approach – that one *must* attempt personal service of a subpoena – the hybrid approach stands on equally shaky policy footing as the majority approach.

For the reasons stated, the Committee concludes that the hybrid approach does not adequately serve the goals of the Federal Rules.

C. The Minority Approach (Permitting Methods of Service Designed to Reasonably Insure Actual Notice to the Subpoenaed Party)

Moore's Federal Practice recognizes that sound policy compels the conclusion that the methods of service authorized for service of a subpoena should be no more restrictive than those authorized for service of a summons and complaint. Courts adopting the minority approach have explicitly or implicitly agreed.

Expansion of the acceptable methods of service of a subpoena to those encompassed by Rule 4 will certainly promote the just determination of litigation by making it most likely that material witnesses and documents will become available to the litigants, as it will be more difficult for a recalcitrant witness to dodge service. The speedy and inexpensive determination of litigation will also be served dramatically, as litigants will no longer be required, as under the hybrid approach, to make numerous attempts at personal service, and then to file costly and time consuming motions to obtain an order for substitute service. In sum, under the minority approach, all of the same methods of service that are available under the hybrid approach only after lengthy and costly delays, will be available to the parties immediately.

For these reasons, the Committee concludes that the minority approach bests serves all of the interests set forth as goals for the administration of justice under the Federal Rules, including the interests of the Courts, the counsel for the parties, the counsel for non-parties who are subject to subpoenas, and, of course, the parties themselves. Further, when coupled with the courts' inherent discretion to authorize alternate methods of service, the minority approach comes as close as possible to serving the stated goals of the Federal Rules.

IV. The Committee's Recommendation

The Committee Recommends amending Rule 45(b)(1) by striking all of the current language in that subsection and inserting instead the language annexed to this proposal as **Exhibit 1.** The Committee recognizes that among the courts adopting the minority approach there is not absolute congruity, as there have been authorized a variety of different means of service. The Committee concludes that in order to provide a consistent and clearly understandable protocol for service of subpoenas, a rule for service that is congruent with Rule 4 of the Federal Rules makes the most sense. Additionally, the proposed rule makes clear that the Court's inherent discretion to provide for alternate methods of service when necessary and appropriate is preserved.

Submitted by,

/s/ Peter M. Falkenstein
/s/ Thaddeus E. Morgan
/s/ Michael W. Puerner

Date: January 12, 2016

EXHIBIT 1

Rule 45(b)(1) of the Federal Rules of Civil Procedure is amended by deleting the language of the current rule and inserting the language below as the substitute rule:

(b) Service.

(1) ***By Whom and How; Tendering fees.***

(A) Any person who is at least 18 years old and not a party may serve a subpoena.

(B) A subpoena shall be effectively served if it is served in accordance with Rule 4, section (e), (f), (g), (h), (i), or (j), as applicable to the particular subpoenaed person, or by alternate means expressly authorized by the Court.

(C) If the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

UNITEL

09-CV-C

June 25, 2009

Hon. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Washington, D.C. 20544

Re: Docket 07-CV-A

Dear Secretary Mc Cabe:

Follow-up to my letter of 15 March 07 (copy enclosed). Ah how time flies – here I am again and same issue. I'm hopeful there has been some interest shown in my suggestion.

The issue has taken on even more importance as we continue in the field to serve mostly Federal Subpoenas for depositions and documents in aid of federal litigation. Nowadays everyone in the country has their guard up because of privacy rights, identity thefts and all type of encroachments on an individual. The days are over when our process servers can simply ring a doorbell or even enter an office suite and announce their attention – security concerns trump everything. Service tricks relying on subterfuge, trespassing, chicanery and the like – was OK and expected years ago, but now one can get shot at, stabbed or punched just trying to perform his duty.

My own limited research into the law of service took me back to the Courts of Chancery in Great Britain of 1843, wherein the Lord Chancellor opined that … [W]hen left at the dwelling house with a servant or family member; it is equally good as personal service, except for the privilege of Peerage … . So even then, there was a glimmer of easing of the rules.

Thus, the issue is ripe for the Committee to conform R-45 (b)(1) to the constructive service provisions of Rule 4.

Thank you for your interest and that of the Committee.

Respectfully submitted,

William P. Callahan, Esq.

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Affiliate Offices: London • Hong Kong • Moscow • Venice

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

COPY

March 15, 2007

William P. Callahan, Esquire
Unitel
17 Battery Place, suite 1226
New York, NY 10004

Re: Your Suggestion for Proposed Amendment to Civil Rule 45 (Docket Number 07-CV-A)

Dear Mr. Callahan:

Thank you for your letter of February 26, 2007, suggesting an amendment to Civil Rule 45, to simplify the methods of service of a subpoena to comport with the service provisions in Rule 4. A copy of your suggestion will be distributed to the chair and reporter of the Advisory Committee on Civil Rules for their consideration.

The federal rulemaking process is an exacting and time-consuming process. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule. To follow the progress on your suggestion, you may contact the Rules Committee Support Office anytime at (202) 502-1820 for a status report.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe

cc: Honorable Lee H. Rosenthal
Professor Edward H. Cooper

COPY

UNITEL
17 Battery Place, Suite 1226
New York, NY 10004
(212) 889-3000

2-26-07

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Recommendations for change of Rule 45 –F.Rules Civil Procedure with respect to personal service of suboenas

Dear Secretary:

I respectfully write to urge a change in the requirements of Rule 45 with respect to personal service of all civil subpoenas to be in accord with substituted service of a summons in Rule 4. I am the president of Unitel and an attorney duly admitted to practice in New York. I am a former Federal Prosecutor with the U.S. Department of Justice.

We are an investigative consulting company and we work almost exclusively for law firms engaged in Intellectual Property litigation practice. Much of our assignments we receive from our law firm clients involve service of Federal Summons & Complaints and Subpoenas for Documents/Depositions. With respect to service of a Summons under Rule 4, there is a great deal of latitude in that Rule for substituted service on individuals and corporations such as Rule 4 (d) Waiver of Service; Duty to Save Costs of Service; Request to Waive. Thus, when an individual is hard to serve there are several remedies available under Rule 4 that are not available under Rule 45.

This is not so under Rule 45, where the Rule, states: "... *service ... shall be made by delivering a copy thereof to such person and tendering the fees ... .*". In our day to day work in the field, we must adhere to the personal service restrictions and in this day and age, such service becomes fairly impractical and futile most of the time. We must resort to all types of tricks and subterfuge since in most cases, the individual has already been served with the Summons and is thus alerted to any further legal documents. People will not open their doors anymore, go to great lengths to evade service, and it is professionally distasteful to have to resort to chicanery and tricks to effect service, not to mention the time and expense and even danger to our servers.

KAPLANFOX

05-CV-H

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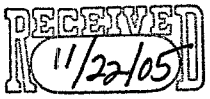
November 17, 2005



Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 45

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On November 16, 2005, the Section unanimously approved the enclosed report entitled "Is Personal Service of a Subpoena Required Under Rule 45." On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

Gregory K. Arenson

Gregory K. Arenson

GKA:sm
Enclosure

cc: Stephen P. Younger, Esq., Chair (w/encl.)
James F. Parver, Esq. (w/encl.)
Glenn LeFebvre, Esq. (w/encl.)

IS PERSONAL SERVICE OF A SUBPOENA REQUIRED UNDER RULE 45?

Summary

Although the language in Rule 45 of the Federal Rules of Civil Procedure governing how subpoenas are to be served has remained unchanged since it was first adopted in 1937, it is unclear whether a subpoena must be personally served on the person to whom it is addressed in order to be valid and enforceable. Rule 45(b)(1) provides that service of a subpoena shall be made "by delivering a copy thereof" to the person named in the subpoena. The Rule is silent as to whether "delivery" requires personal in-hand service or permits some form of substitute service. There is a split in authority (including a split within the federal courts in New York State) as to whether personal in-hand service is required. The supposed "majority rule" is that personal in-hand service is required. However, a significant number of decisions have held that personal in-hand service is not required.

The Section believes that personal in-hand service of a subpoena is not required by the language of Rule 45(b)(1); that, as a matter of policy, personal service should not be the only method of service permitted, particularly since service of a summons and complaint other than by personal in-hand service is permitted in the federal courts; and that non-personal service is and should be permitted, provided that the method of service employed satisfies the due process requirement of providing reasonable assurance that the subpoena has been received. The Section further believes that any method of service permitted under Rule 4 of Federal Rules of Civil Procedure for the service of a summons and complaint should be permitted under Rule 45(b)(1) for the service of a subpoena and that Rule 45(b)(1) should be amended to explicitly provide that.

A. Applicable Provisions of Rule 45 and Their History

Rule 45(b)(1) provides in pertinent part: "Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . .." Rule 45(b)(3) provides in pertinent part: "Proof of service when necessary shall be made by filing . . . a statement of the date and manner of service . . .."

Rule 45(b)(1) does not specify whether a copy of the subpoena must be delivered personally to the witness named in the subpoena or whether some other means of delivery will suffice. The relevant language of Rule 45(b)(1) has remained unchanged since it was first adopted in 1937 as part of then Rule 45(c) of the original Federal Rules of Civil Procedure.[1] The language was moved from Rule 45(c) to Rule 45(b)(1) as part of the 1991 Amendments to the Federal Rules. *See* Advisory Committee Notes, 1991 Amendment, Subdivision (b) ("Paragraph (b)(1) retains the text of the former subdivision (c) with minor changes."). Similarly, the language of Rule 45(b)(3) has remained unchanged, except for being moved from Rule 45(d)(1) to Rule 45(b)(3) as part of the 1991 Amendments. *See* Advisory Committee Notes, 1991 Amendment, Subdivision (b) ("Paragraph (b)(3) retains language formerly set forth in Paragraph (d)(1).").

The Advisory Committee Notes to the 1937 adoption of then Rule 45(c) state that subdivision (c) "provides for the simple and convenient method of service permitted under many state codes; *e.g.*, N.Y.C.P.A. (1937) §§ 220, 404...; Wash Rev. Stat. Ann. (Remington, (1932) § 1218." The Advisory Committee Notes give no indication as to whether personal service of a subpoena was intended to be required by then Rule 45(c).

[1] The proposed style revision to Rule 45(b)(1) by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States does not alter the language or clarify what the term "deliver" means. *See* Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure (Feb. 2005).

Although then Rule 45(c) (now Rule 45(b)(1)) did not specify whether the term "delivering" required personal delivery or whether some form of non-personal delivery would be permitted, the 1951 edition of *Moore's Federal Practice* stated, without explanation, that "service must be made by delivering a copy to the person named personally." 5 *Moore's Fed. Practice* ¶ 45.06[1] (2d ed. 1951).

The state laws to which the 1937 Advisory Committee Notes refer do not clearly indicate whether it was intended that a subpoena had to be personally served. The reference to the New York Civil Practice Act supports the position that only personal service was intended to be permitted. Section 404 of the C.P.A. provided, in pertinent part:

> **§ 404. Service of Subpoena Issued out of a Court.** A subpoena issued out of the court, to compel the attendance of a witness, and, where the subpoena so requires, to compel him to bring with him a book or paper, must be served as follows:
>
> 1. The original subpoena must be exhibited to the witness.
>
> 2. A copy of the subpoena, or a ticket containing its substance, must be delivered to him.

C.P.A. § 404, *Clevenger's Practice Manual of New York* (1936 & 1939 eds.).

The requirement that the original of the subpoena must be exhibited to the witness indicates that personal service was required.[2] And in *Broderick v. Shapiro*, 172 Misc. 28, 14

[2] At some point prior to 1958, the requirement that the original subpoena be exhibited to the witness was eliminated and C.P.A. § 404 required only that a copy of the subpoena be delivered to the witness. *See Application of Barbara*, 14 Misc.2d 223, 226, 180 N.Y.S.2d 924, 927 (Sup. Ct. Tioga Co. 1958), *aff'd*, 7 A.D.2d 340, 183 N.Y.S.2d 147 (3d Dep't 1959). That version of C.P.A. § 404 was construed by both the lower court and the Appellate Division in *Application of Barbara* to permit service of the subpoena by means other than personally handing the subpoena to the witness, at least where the witness sought to avoid service of the subpoena. In *Application of Barbara*, the process server went to the witness's home and told his wife that he had a subpoena and explained its contents, but she refused to summon the witness or accept the subpoena on his behalf. The process server observed the witness through a window and told him that he had a subpoena, exhibited the subpoena and stated its substance. Thereafter, he fastened the subpoena to the front door and, using a portable electronic amplifier, read the contents of the subpoena through the amplifier at least twelve more times from various positions around the house. In holding that the requirement of delivery was complied with, the Appellate Division stated that "the requirement that a subpoena 'be delivered to the witness' (Civil Practice Act, § 404) is somewhat less stringent then the provision that a summons be delivered 'to the defendant in person' (Civil Practice Act § 225)." 7 A.D.2d at 343, 183 N.Y.S.2d at 149.

N.Y.S.2d 542, 543 (Sup. Ct. N.Y. Co. 1939), the court held that "a subpoena must be served on a witness personally." *See also In re Depue*, 185 N.Y. 60, 69-70, 77 N.E. 798, 801 (1906).

Section 220 of the C.P.A. also referenced in the 1937 Advisory Committee Notes, provided that a summons could be served by any person over the age of 18 who was not a party and that "the provisions of this article relating to personal service, or a substitute for personal service, of an original summons apply to a supplemental summons." C.P.A. § 220, *Clevenger's Practice Manual of New York* (1936 & 1939 eds.). The provisions of the C.P.A. governing service of a summons provided for only personal service unless a court order for substituted service was obtained and such an order could only be obtained upon a showing that "the plaintiff has been or will be unable, with due diligence, to make personal service of the summons within the state." C.P.A. § 230, *Clevenger's Practice Manual of New York* (1936 & 1939 eds.). Section 230 provided for an order for substituted service upon a defendant that was a domestic corporation (with certain limited exceptions) or a natural person residing within the state. *See also* C.P.A. § 225 (personal service upon a natural person), § 228 (personal service upon a domestic corporation), § 229 (personal service upon a foreign corporation, § 231 (manner of making substituted service), and § 232 (order for service of summons by publication).

On the other hand, the Washington statute referenced in the 1937 Advisory Committee Notes suggests that at least some form of substituted service would be permissible. Section 1218 of Wash. Rev. Stat. Ann. (Remington) (1932) provided that a subpoena:

> may be served...by exhibiting and reading it to the witness, or by giving him a copy thereof, *or by leaving such copy at the place of his abode*.

(Emphasis added.)

B. Applicable Legal Authority

Many decisions have found that personal service of a subpoena is required by Rule 45.[3] This is the supposed "majority rule." *See Hall v. Sullivan*, 229 F.R.D. 501, 502 (D. Md. 2005) ("a majority of courts have held that personal service is required, while a growing minority of others have not"; court followed minority position in holding that personal service is not required in case of subpoena *duces tecum*); *Agran v. City of New York*, 1997 WL 107452, at * 1 (S.D.N.Y. Mar. 11, 1997) ("the weight of authority is that a subpoena duces tecum must be served personally"); *In re Shur*, 184 B.R. 640, 642 (E.D. Bankr. Ct. 1995) ("a majority of courts hold that Rule 45 requires personal service;" court followed other authorities in holding that

[3] *See Agran v. City of New York*, 1997 WL 107452 (S.D.N.Y. Mar. 11, 1997) (service by mail improper); *Alexander v. Jesuits of Missouri Province*, 175 F.R.D. 556, 560 (D. Kan. 1997) (leaving subpoena at home of witness with her husband improper); *Application of Johnson & Johnson*, 59 F.R.D. 174, 177 (D. Del. 1973) (personal service of a subpoena is required when an individual is subpoenaed; service on registered agent for corporation not proper when subpoena directed to individuals); *Barnhill v. United States*, 1992 WL 453880, at * 4 (N.D. Ind. Apr. 8, 1992), *rev'd on other grounds*, 11 F.3d 1360 (7th Cir. 1993) (service by certified mail improper); *Benford v. American Broadcasting Cos., Inc.*, 98 F.R.D. 40, 41 n. 5 (D. Md. 1983) (*dicta*); *Chima v. United States Dep't of Defense*, 2001 WL 1480640, at * 2 (9th Cir. Dec. 14, 2001) (unpublished decision) (service by mail improper); *In re Smith (Conanicut Inv. Co. v. Coopers & Lybrand)*, 126 F.R.D. 461, 462 (E.D.N.Y. 1989) (court refused to order alternative means of service, holding that Rule 45 requires personal delivery of the subpoena to the party named); *Federal Trade Commission v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1307, 1312-13 (D.D.C. 1980) (service by registered mail invalid); *Ghandi v. Police Dep't of City of Detroit*, 74 F.R.D. 115, 120-21 (E.D. Mich. 1977); *Gillam v. A. Shyman, Inc.*, 22 F.R.D. 475, 479 (D. Alaska 1958) (subpoena served on wife of witness not valid); *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968) (service of subpoena *duces tecum* on plaintiff's counsel not valid); *In re Nathurst*, 183 B.R. 953, 955 (M.D. Fla. Bankr. Ct. 1995) (service by certified mail improper); *In re Pappas*, 214 B.R. 84, 85 (D. Conn. Bankr. Ct. 1997); *In re Smith*, 126 F.R.D. 461, 462 (E.D.N.Y. 1989) (court refused to order alternative means of service, holding that Rule 45 requires personal delivery of subpoena to party named); *James v. McKenna*, 2003 WL 348921, at * 2 (E.D. La. Feb. 6, 2003) (service by certified mail invalid); *Khachikian v. BASF Corp.*, 1994 WL 86702, at * 1 (N.D.N.Y. Mar. 4, 1994) (service of subpoena *duces tecum* directed to defendant invalid when served on defendant's attorney by regular mail); *Klockner Namasco Holdings Corp. v. Daily Access.com, Inc.*, 211 F.R.D. 685, 687 (N.D. Ga. 2002) (service of subpoena made on wife of witness improper); *Lehman v. Kornblau*, 206 F.R.D. 345, 346-47 (E.D.N.Y. 2001) (service of subpoena by certified mail on counsel for non-parties was improper); *Northeast Women's Center, Inc. v. McMonagle*, 1987 WL 6665, at * 5 (E.D. Pa. Feb. 10, 1987) (subpoena served by mail improper); *Rotter v. Cambex Corp.*, 1995 WL 374275, at * 1 (N.D. Ill. Jun. 21, 1995) (service by mail improper); *Scarpa v. Saggese*, 1994 WL 38620 (1st Cir. Feb. 10, 1994) (unpublished opinion) ("a subpoena cannot be left at someone's home; it must be served upon the person"); *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 685-86 (D. Kan. 1995) (service by certified mail improper); *Terre Haute Warehousing Serv. Inc. v. Grinnell Fire Protection Sys. Co.*, 193 F.R.D. 561, 562-63 (S.D. Ind. 1999) (service by certified, return receipt held improper); *Tidwell-Williams v. Northwest Georgia Health Sys., Inc.*, 1998 WL 1674745, at * 7 (N.D. Ga. Nov. 19, 1998) (subpoenas not properly served; plaintiff failed to show the subpoenas were personally served rather than faxed or mailed); *United States v. Philip Morris Inc.*, 312 F. Supp.2d 27, 37-38 (D.D.C. 2004) (deposition subpoenas left at mailroom of Justice Department or with support staff, but not personally served on witnesses, invalid); *Whitmer v. Lavida Charter, Inc.*, 1991 WL 256885 (E.D. Pa. Nov. 26, 1991) (not sufficient to leave subpoena at dwelling place of witness).

personal service is not required); 9 *Moore's Fed. Practice* § 45.03 [4][b][i], at 45-26 (3d ed.) ("[a] majority of courts have held that Rule 45 requires personal service").

However, there are a significant number of cases that have concluded that personal service is not required.[4] There is also a split of authority among the decisions of federal courts in New York. *Compare Agran*, 1997 WL 107452 (S.D.N.Y.); *In re Smith*, 126 F.R.D. at 462 (E.D.N.Y.); *Khachikian*, 1994 WL 86702, at * 1 (N.D.N.Y.); and *Lehman*, 206 F.R.D. at 346-47 (E.D.N.Y.), which conclude that personal service is required, *with Catskill Development, L.L.C.*, 206 F.R.D. at 84 n. 5 (S.D.N.Y.); *Cohen*, 2001 WL 257828, at * 3 (E.D.N.Y.); *Cordius Trust*, 2000 WL 10268 (S.D.N.Y.); *First City, Texas-Houston, N.A.*, 197 F.R.D. at 254-55 (S.D.N.Y.); *First Nationwide Bank*, 184 B.R. 640 (E.D.N.Y. Bankr. Ct.); *Hinds*, 1988 WL 33123 (E.D.N.Y.); *King*, 170 F.R.D. 355 (E.D.N.Y.); and *Ultradent Prods., Inc.*, 2002 WL 31119425 (S.D.N.Y.), which find that personal service of a subpoena is not required.

[4] *See Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 84 n. 5 (S.D.N.Y. 2002) (substituted service of subpoenas on tribal officials upheld; subpoenas served at the tribe's offices followed by mailing to the same address); *Codrington v. Anheuser-Busch, Inc.*, 1999 WL 1043861, at * 1 (N.D. Fla. Oct. 15, 1999) (service by mail upheld); *Cohen v. Doyaga*, 2001 WL 257828, at * 3 (E.D.N.Y. Mar. 9, 2001) (service by mail upheld); *Cordius Trust v. Kummerfeld*, 2000 WL 10268 (S.D.N.Y. Jan. 3, 2000) (court ordered service of subpoena by mail); *Doe v. Hersemann*, 155 F.R.D. 630 (N.D. Ind. 1994) (service by certified mail upheld); *Firefighters' Inst. for Racial Equality ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 903 (8th Cir. 2000) (service by fax and mail held invalid because court could not be assured that delivery occurred; court indicated that substituted service that will ensure receipt of the subpoena may be proper); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 254-55 (S.D.N.Y. 2000) (service by attaching subpoena to door and mailing a copy to counsel for witness, which was a party, upheld after unsuccessful attempt to personally serve the agent the witness had appointed for service of process), *aff'd*, 281 F.3d 48, 55 (2d Cir. 2002) ("[a]lthough compliance with the service requirements may not have been exact, they were substantial and sufficient"); *In re Shur*, 184 B.R. 640 (E.D.N.Y. Bankr. Ct. 1995) (court upheld service of subpoena mailed to witness's home with copy delivered to his counsel in another case); *Green v. Baca*, 2005 WL 283361, at * 1 (C.D. Cal. Jan. 31, 2005) (court upheld service where subpoenas left at various witnesses' offices); *Hall v. Sullivan*, 229 F.R.D. 501, 505-06 (D. Md. 2005) (holding personal service not required in case of subpoena *duces tecum*); *Hinds v. Bodie*, 1988 WL 33123 (E.D.N.Y. Mar. 22, 1988) (court ordered service of subpoena by alternate means and held witness in contempt for failure to comply); *King v. Crown Plastering Corp.*, 170 F.R.D. 355 (E.D.N.Y. 1997) (delivery of subpoena to witness's residence and mailing to residence upheld); *Ultradent Prods., Inc. v. Hayman*, 2002 WL 31119425, at ** 1, 2 (S.D.N.Y. Sept. 24, 2002) (service of subpoena *duces tecum* on corporation by service on Secretary of State upheld on ground that the method of service was authorized by New York state law); *Western Resources, Inc. v. Union Pacific R.R. Co.*, 2002 WL 1822432, at * 2 (D. Kan. Jul. 23, 2002) (court upheld service upon non-party's attorney and by Federal Express).

At one time, *Moore's Federal Practice*, without explanation, took the position that Rule 45 (then Rule 45(c)) required personal service of a subpoena. *See* 5A *Moore's Fed. Practice* ¶ 46.06[1] (1994) and 5 *Moore's Fed. Practice* ¶ 45.06 [1] (2d ed. 1951). The current version of *Moore's* no longer adheres to that position. After stating that a majority of courts require personal service, it notes that several courts have declined to follow the majority rule and "have presented several effective arguments in opposition to requiring personal service." 9 *Moore's Federal Practice* § 45.03 [4][b][i], at 45-26 (3d ed.). Those arguments are discussed below. *Wright & Miller*, however, takes the position that personal service is required. 9A C. Wright & A. Miller, *Federal Practice & Procedure Civil 2d* § 2454, at 24-25 (1995) ("*Wright & Miller*"). It offers no explanation or analysis except to cite cases that found that personal service is required. As noted above, none of those cases provides any explanation for that conclusion. Although *Wright & Miller* also cites cases finding that personal service is not required, it does not address this split in authority or explain why requiring "personal service" is the better or correct conclusion. *Wright & Miller* § 2454, at 24-25 (1995).

Analyzing the 1991 changes to Rule 45, Professor David Siegel stated with respect to Rule 45(b)(1):

> No change is made in method, alas. The method is still by "delivering" the subpoena to the person to be served. Subdivision (b)(1). The substituted methods available for summons service under Rule 4 are not available for a subpoena, such as by delivery to a person of suitable age and discretion at the witness's dwelling house under Rule 4(d)(1). The word "delivering" has been rigidly construed. [citing *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson.*]

D. Siegel, "Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure," 139 F.R.D. 197, 207 (1992).

Rule 17(d) of the Federal Rules of Criminal Procedure contains the same language as Rule 45(b)(1), providing that "[s]ervice of a subpoena shall be made by delivering a copy thereof to the person named."[5] Rule 17(d) does not contain any language regarding proof of service. Thus, there is nothing comparable to the language in Rule 45(b)(3) regarding proof of "manner of service." The language in Rule 17(d) regarding service being made by "delivering" a copy of the subpoena has remained unchanged since the Rule first took effect in 1946. The Advisory Committee Notes to original Rule 17(d) specifically note that Rule 17(d) "is substantially the same as" then Rule 45(c) of the Federal Rules of Civil Procedure.

There is limited legal authority addressing whether Fed. R. Crim. P. 17(d) permits only personal service of a subpoena. All but one of the cases that could be found and two legal treatises say that personal service is required by Fed. R. Crim. P. 17(d). However, no analysis or explanation is provided for that conclusion. *See United States v. Grooms*, 6 Fed. Appx. 377, 381 (7th Cir. 2001) (in rejecting defendant's claim that a defense witness's failure to appear at trial denied defendant his Sixth Amendment right to compulsory process, the court stated "defendants bear the responsibility of using proper methods to secure their witnesses' presence in court, such as effecting personal service of subpoenas as required by Rule 17(d)"); *Arnsberg v. United States*, 757 F.2d 971, 974-75, 976 (9th Cir. 1985) ("the date of Arnsberg's scheduled appearance passed without the personal service required by Rule 17(d)"; "because Arnsberg had not been personally served, he had no obligation to appear before the grand jury and therefore could not lawfully be arrested for failing to do so"); 25 *Moore's Fed. Practice* § 617.05[2] (3d ed.)

[5] A number of states' provisions governing service of subpoenas also use the same language as Fed. R. Civ. P. 45(b)(1). *See* Ariz. R. Civ. P. 45(b)(1); Colo. R. Civ. P. 45(c); Del. Super. Ct. Civ. R. 45(b)(1); D.C. Super. Ct. R. Civ. P. 45(b)(1); Haw. R. Civ. P. 45(c); Idaho R. Civ. P. 45(c)(2); Me. R. Civ. P. 45(b)(1); Mo. Sup. Ct. R. Civ. P. 57.09(d); Nev. R. Civ. P. 45(b); N.J. R. Gen. Application 1:9-3; N.M. R. Civ. P. 1-045(B)(2); Wyo. R. Civ. P. 45(b)(1). Whether those state provisions have been construed to require personal service is beyond the scope of this report.

("personal service is required"); L. Levenson, *Federal Criminal Rules Handbook*, Rule 17(d) ("[S]ervice must be personal. Service by fax is not authorized and a subpoena may not simply be left at the witness's dwelling place.").

In *United States v. Venecia*, 172 F.R.D. 438 (D. Or. 1997), the court held, without any explanation, that service by fax is not authorized by Criminal Rule 17(d). In *United States v. Crosland*, 821 F. Supp. 1123, 1128 n. 5 (E.D. Va. 1993), the court stated: "[A]lso somewhat questionable is the use of facsimile transmission to effect service. It is unclear whether facsimile transmission is contemplated by Rule 17(d)'s reference to 'delivering' the subpoena. In the civil context, several courts have found that facsimile transmissions do not constitute valid service under Rule 5(b) of the Federal Rules of Civil Procedure. *See, e.g., Mushroom Assocs. v. Monterey Mushrooms, Inc.*, 1992 WL 442898, *3 (N.D. Cal. 1992); *Salley v. Board of Governors, University of North Carolina*, 136 F.R.D. 417 (M.D. N.C. 1991)."[6] *See also Ferrari v. United States*, 244 F.2d 132, 141 (9th Cir. 1957) (service of a subpoena on a former employer who plainly says he has no intention of finding the named witness does not meet the requirements of Rule 17(d)).

However, in *United States v. Williams*, 557 F. Supp. 616 (E.D. Tenn. 1982), the court upheld service of a subpoena under Fed. R. Crim. P. 17(d) where the subpoena was personally delivered to the secretary of the witness after the witness was notified of the subpoena by his secretary, acknowledged the subpoena, and the secretary accepted it in his behalf. The court stated: "as to such federal process, '* * * in-hand service is not required * * * '", citing *Hanna v. Plumer*, 380 U.S. 460, 466 (1965). *Id.* at 622 n. 2.

[6] *Mushroom Associates* and *Salley* involved the issue of whether service of discovery requests on a party by fax is proper under Fed. R. Civ. P. 5(b), which covers service of papers on a party in an action represented by an attorney. Both courts held that it was not.

C. Reasons For and Against Construing Rule 45(b)(1) to Permit Non-Personal Service

1. Reasons to Find Personal Service is not Required

The decisions finding that Rule 45 does not require personal service offer five reasons for that conclusion. First, the language of Rule 45 does not explicitly require personal service and does not explicitly preclude non-personal service. Rather, it only requires that a copy of the subpoena be "delivered" to the person named. *See, e.g.*, *Cordius*, 2000 WL 10268, at * 2; *King*, 170 F.R.D. at 356; *Doe*, 155 F.R.D. at 630; *Green*, 2005 WL 283361, at * 1 n. 1. A number of courts have relied upon a dictionary definition of the word "deliver" and their belief that nothing in the everyday meaning of the term suggests a requirement of by-hand delivery to the recipient. Delivery by regular, registered or certified mail, for example, does not require the personal presence of the addressee. *See Doe*, 155 F.R.D. at 360 ("'Delivery' connotes simply 'the act by which the *res* or the substance thereof is placed within the actual . . . possession or control of another,'" quoting *Black's Law Dictionary*); *In re Shur*, 184 B.R. at 642 ("Deliver" is defined as "to bring or transport to the proper place or recipient;" "Transport" is defined as "[t]o carry from one place to another; convey;" "Convey" is defined as "to communicate or make known; impart," quoting *American Heritage Dictionary of the English Language*; also relying on *Black's Law Dictionary*.) However, as discussed below, the term deliver, as used in Rule 45(b)(1), as well as in other Federal Rules, has been construed, albeit without analysis, to require personal service.

The second reason courts have found for not requiring personal service is that the drafters of the Federal Rules of Civil Procedure knew how to indicate that personal service was required when that requirement was intended. *See* Fed. R. Civ. P. 4(e)(2) and 4(f)(2)(C)(i). Rule 4(e)(2), which covers service of a summons and complaint upon an individual within the United States,

provides, in pertinent part, for "delivering a copy of the summons and of the complaint to the individual *personally* . . .." (emphasis added). Similarly, Rule 4(f)(2)(C)(i), which covers service of a summons and complaint upon an individual in a foreign country, provides, in pertinent part, for "(i) delivery to the individual *personally* of a copy of the summons and complaint . . .." (emphasis added.) If "delivering" in Rule 45(b)(1) requires personal, in-hand service, then the word "personally" in Rules 4(e)(1) and 4(f)(2)(C)(i) would be mere surplusage. *See, e.g.*, *Cordius*, 2000 WL 10268, at * 2; *Doe*, 155 F.R.D. at 630-31; *In re Shur*, 184 B.R. at 642-43.

The language in Rule 4(e)(2) that is quoted above appeared in the predecessor of that Rule - - Rule 4(d)(1) - - when it was adopted as part of the Federal Rules in 1937. Rule 45(c), adopted at the same time and which covered service of a subpoena, only required, as Rule 45(b)(1) now does, that a subpoena be delivered; there was no express requirement that a subpoena be delivered personally to the witness. The fact that the drafters specified personal delivery in Rule 4(d)(1), but did not specify personal delivery in Rule 45(c), suggests that when Rule 45(c) was adopted in 1937, it was not intended that a subpoena had to be personally delivered.

The predecessor of Rule 4(f)(2)(C)(i) was adopted in 1963 as then Rule 4(i)(1)(C) and contained the same language as Rule 4(f)(2)(C)(i) now does - - "delivery to the individual personally." It could be argued that if the word deliver, standing alone, was understood to require personal delivery, then the word "personally" would not have been included as part of the new provision. On the other hand, it is at least equally plausible, if not more so, that the drafters were simply using the same language that was contained in then Rule 4(d)(1), which covered

service on individuals in the United States, when they added a provision expressly addressing service on individuals in a foreign country.

Third, none of the cases that conclude that personal service of a subpoena is required provide any analysis in support of that position or even attempt to explain the basis for that conclusion. *See Doe*, 155 F.R.D. at 631; *First Nationwide Bank*, 184 B.R. at 642-43; *see* other cases cited in note 1, above.

Fourth, there is no persuasive policy reason for a requirement that a subpoena must be personally served. There is no meaningful policy distinction that would justify a requirement of personal service of a subpoena under Rule 45 when personal service of a summons and complaint is not required under Rule 4 in the case of certain categories of defendants.[7] The policy underlying both Rules is that the method of service must comply with the due process requirement that it be reasonably calculated to give actual notice. *See, e.g., Green*, 2005 WL 283361, at * 1 n. 1; *First Nationwide Bank*, 184 B.R. at 643. *See also* discussion at pp. 16-17, below.

Fifth, Rule 45(b)(3) requires proof of service of the subpoena that indicates the "manner of service." If the only manner of service permitted were by in-hand, personal service, no statement as to the manner of service would be necessary. *See, e.g., Cordius*, 2000 WL 10268, at * 2; *Green*, 2005 WL 283361, at * 1 n. 1; *Western Resources, Inc.*, 2002 WL 1822432, at * 2.

[7] Rule 4 contains a number of provisions allowing non-personal service of a summons and complaint. In the case of service upon an individual in the United States, Rule 4(e)(1) permits service in accordance with the law of the state in which the district court is located or in which service is effected and Rule 4(e)(2) permits leaving copies of the summons and complaint at the individual's dwelling or usual place of abode with a person of suitable age and discretion or by delivering copies to an agent authorized to receive service of process. In the case of service upon individuals in a foreign country, Rule 4(f)(2)(C) provides that, unless prohibited by the law of the foreign country, a summons and complaint may be served by any form of mail requiring a signed receipt. In the case of service upon a corporation in the United States, Rule 4(h)(1) provides that service may be made in the manner prescribed for individuals in Rule 4(e)(1), which, in turn, provides for non-personal service.

Courts have also relied upon Fed. R. Civ. P. 1, which provides that the Rules should "be construed and administered to secure the just, speedy and inexpensive determination of every action." *Hall*, 229 F.R.D. at 504; *Cordius*, 2000 WL 10268, at * 2; *Doe*, 155 F.R.D. at 630; *Western Resources, Inc.*, 2002 WL 1822463, at *2.

2. Reasons to Find Personal Service is Required

As indicated above, the decisions finding that personal service of a subpoena is required by Rule 45 provide no explanation for or analysis of that conclusion, except to say that Rule 45 does not authorize any other method of service, apparently construing (without explanation) the term "delivering" to mean personal, in-hand delivery. *See, e.g., In re Smith*, 26 F.R.D. at 462; *Agran*, 1997 WL 107452, at * 1; *Application of Johnson & Johnson*, 59 F.R.D. at 177. The closest thing to an explanation is the Court's statement in *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980), as follows:

> Federal Rule of Civil Procedure 4, which governs service of process, is primarily concerned with effectuating notice. To that end, the Rule provides for a wide range of alternative methods of service, including registered mail, each designed to ensure the receipt of actual notice of the pendency of the action by the defendant. By contrast, Federal Rule 45(c), governing subpoena service, does not permit any form of mail service, nor does it allow service of the subpoena merely by delivery to a witness's dwelling place. Thus, under the Federal Rules, compulsory process may be served upon an unwilling witness only in person. Even within the United States, and even upon a United States citizen, service by registered U.S. mail is never a valid means of delivering compulsory process, although it may be a valid means of serving a summons and a complaint.

636 F.2d at 1312-13. The court evidently concluded that absent an affirmative provision expressly authorizing a method of service other than personal service, personal service was the only method permitted.

There are five reasons that can be advanced for requiring only personal in-hand service of a subpoena. First, Rule 45(b)(1) does not expressly authorize any other method of service.

When the drafters of the Federal Rules of Civil Procedure have wanted to authorize service of a summons and complaint by a method other than personal service, they have explicitly said so. *See* Fed. R. Civ. P. 4(e)(2) & 4(f)(1)-(3); *see also* Fed. R. Civ. P. 4(e)(1) (service pursuant to state law). The countervailing argument is that when the drafters wanted to require personal service, they explicitly said that. *See* Fed. R. Civ. P. 4(e)(2) & 4(f)(2)(C)(i).

Second, courts have construed the word "delivering" as used in Federal Rules governing the service of subpoenas in criminal cases and the service of the summons and complaint in the case of certain categories of defendants in civil cases as requiring personal service.

"Delivering" as used in Fed. R. Crim. P. 17(d), which governs service of subpoenas in criminal cases, has been construed to require personal service. *See* pp. 7-9, above.

Similarly, the word "delivering" in Fed. R. Civ. P. 4(h)(1), which governs service of a summons and complaint on a corporation in the United States, and provides that service may be made by "delivering" copies on certain specified individuals, has been construed to require personal service. *See Taylor v. Stanley Works*, 2002 WL 32058966, at ** 4-5 (E.D. Tenn. Jul. 16, 2002); *Amnay v. Del Labs*, 117 F. Supp. 2d 283, 286-87 (E.D.N.Y. 2000); *Mettle v. First Union Nat'l Bank*, 279 F. Supp. 2d 598, 602 (D.N.J. 2003); *Petrolito v. 1st Nat'l Credit Servs. Corp.*, 2005 WL 331741, at * 1 n. 2 (D. Conn. Feb. 2, 2005); *Osorio v. Emily Morgan Enters., L.L.C.*, 2005 WL 589620, at * 2 (W.D. Tex. Mar. 14, 2005); *Cataldo v. United States Dep't of Justice*, 2000 WL 760960, at * 7 (D. Me. May 15, 2000); 1 *Moore's Fed. Practice 3d*, § 4.53 [2]; *see also BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d 73, 84 (D.D.C. 2003) (mailing summons and complaint to employee of corporate subsidiary of corporation being sued "does not fulfill any part of [the] requirement" of Rule 4(h)(1)).[8]

[8] Unlike Rule 4(h)(1), Rule 45 does not address, in the case of a corporation, to whom the subpoena must be delivered. Courts have looked to Rule 4(h)(1) for guidance. In *In re Pappas*, 214 B.R. 84, 85 (D. Conn. Bankr. Ct.

Former Fed. R. Civ. P. 4(d)(4), now part of Fed. R. Civ. P. 4(i)(1)(A), which governed service of a summons and complaint on the United States, provided that service was to be made "by delivering a copy of the summons and of the complaint to the United States Attorney for the district in which the action is brought * * *." The term "delivering" in former Rule 4(d)(4) has been held to require personal service. *See Gabriel v. United States*, 30 F.3d 75, 77 (7th Cir. 1994); *Peters v. United States*, 9 F.3d 344, 345 (5th Cir. 1993); *McDonald v. United States*, 898 F.2d 466, 467-68 (5th Cir. 1990); *Dowdy v. Sullivan*, 138 F.R.D. 99, 100 (W.D. Tenn. 1991) (service by certified mail on U.S. Attorney was improper service; personal service required); *accord* 1 *Moore's Fed. Practice* § 4.55 [1], at 4-72 (3d ed.) (if service on the U.S. attorney is effected under Rule 4(i)(1)(A) by delivery, "the summons and complaint must be personally delivered").

Fed. R. Civ. P. 4(j)(2) provides that service of a summons and complaint upon a state municipal corporation, or other governmental organization shall be effected by, among other things, "delivering" copies of the summons and complaint to its chief executive officer. The term "delivering" has been construed to require personal service. *See* 4B C. Wright & A. Miller, *Federal Practice & Procedure: Civil 3d* § 1109, p. 47 (2002); *Gilliam v. County of Tarrant*, 94 Fed. Appx. 230 (5th Cir. 2004) (use of certified mail does not satisfy Rule 4(j)(2)); *Husner v. City of Buffalo*, 172 F.3d 37 (Table), 1999 WL 48776, at ** 1 (2d Cir. Feb. 1, 1999); *Cambridge Mut. Fire Ins. Co. v. City of Claxton, Ga.*, 720 F.2d 1230, 1232 (11th Cir. 1983) (applying predecessor of Rule 4(j)(2), then Rule 4(d)(6)); *Gil v. Vogilano*, 131 F. Supp. 2d 486, 494

1997), the court held that service of a subpoena on a corporation's receptionist constituted valid service under Rule 45(b)(1) after first concluding that Rule 45(b)(1) requires personal service of a subpoena. The court reached its conclusion as to the propriety of the service in question by finding that because Rule 45 does not specify what constitutes personal service upon a corporation, courts look to Rule 4(h)(1) for guidance, and that under applicable state law, service upon a corporation's receptionist constituted personal service. *See Khachikian v. BASF Corp.*, 1994 WL 86702, at * 1 (N.D.N.Y. 1994) (look to Rule 4(d)(3) (now Rule 4(h)) to determine who can be served with subpoena addressed to corporation); *In re Grand Jury Subpoenas*, 775 F.2d 43, 46 (2d Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986) (same).

(S.D.N.Y. 2001) (service by mail not proper); *Barrett v. City of Allentown*, 152 F.R.D. 46, 48-49 E.D. Pa. 1993) (applying former Rule 4(d)(6)); *Miles v. WTMX Radio Network*, 2002 WL 1359398, at * 2 (N.D. Ill. Jun. 20, 2002), *report and recommendation approved in part*, 2002 WL 1613762 (N.D. Ill. Jul. 17, 2002); *Oltremari by McDaniel v. Kansas Social & Rehabilitative Serv.*, 871 F. Supp. 1331, 1353 (D. Kan. 1994).

However, none of the authorities construing Fed. R. Crim. P. 17(d), Fed. R. Civ. P. 4(h)(1) and 4(j)(2), and former Rules 4(d)(4) and 4(d)(6) contains any explanation, discussion or analysis as to why the term "delivering" requires personal service. They simply state that personal service is required. And as indicated on pp. 4-6, above, courts have split in deciding whether the term "delivering", as used in Rule 45(b)(1), requires only personal service. *See* cases cited in notes 2 and 3, above.

Because the term "delivering" does not intrinsically mandate only personal service, a conclusion that only personal service is authorized, based on the use of that word, is not warranted. Such a conclusion also ignores the fact that Rule 45(b)(1) does not use the term "personally", as contrasted with Rules 4(e)(1) and 4(f)(2)(C)(i), which are explicit in requiring personal service, and that Rule 45(b)(3) requires proof of the "manner of service" employed, which suggests that more than one method is permissible.

A third reason that could be advanced for requiring only personal service of a subpoena is the severity of the sanction that can be imposed for ignoring a subpoena -- contempt of court. *See* Fed. R. Civ. P. 45(e). It could be argued that personal service ensures that before such a severe sanction is imposed, there is no dispute about whether the party received the subpoena.[9] On the other hand, the failure to respond to a summons and complaint can also result in a severe

[9] There will always be the possibility of dispute over receipt, even in the case of personal service, if the recipient attempts to lie about receiving it or in the case of sewer service.

sanction -- a default judgment against the defaulting party. *See* Fed. R. Civ. P. 55(a) & (b). In the case of a default judgment, the defaulting party can seek to have it vacated for good cause. *See* Fed. R. Civ. P. 55(c) & 60(b). In the case of a subpoena that has allegedly been ignored, before the sanction of contempt can be imposed, the defaulting party will have an opportunity to argue that the subpoena was never properly served. Due process requires that the allegedly defaulting party be given adequate notice and an opportunity to be heard on a motion for contempt. *See Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1342 (8th Cir. 1975); 9A *Wright & Miller* § 2465, at 82 (1995). In addition, in order to hold the witness in contempt, the subpoena must be valid and the witness must not have an adequate excuse for the noncompliance. *Id.* at 85-86. Thus, there does not seem to be any policy reason based on the potential severity of the sanction for requiring personal service of a subpoena when personal service of a summons and complaint is not always required.

A fourth reason is that when Fed. R. Civ. P. 45(c) was amended in 1991 to move the language concerning the method of service of a subpoena into Rule 45(b)(1), all the decisions addressing whether personal service was required by Rule 45(c) had found that it was, except for the decision in *Hinds*, 1988 WL 33123. *See* case cited in footnotes 2 and 3, above; *see also* Note, "Rule 45(b): Ambiguity in Federal Subpoena Service," 20 *Cardozo L. Rev.* 1065, 1071 (1999). If the Advisory Committee had thought that the courts had improperly construed Rule 45(c) to require personal service, presumably there would have been a proposed or actual amendment of the Rule to change that requirement, or the Advisory Committee would have commented on those decisions, which it did not. This would suggest that the decisions requiring personal service were correct.

A fifth reason that could be advanced for construing the word "deliver" in Rule 45(c) to require personal delivery would be based on Rule 5, which covers service on a party represented by an attorney. Rule 5(b)(2)(A) provides a definition of "deliver" for that limited purpose and does not limit the term to personal delivery:

> (A) Delivering a copy to the person served by:
> (i) handing it to the person;
> (ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or
> (iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

Virtually the same language was contained in Rule 5(b) when it was adopted in 1937.[10]

It could be argued that the need to spell out in then Rule 5(b) that "deliver" did not require only personal delivery, shows that the word "deliver" was understood in 1937 to require personal delivery unless otherwise provided. However, that would be inconsistent with the perceived need to expressly require in then Rule 4(d)(1) that delivery of a summons and complaint on an individual in the United States had to be delivered to the individual "personally." Thus, the argument would appear, at most, to support the idea that the word "deliver", standing alone, is inherently ambiguous as to whether delivery must be personal delivery. Then Rule 5(b), as Rule 5(b)(2)(B) does now, also permitted, as an alternative to delivery, service by mail. This might lend support to the argument that even if delivery does not mean personal delivery, it would not encompass service by mail.

It could also be argued that it is somewhat unfair to involve a person with no stake in a lawsuit without providing that person with the best notice possible, that is, personal service. But

[10] Then Rule 5(b) provided in pertinent part: "Service upon the attorney or upon a party shall be made by delivering a copy to him * * *. Delivery of a copy within this rule means: handing it to the attorney or the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

we fail to see how the need of the parties to involve others in their dispute should require the *best* notice possible, rather than notice sufficient to satisfy the requirements of due process. The countervailing policies of seeking to provide justice and have the truth come to light override the concern of third parties not to be involved in a dispute about which they have necessary information.

D. Due Process Requirements

Due process requires a method of service of a summons or a subpoena that is reasonably calculated, under the circumstances, to provide actual notice and an opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988); *Baker v. Latham Sparrowbush Assocs.*, 72 F.3d 246, 254 (2d Cir. 1995); *S.E.C. v. Tome*, 833 F.2d 1086, 1093 (2d. Cir. 1987); *Cordius Trust*, 2000 WL 10268, at * 2 (service of subpoena by certified mail satisfies due process); *First Nationwide Bank*, 184 B.R. at 644 (after 6 failed attempts at personal service, mailing a subpoena to witness at his home address and then delivering it to his counsel in another case held to satisfy due process); *King*, 170 F.R.D. at 356 (delivery of subpoena by hand to someone at witness' residence and mailing copy to the same address satisfied due process); *Doe*, 155 F.R.D. at 630 (delivery by certified mail upheld, but leaving the document at the served individual's dwelling "would not assure delivery *to the person*").

As the foregoing cases indicate, due process does not require in-hand personal service. While it is beyond the scope of this Report to address which methods of service, other than personal service, would satisfy due process, it appears that any method authorized under Rule 4 would satisfy such requirements.

Conclusion

After considering the applicable authority and the reasons in favor and against construing Rule 45(b)(1) to require personal in-hand service of a subpoena, the Section has concluded that personal in-hand service of a subpoena is not required by the language of Rule 45(b)(1), that there is no policy reason why only personal in-hand service should be required, particularly since personal in-hand service of a summons and complaint is not required in many situations in federal court. The Section further believes that any method of service permitted under Rule 4 of the Federal Rules of Civil Procedure for the service of a summons and complaint should be permitted under Rule 45(b)(1) for the service of a subpoena and that Rule 45(b)(1) should be amended to explicitly provide for that.

November 16, 2005

New York State Bar Association
Commercial and Federal Litigation Section
Committee on Federal Procedure

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TAB 12

12. Rule 7.1 -- recusal disclosure requirement

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." According to current reports, this database is to become available on Nov. 9, 2022. As noted below, informal discussion suggests that this committee can take the lead.

Two submissions address 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. 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."

If the inquiry into nonparty interests is pursued, it might reach other interests than "grandparent" corporations and go beyond ownership of stock. For example, when the Rule 23 Subcommittee was considering the possibility of rulemaking regarding *cy pres* disposition of the residue from class-action settlements, one concern raised was that judges might be prone to favor awards to their favored charities (or the law schools they attended). The range of entities that might arguably be relevant is quite large, but there has not been any suggestion to date that Rule 7.1 disclosure extend so far.

The second problem identified by Judge Erickson does not seem to be a rules matter. As Judge Erickson notes, one solution for judges who hold Berkshire Hathaway or CitiGroup stock is to transfer those investments into ETFs or mutual funds. But if those holdings had substantial

capital gains, such a transfer might trigger substantial capital gains tax liability. It does not seem that any rule change could readily solve this problem. Additionally, there could be some concern about narrowing the investment options for judges (including investment decisions made before they became judges), and applying these strictures also to their spouses and some other family members. Of course, Rule 7.1 is only a disclosure rule, and does not itself define when recusal might be required under 28 U.S.C. § 455, but the two may be linked.

Magistrate Judge Barksdale (M.D. Fla.) proposes 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.

Both submissions are included in this agenda book. It may be that somewhat similar issues could be raised for the Appellate Rules Committee and the Bankruptcy Rules Committee, but this committee may be a suitable venue for initial consideration of these questions. As a contrast, the disclosure requirements of Rule 12.4 of the Criminal Rules likely do not come into play very often. At the same time, 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.

But the fact that disclosure cannot affect a judicial requirement to recuse does not mean that amending the rule is unwise. For example, the pending amendment to Rule 7.1 that is scheduled to go into effect on Dec. 1, 2022, is 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 will not begin to operate until November of this year 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 pending 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 2, 2022, New York Times story illustrates possible future developments. "Judges Recuse Themselves Over Vaccine-Maker Stock," 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.

This memo is intended only to introduce the issues possibly presented. Further work will be needed before any specific action is proposed.

From: Ralph Erickson <[redacted]>
Sent: Thursday, June 30, 2022 11:43 AM
To: Robert Dow <[redacted]>; Jennifer Elrod <[redacted]>
Cc: Roslynn R Mauskopf <[redacted]>
Subject: Problems Associated with Berkshire Hathaway holdings by judges

Good Morning,

I just wanted to pass on a couple of recurring issues that I'm being contacted about by judges around our circuit—and from a couple from outside the Eighth Circuit.

A number of judges have contacted me indicated that they have holdings in Berkshire Hathaway and that they have accumulated substantial capital gains that would be problematic if they moved the investment into ETFs or Mutual funds. Each of them called me because he or she had recently discovered that Berkshire Hathaway was either a parent or the parent of a parent company. The parent companies are usually disclosed on the Rule 7.1 disclosure and are caught before a judge acts or is even assigned. The problem arises when Berkshire Hathaway is the parent company of a parent company and the disclosure does not appear to be required under Rule 7.1 of the FRCivP. As an example, Orange Julius of America is wholly owned by International Dairy Queen. In compliance with Rule 7.1 Orange Julius would disclose that International Dairy Queen is its parent company—but it would not disclose that IDQ is wholly owned by Berkshire Hathaway. In some cases judges have presided only to find out later about the relationship. People who own CitiGroup have similar problems as CitiGroup has a controlling interest in some 300 companies. Given the breadth of Canon 3C(1) and the broad definition of "financial interest" in 3C(3)(C) of the Code of Conduct for United States Judges, as well as the guidance in Advisory Opinion 57 the conflict is a thorny one for judges to maneuver in the field.

This brings to mind a couple of issues, one for the Codes Committee and one for the Civil Rules Advisory Committee. First, should we amend the Certificate of Divestiture process so as to allow judges a window to preemptively divest themselves of these sorts of holdings and move into qualified investments and get a Certificate of Divestiture? As I said, the large capital gains tax is the main reason that judges still hold these investments even though they know they create a conflict nightmare.

Second, should we amend Rule 7.1 to require the disclosure of companies that hold the parent corporations of corporations in a parent relationship to a party to the action? It seems to me that more information rather than less is prudent in today's environment.

Thanks for your consideration. Have a great Independence Day holiday!

Ralph R. Erickson
U.S. Court of Appeals for the 8th Circuit
Fargo, ND
[redacted]

From: Patty Barksdale
To: RulesCommittee Secretary
Subject: Suggestion for Fed. R. Civ. P. 7.1 (Disclosure Statement)
Date: Wednesday, June 08, 2022 10:20:32 AM

22-CV-F

To address issues with financial conflicts of interest, please consider amending Rule 7.1 to require a nongovernmental corporate party, when filing a disclosure statement, to certify the party has checked the assigned 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 of interest.

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS. A nongovernmental corporate party must file ~~2 copies of~~ a disclosure statement that:

(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock~~;~~ or states that there is no such corporation;

~~(2) states that there is no such corporation~~and

(3) 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.~~.~~

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement with a supplemental certificate, ~~if~~ any required information changes.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202
(904) 549-1950

TAB 13

13. Rule 55(a) and (b) -- clerk "must" enter default or 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 his 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 the 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 Frow 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 interpretation of Rule 55. It may be that an amendment to the rule would serve to 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.

TAB 14

14. Rules 38, 39, and 81(c) -- jury trial demand

At the 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 style 2007 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 is included in this agenda book. This report does 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, as Table 5 shows, more than 90% of product liability cases show a jury demand, while only about 1% of prisoner cases show such a demand. The study does not show whether settlement occurs more frequently in cases in which a timely jury trial demand was not made, but a review of dockets would not show that. And the effect of facing a prospect of jury trial might be ambiguous in terms of affecting willingness to settle.

The FJC report in this agenda book 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 contribute to that decline.

Jury-Trial Demands in Terminated Civil Cases, Fiscal Years 2010–2019

Prepared for the Judicial Conference Advisory Committee on Civil Rules

Kristin A. Garri
Emery G. Lee III

June 2022

Executive Summary

The Judicial Conference Advisory Committee on Civil Rules is currently considering amending Federal Rules of Civil Procedure 38 and 39 related to the Seventh Amendment right to jury trial. To inform the advisory committee's discussions, this report summarizes findings on jury-trial demands from court electronic records for civil cases terminated in fiscal years 2010–2019 (inclusive). Findings include:

- 0.7% of civil cases terminated during or after a jury trial during the study period.
- Jury-trial demands were recorded in half of civil cases (50%).
- Jury trials occur in 1.3% of cases in which a jury-trial demand is recorded.
- Jury trials occur rarely in cases in which no jury-trial demand is recorded (0.1%).
- The jury-trial demand rate varies by jurisdictional basis of a case, origin of a case, type of case, and the representation status of the parties.

Background

The Seventh Amendment preserves the right to trial by jury in civil cases in federal court. But a jury trial is not the default setting in the Federal Rules of Civil Procedure. Rule 38 requires the parties to affirmatively demand a jury trial in order to preserve their Seventh Amendment right of trial by jury in civil cases. Failure to properly serve and file a jury-trial demand results in a waiver of the constitutional right. The Advisory Committee on Civil Rules is currently reviewing whether this default setting should be reversed and has requested information related to jury-trial demands drawn from court electronic records. This report is limited to precoronavirus pandemic data, analyzing civil cases terminated in fiscal years 2010–2019 (inclusive), as it is outside the scope of this report to determine the pandemic's impact, if any, on jury-trial demands.

Jury-Trial Demands in Court Electronic Records

Rule 39(a) requires that, when a jury-trial demand has been made pursuant to Rule 38, "the action must be designated on the docket as a jury action." In practical terms, this means that jury-trial demand information is available in court electronic records. For all civil cases terminated in the district courts in fiscal years 2010–2019 inclusive (N = 2,819,570), for example, court records indicate that a jury trial was demanded by at least one party in 50% of closed cases and not demanded in 49%, with 1% missing. The category of "all civil cases," of course, includes cases that would not normally be tried to a jury, including cases against the United States[1] and habeas corpus cases. More information on case characteristics associated with jury-trial demands is presented in the next section.

1. "The Seventh Amendment right to a jury trial does not apply in actions against the Federal Government," Lehman v. Nakshian, 453 U.S. 156, 160 (1981), although Congress can authorize jury trials by statute, *id.* at 160–61.

One concern with the civil rules' default setting is that it insufficiently protects the constitutional guarantee, creating situations in which parties inadvertently waive their Seventh Amendment right to trial by jury. Rule 39(b) provides discretion for the court on motion to "order a jury trial on any issue for which a jury might have been demanded," but many courts require "some cause beyond mere inadvertence . . . to permit an untimely demand."[2] Court records were examined to determine how often jury trials occur in civil cases when a jury-trial demand is not recorded. Regardless of whether a jury trial is demanded, of course, very few civil cases terminate after the start of a jury trial. For fiscal years 2010–2019, only 0.7% of closed civil cases terminated during or after[3] a jury trial (a total of 20,047 civil cases over the ten-year period). As can be seen in Table 1, terminated civil cases in which a jury-trial demand was recorded were much more likely to terminate during or after a jury trial (1.3%) than cases in which a jury-trial demand was not recorded (0.1%), but jury trials did occur in the latter category of cases. It is likely that the court ordered a jury trial despite waiver, pursuant to Rule 39(b), in many of these cases.[4]

Table 1: Civil Cases Terminating During or After Jury Trial by Jury-Trial Demand, FYs 2010–2019 (N = 2,819,570)

Jury-Trial Demand Recorded	Percentage of All Civil Terminations	N	Percentage Terminating During or After Jury Trial	N
Yes	50%	1,420,881	1.3%	18,178
No	49%	1,374,134	0.1%	1,205
Missing	1%	24,555	2.7%	664
All	100%	2,819,570	0.7%	20,047

For the 1% of cases in which the jury-trial demand information was missing from court records for fiscal years 2010–2019, fully 2.7% terminated after the start of a jury trial—which translates to 664 jury trials in cases in which no jury-trial demand information was recorded. Without more research, it is impossible to know in how many of these cases the court ordered a jury trial despite waiver and in how many the court records should have reflected a properly made jury-trial demand. But at minimum, the absence of a jury-trial demand in the court records is not determinative of whether a jury trial occurs.

Table 2 includes civil cases that terminated after the start of any trial (including bench trials). Fully 85% of cases that terminated by trial and in which a jury-trial demand was recorded

2. Chen v. Hunan Manor Enter., Inc., 340 F.R.D. 85, 88 (S.D.N.Y. 2022) (quotation omitted).

3. This includes incomplete jury trials (e.g., the case settled before the jury verdict). Note, however, that incomplete jury trials represent only about one in ten cases in which a jury trial starts.

4. In other words, a civil case in which a jury-trial demand was recorded was "only" thirteen times more likely to reach a jury trial and not infinitely more likely, as would be the case if no jury trials were ever conducted in cases in which a demand was not recorded.

terminated during or after a jury trial, as opposed to during or after a bench trial (15%). But note that 18% of cases in which a jury-trial demand was not recorded terminated during or after a jury trial. In other words, almost one in five trials that started in cases in which a jury-trial demand was not recorded was before a jury. Moreover, one-third of cases (33%) terminating during or after a trial in which the jury-trial demand was missing terminated during or after a jury trial. These findings are difficult to square with the view that courts are not ordering jury trials despite waivers, at least in some subset of cases.

Table 2: Civil Cases Terminating During or After Jury or Bench Trial, by Jury-Trial Demand, FYs 2010–2019 (N = 28,890)

Jury-Trial Demand Recorded	During or After Jury Trial	During or After Bench Trial	N
Yes	85%	15%	21,321
No	18%	82%	6,578
Missing	33%	67%	991
All	69%	31%	28,890

Case Characteristics Associated with Jury-Trial Demands

As mentioned in the previous section, the Seventh Amendment right to a jury trial in civil cases does not extend to all cases in federal court, including cases against the United States. As can be seen in Table 3, which is broken out by the basis of jurisdiction, United States defendant cases have the lowest rate of jury-trial demands (7%), and diversity-of-citizenship cases, based on state law, have the highest rate (67%). It is clear from Table 3 that the largest category, cases based on federal-question jurisdiction, includes large swaths of cases in which jury trials do not occur—for example, habeas corpus proceedings brought by state prisoners.

Table 3: Jury-Trial Demands by Basis of Jurisdiction, Terminated Civil Cases, FYs 2010–2019

Basis of Jurisdiction	Demand	No Demand	Missing	N
Federal Question	53%	46%	1%	1,472,058
Diversity of Citizenship	67%	32%	1%	896,584
United States Defendant	7%	92%	< 1%	384,053
United States Plaintiff	17%	82%	1%	68,622
All	50%	49%	1%	2,819,570

Given that the highest jury-trial demand rate observed in Table 3 was among diversity-of-citizenship jurisdiction cases, there should also be a high jury-trial demand rate among cases removed from the state courts.[5] Table 4 shows the jury-trial demand rate by origin of the case (excluding reopened cases and appellate remands). The jury-trial demand rate is, indeed, relatively high for removals to federal court (70%), but the highest jury-trial demand rate is among multi-district litigation (MDL) cases directly filed in the transferee district (94%). MDL cases are often filed in the transferee district for the purpose of providing the transferee court with the authority to try the case. In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* (1998),[6] the Supreme Court held that 28 U.S.C. § 1407 transfer is limited to pretrial proceedings, but nothing prevents an MDL court from trying cases filed directly in the district after centralization.[7] In contrast, MDL cases transferred pursuant to § 1407 have a relatively low jury-trial demand rate (30%). Original proceedings and interdistrict (non-MDL) transfer cases have jury-trial demand rates comparable to federal-question cases in general (both at 49%).

Table 4: Jury-Trial Demand Rate by Origin, Terminated Civil Cases, FYs 2010–2019

Case Origin	Percentage in Which Demand is Recorded	N
Original Proceeding	49%	2,085,418
Removal from State Court	70%	329,921
Interdistrict Transfer	49%	51,234
MDL Transferred to Transferee District	30%	211,860
MDL Directly Filed in Transferee District	94%	30,710

To shed more light on the jury-trial rate by case type, Table 5 shows the jury-trial demand rate for the eighteen largest nature-of-suit codes; each of these nature-of-suit codes accounted for at least 2% of terminated cases during fiscal years 2010–2019.

5. Jury-trial demands in removals from state court are governed by Fed. R. Civ. P. 81(c)(3).

6. 523 U.S. 26. *See also* Melissa J. Whitney, Bellwether Trials in MDL Proceedings 11–13 (Fed. Jud. Ctr. 2019).

7. The data on direct-filed MDL cases is somewhat limited because this origin code did not exist prior to July 1, 2016. It should also be noted for the 30,710 cases in this category of cases, *only five* are recorded in court electronic records as having terminated after a jury trial (0.0002%). It appears that bellwether trials do not appear in the court data as jury-trial terminations. It seems likely that there would have been more than five bellwether trials among the MDL direct-file cases terminated 2016–2019.

Table 5: Jury-Trial Demand Rate for 18 Largest Nature-of-Suit Codes, Terminated Civil Cases, FYs 2010–2019

Nature-of-Suit Code	Percentage in Which Demand is Recorded	N
Insurance (110)	63%	97,473
Other Contract Actions (190)	55%	125,951
Other Personal Injury (360)	84%	93,383
Product Liability-Personal Injury (365)	94%	262,946
Product Liability-Pharm./Med. Device (367)	98%	67,358
Asbestos Product Liability (368)	9%	155,882
Other Civil Rights (440)	69%	156,134
Civil Rights (Jobs) (442)	85%	132,933
Consumer Credit (480)	85%	94,230
Prisoner Petition-Vacate Sentence (510)	< 1%	80,975
Prisoner Petition-Habeas Corpus (530)	1%	187,547
Prisoner-Civil Rights (550)	38%	179,912
Prisoner-Prison Conditions (555)	45%	92,727
Fair Labor Standards Act (710)	80%	75,601
Employee Retirement Income Security Act (791)	12%	76,819
D.I.C.W./D.I.W.W. (863)	1%	79,160
S.S.I.D. (864)	1%	86,626
Other Statutory Actions (890)	60%	93,481

The lowest jury-trial demand rates are observed for prisoner petitions brought under 28 U.S.C. §2254 (state-prisoner, non-capital habeas) and §2255 (vacate federal sentence), nature-of-suit codes 510 and 530; Social Security disability appeals, 863 and 864; asbestos cases, 368; and ERISA cases, 791. The highest jury-trial demand rates are observed in the product liability nature-of-suit codes.

The jury-trial demand rate also varies by the representation status of the parties (see Table 6); cases in which all parties are represented by counsel have much higher rates of jury-trial demands than cases in which there is at least one self-represented party. There is obviously overlap between case types with low jury-trial demand rates—e.g., noncapital habeas petitions (in Table 5)—and the incidence of self-represented parties.

Table 6: Jury-Trial Demand by Representation Status, Terminated Civil Cases, FYs 2010–2019

Representation Status	Percentage in Which Demand is Recorded	N
No Self-Represented Parties	59%	2,040,110
Self-Represented Plaintiffs	27%	708,472
Self-Represented Defendants	36%	59,257
Self-Represented Plaintiffs and Defendants	36%	11,731

Conclusion

Jury-trial demands were recorded in half of civil cases terminated in fiscal years 2010–2019 (inclusive), though only 0.7% of civil cases were terminated during or after a jury trial. Jury trials occur at a higher rate for cases in which a jury-trial demand is recorded (1.3%). However, jury trials also occur in cases in which no jury-trial demand appears in court electronic records (0.1%). The absence of a jury-trial demand in court records may not necessarily be indicative of no demand, however, making it difficult to know the true jury-trial demand rate.

TAB 15

15. End of E-filing Day -- Intercommittee project

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 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. That 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 nonelectronic means can vary, as are the hours during which the clerk's office is open in various localities.

The Federal Judicial Center has completed an extensive study of filing practices of lawyers and of various courts which is included in this agenda book. That study has some 2,000 pages of appendices, which are not included in this agenda book but can be accessed via the FJC website:

https://www.fjc.gov/content/365889/electronic-filing-times-federal-courts

The FJC study does not take account of the impact of the COVID pandemic on the operations described in the study.

The Civil Rules Committee has not actively considered any rule amendment to address the time for electronic filing. For present purposes, it may be helpful to relay to the Standing Committee the Advisory Committee's view on whether it considers further work on this project would be worthwhile, at least in terms of considering an amendment to the Civil Rules.

Electronic Filing Times

in Federal Courts

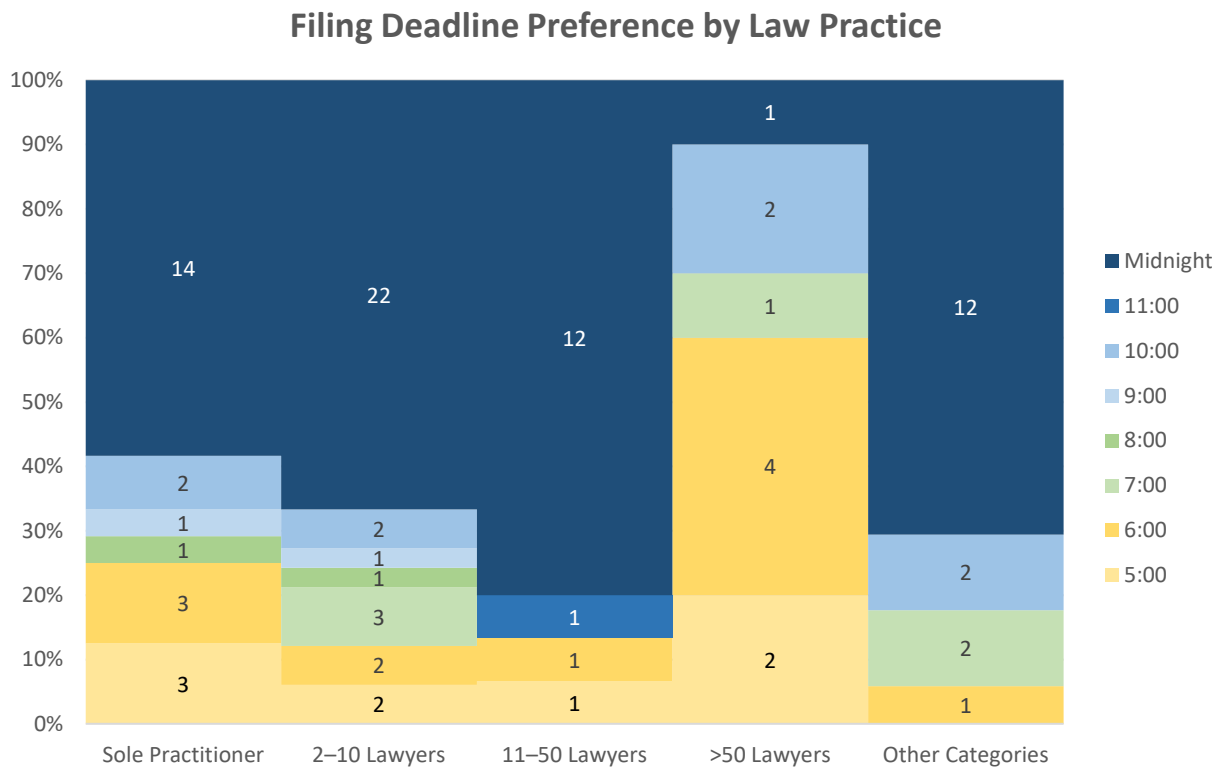
Federal Judicial Center
2022

ELECTRONIC FILING TIMES IN FEDERAL COURTS

Tim Reagan, Carly Giffin, Jessica Snowden,
George Cort, Jana Laks, Roy Germano, Marie Leary,
Saroja Koneru, Jasmine Elmasry, Nafeesah Attah,
Rachel Palmer, Annmarie Khairalla, and Danielle Rich

Federal Judicial Center 2022

This empirical research was completed to inform the Judicial Conference's standing Committee on Rules of Practice and Procedure as the committee considers whether the due time for a filing in a federal court should be some time before midnight on the due date. We have charted the time of day for all docket entries[1] made in 2018 in all federal courts of appeals, district courts, and bankruptcy courts. We have charted separately and together various types of filer for each court, and we have additionally charted motions and responses for courts both together and separately.



We planned to ask a random sample of judges and attorneys about their practices and preferences, but we brought the survey to a close during its pilot phase because of the still-present COVID-19 pandemic. Our pilot data were

1. The expressions "docket entries" and "filings" are used in this report substantially interchangeably.

too limited for nuanced analyses, but as the preceding chart shows, attorneys working for large firms were most likely to have a preference for a filing deadline earlier than midnight.[2]

Attorneys participating in the pilot survey were identified from a random selection of filings in one court of appeals, three district courts, and three bankruptcy courts, excluding assistant U.S. attorneys, whom we would have needed additional permission to include in the final survey. The response rate was 54%.

Courts

There are thirteen federal courts of appeals and ninety-four district courts. The three territorial districts—Guam, Northern Mariana Islands, and Virgin Islands—have bankruptcy divisions rather than separate bankruptcy courts. A single bankruptcy court serves both districts in Arkansas, but there are separate filing data for the two districts in that bankruptcy court. There is a separate bankruptcy court for each of the other districts, ninety in all.

We examined the local rules and electronic filing administrative procedures for each court, and we summarize the relevant provisions in Appendix I for the courts of appeals,[3] Appendix II for the district courts,[4] and Appendix III for the bankruptcy courts.[5]

Because the COVID-19 pandemic disrupted filing practices, we did not do the comprehensive survey of clerks of court that we had planned.

Office Hours

Our research on the courts' office hours was conducted before the COVID-19 pandemic. Many courts made temporary adjustments to their counter hours because of the pandemic. We did not look for permanent changes, which we think have been modest in scope and uncertain in longevity.

Clerks' offices open as early as 8:00 for paper filing, and they stay open as late as 5:00. All clerks' offices are open during the hours from 9:00 to noon in the morning and from 1:30 to 3:00 in the afternoon.

Two courts of appeals, eighteen district courts, and eleven bankruptcy courts are open as many as nine hours. Nineteen district courts and twenty-two bankruptcy courts are open for as few as six to seven hours. The rest are open for about eight hours.

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2. Numbers in the chart refer to how many attorneys of each practice organization type preferred each filing deadline. For example, fourteen sole practitioners, twenty-two attorneys working in firms with two to ten lawyers, twelve attorneys working in firms with eleven to fifty lawyers, one attorney working in a firm with more than fifty lawyers, and twelve attorneys working in other organizations preferred a midnight deadline.

Other organizations included federal, state, and local governments; corporations; and nonprofit organizations.

3. www.fjc.gov/sites/default/files/materials/39/FilingTimesCourtsOfAppeals.pdf.

4. www.fjc.gov/sites/default/files/materials/39/FilingTimesDistrictCourts.pdf.

5. www.fjc.gov/sites/default/files/materials/27/FilingTimesBankruptcyCourts.pdf.

For the following summaries of filing hours, if a court has different hours in different offices, the summaries are based on prevailing hours in main offices.

Morning Opening

Ten courts of appeals, seventy-two district courts, and sixty-nine bankruptcy courts are open at 8:30. Two courts of appeals, thirty-one district courts, and thirty-three bankruptcy courts open at 8:00.

Lunch Closing

Clerks' offices in six district courts and one bankruptcy court are closed from noon to 1:00, clerks' offices in two district courts are closed from 12:30 to 1:30, and the clerk's office in one bankruptcy court is closed from 1:00 to 1:30.

Afternoon Closing

Clerks' offices for the district courts and the bankruptcy courts in the District of Guam and the Eastern District of Kentucky and for the bankruptcy court in the Northern District of Oklahoma close at 3:00. Eighteen other district courts and thirty-five other bankruptcy courts close at 4:00. Three courts of appeals, thirty-five district courts, and thirty-three bankruptcy courts close at 4:30. Ten courts of appeals, thirty-eight district courts, and twenty-two bankruptcy courts remain open until 5:00.

Websites

Many courts clearly post their operating hours on their public websites. However, for four courts of appeals, fifteen district courts, and two bankruptcy courts, it took two researchers to find counter hours online. For an additional three district courts and three bankruptcy courts, we had to call to learn the hours.

Drop Boxes

Our research on physical drop boxes was not comprehensive, but we feel confident of summary findings derived from several dozen conversations with clerks of court and members of their staffs for another project.

Many courts stopped using drop boxes with the advent of electronic twenty-four-hour filing. Some courts began to use them again because of COVID-19 pandemic counter closures. Some of these courts stopped using them when counter availability resumed normal hours.

A few courts have drop boxes available at all hours and from outside the court's building. More typically, the drop box is within the federal building where the court sits, and it is available during building hours: from some time before the clerk's counter opens until some time after the clerk's counter closes, not at all times.

Drop boxes often have time stamps attached. They are checked by court staff regularly.

Deadlines Before Midnight

Three district courts have afternoon filing deadlines on the days that filings are due: 5:00 in the Eastern District of Arkansas and 6:00 in the Districts of Delaware and Massachusetts. The District of Massachusetts's bankruptcy court has a 4:30 deadline. Replies in the Southern District of New York's bankruptcy court generally are due at 4:00 p.m. three days before the hearing. The District of Delaware's bankruptcy court explicitly declines to follow the district court's afternoon deadline.

The reason for the afternoon deadline in Delaware is unusual. The federal courts there extend filing privileges only to local attorneys, who frequently work with out-of-state attorneys—many in western time zones—because of the nature of federal litigation in Delaware. The afternoon filing deadline protects local attorneys from evening waits for documents submitted by other attorneys for the local attorneys to file in the district court. Because bankruptcy practice is different, bankruptcy attorneys did not request a due time earlier than midnight.

Docket Entries

We examined 47,420,684 docket entries made in 2018, the calendar year preceding our beginning the research. Most docket entries were made between 8:00 a.m. and 5:00 p.m. About one in fifty was made before that in the courts of appeals and the district courts, but 17% were made before 8:00 in the bankruptcy courts. There was a lot of nighttime robotic filing of notices in the bankruptcy courts.

About one in ten of the docket entries in the courts of appeals and the district courts was made after 5:00 p.m., about one in twenty after 6:00 p.m. In the bankruptcy courts, 16% of the docket entries were made after 5:00 p.m., and 12% were made after 6:00 p.m.

The data for the district courts and the bankruptcy courts distinguished filings by attorneys and filings by others, such as the court. The data for the courts of appeals do not reliably identify filer type, but they do identify which filings are briefs, and those are predominantly what attorneys file in the courts of appeals. About four out of five attorney filings in all three types of courts were made between 8:00 a.m. and 5:00 p.m. About one in fifty was made before 8:00, about one in six was made after 5:00, and about one in ten was made after 6:00.

In the district courts and the bankruptcy courts, filings are classified by type and subtype. Looking at the type and subtype data for each court, we identified combinations for each court that identified motions and responses approximately as well as we would have had we examined each of the several million docket entries individually.

Most motions and responses were filed between 8:00 a.m. and 5:00 p.m., but nearly a third of the responses filed in district courts were filed after 5:00 p.m. (31%). Somewhat more than one in five was filed after 6:00 p.m. (21%).

We examined random samples of individual motions and responses filed in a random sample of district courts.[6] A document is usually filed on the day that it is due. A document filed at night is typically due on that day, but sometimes it is due on the following day.

Docket Entries in All Courts[7]

Court Type	*Docket Entries*	*Before 8:00*	*Between 8:00 and 5:00*	*After 5:00*	*After 6:00*
Appeals	1,321,506	2.5%	89%	8.9%	4.9%
District	15,267,093	2.0%	87%	11%	5.4%
Bankruptcy	30,832,085	17%	67%	16%	12%
ALL COURTS	47,420,684	12%	74%	14%	9.8%

Attorney Filings in All Courts

Court Type	*Filings*	*Before 8:00*	*Between 8:00 and 5:00*	*After 5:00*	*After 6:00*
Appeals (Briefs)	135,561	1.7%	83%	15%	10%
District	5,106,353	1.6%	79%	19%	11%
Bankruptcy	10,853,500	2.4%	82%	15%	8.3%
ALL COURTS	16,095,414	2.2%	81%	16%	9.3%

Motions Filed in District and Bankruptcy Courts

Court Type	*Motions*	*Before 8:00*	*Between 8:00 and 5:00*	*After 5:00*	*After 6:00*
District	1,350,949	1.4%	78%	20%	12%
Bankruptcy	1,444,190	2.3%	83%	14%	7.6%
ALL	2,795,139	1.9%	81%	17%	9.7%

Responses Filed in District and Bankruptcy Courts

Court Type	*Responses*	*Before 8:00*	*Between 8:00 and 5:00*	*After 5:00*	*After 6:00*
District	553,285	1.9%	67%	31%	21%
Bankruptcy	285,539	2.3%	81%	17%	9.8%
ALL	838,824	2.0%	71%	26%	17%

6. *See* Appendix IV. An Analysis of When Responses Were Filed in a Sample of Cases in a Sample of Courts:
www.fjc.gov/sites/default/files/materials/22/SpecificCasesMotionsAndResponses.pdf.

7. Note that in tables of this sort, the data in the "After 6:00" column are a subset of the data in the "After 5:00" column.

Appendices

This report has four appendices. The first three chart times for docket entries in each court. The fourth appendix examines filing times for random samples of motions and responses in thirteen district courts.

I. The Courts of Appeals (44 pages)
www.fjc.gov/sites/default/files/materials/39/FilingTimesCourtsOfAppeals.pdf
II. The District Courts (1,032 pages)
www.fjc.gov/sites/default/files/materials/39/FilingTimesDistrictCourts.pdf
III. The Bankruptcy Courts (1,435 pages)
www.fjc.gov/sites/default/files/materials/27/FilingTimesBankruptcyCourts.pdf
IV. An Analysis of When Responses Were Filed in a Sample of Cases in a Sample of Courts (54 pages)
www.fjc.gov/sites/default/files/materials/22/SpecificCasesMotionsAndResponses.pdf

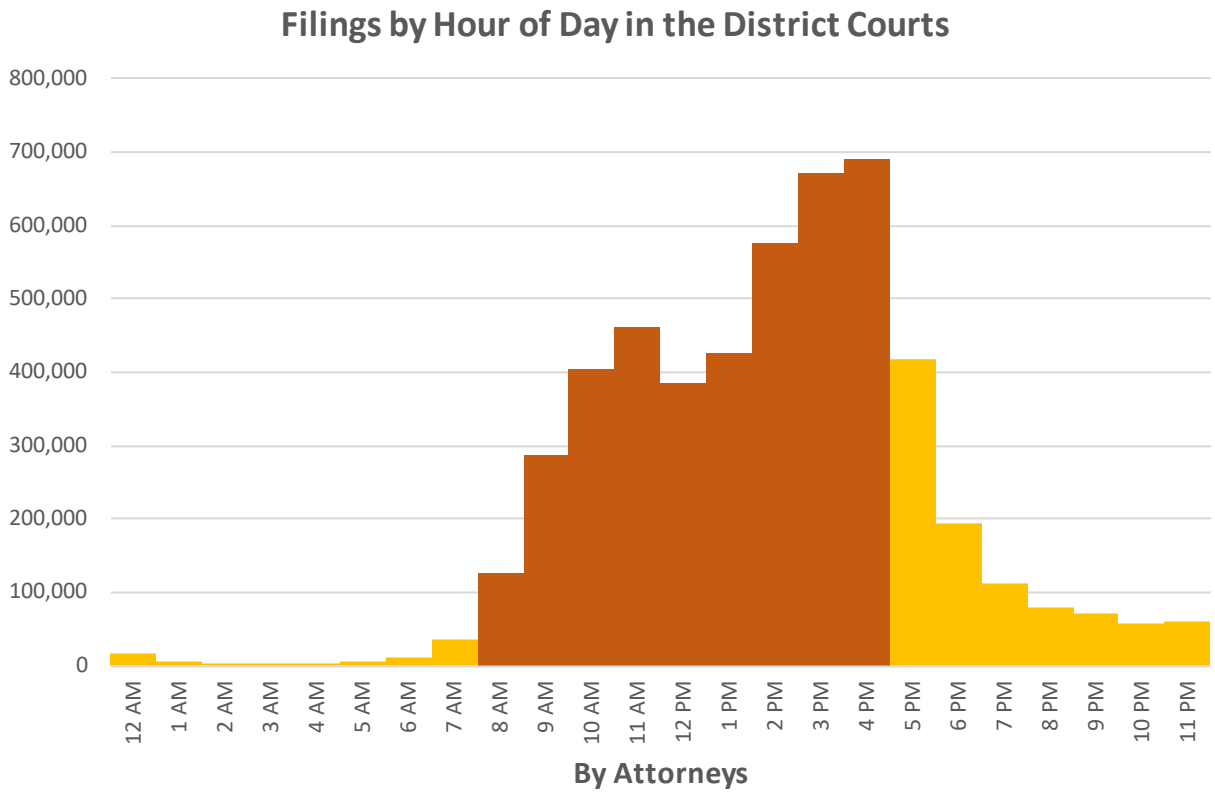
Reading Charts

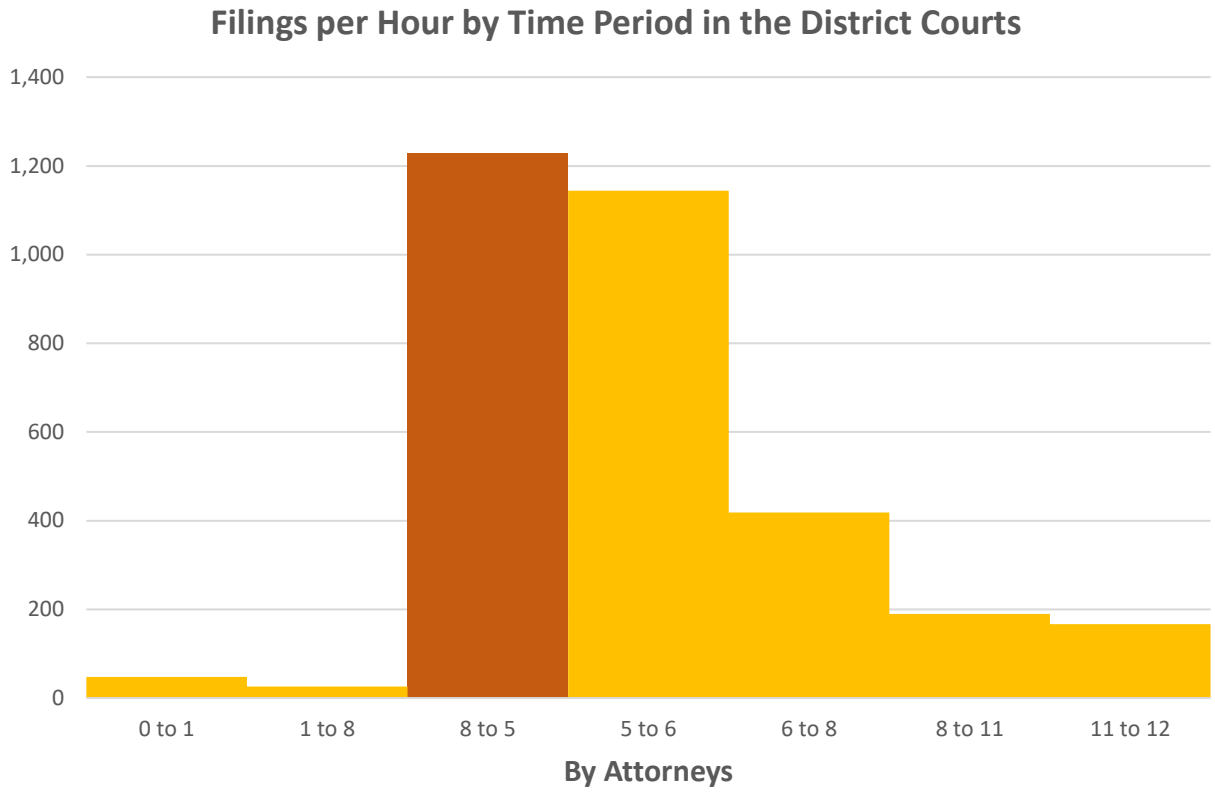
Many appendix charts show number of docket entries by hour time block for all filers or for a specific group of filers, such as the first chart on the next page. Color shading identifies the customary office hours of 8:00 a.m. to 5:00 p.m. Paired with these charts are charts showing the data in seven time blocks expressed as average docket entries made per hour over the course of the year, holidays and weekends included. The time blocks include customary office hours, the hour before midnight, the hour after midnight, the time block between the hour after midnight and the beginning of customary office hours, the hour immediately after customary office hours (5:00 to 6:00 p.m.), the evening hours (6:00 to 8:00 p.m.), and the nighttime hours between evening and the hour before midnight (8:00 to 11:00 p.m.).

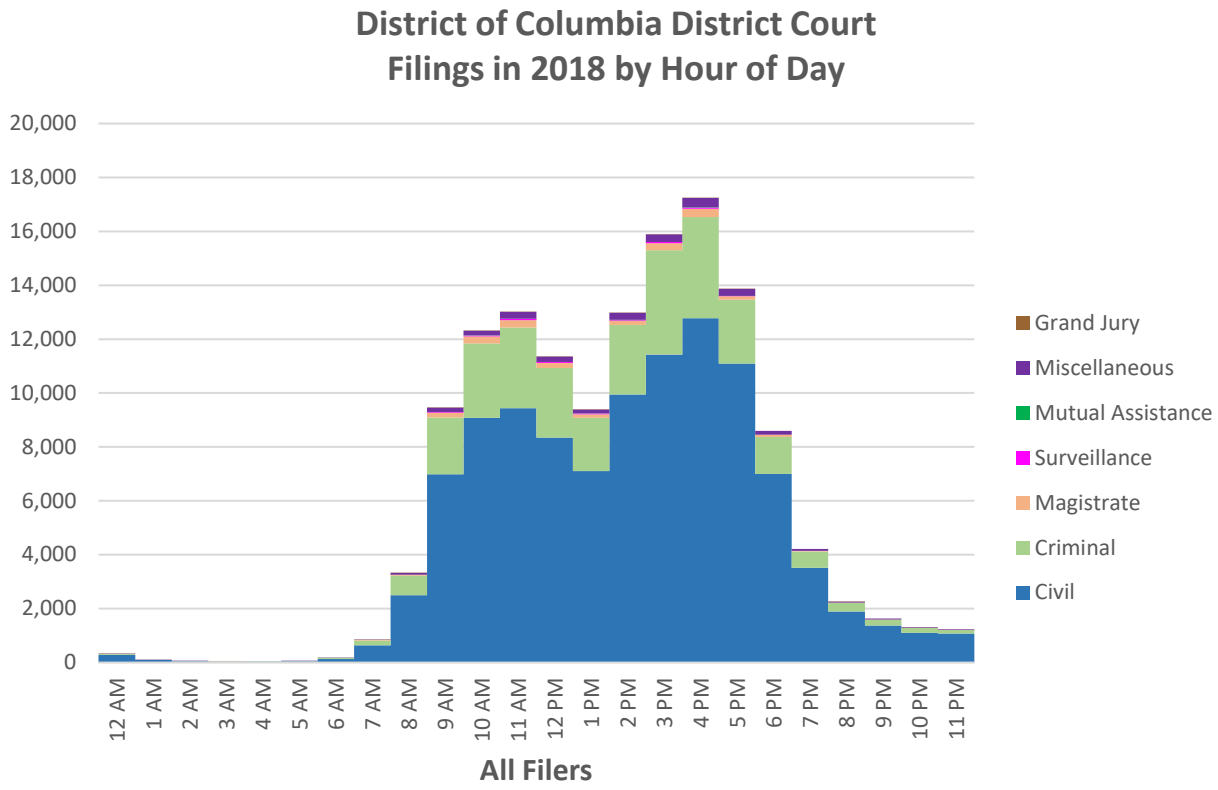
We prepared charts similar to the first chart on the next page for briefs in the courts of appeals and motions and responses in the district and bankruptcy courts.

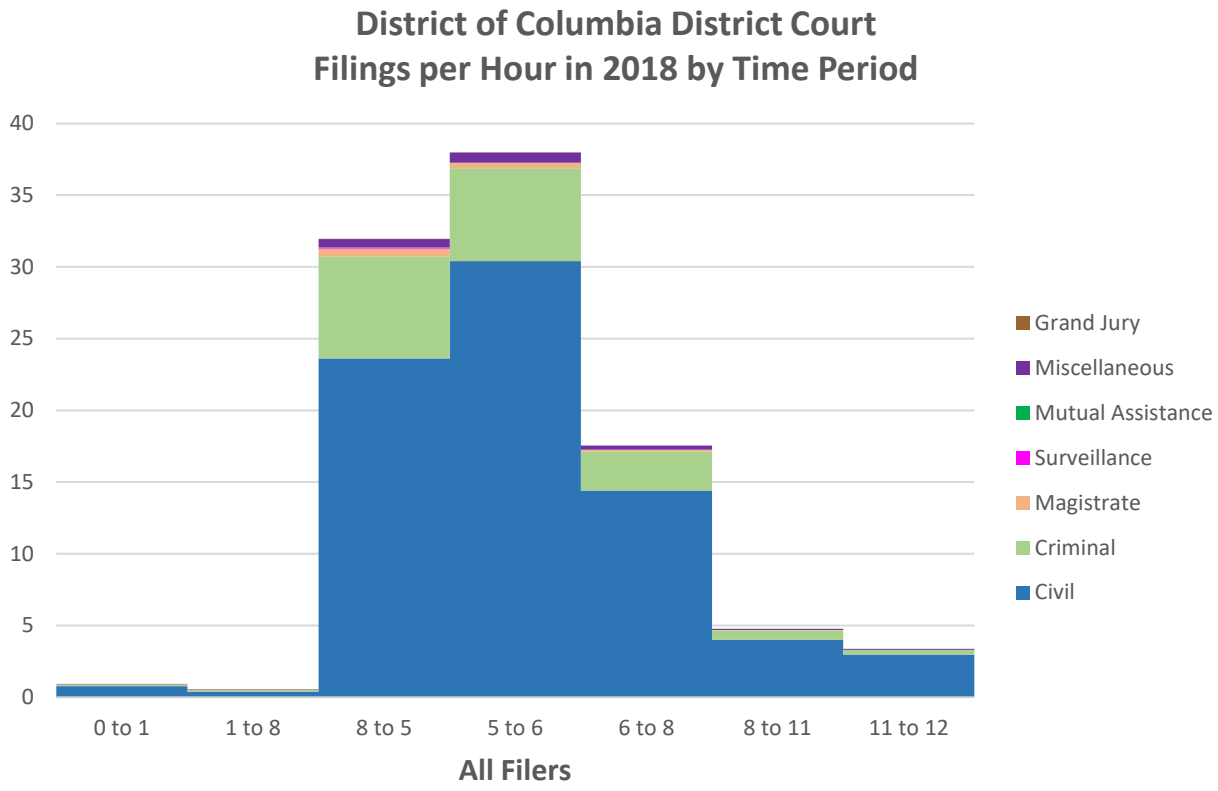
For some charts, we used color to show case type, and in those charts we did not use color to highlight customary office hours. Representative examples follow the charts on the next page. Note that for these statistical purposes, prosecutions against each defendant in a multidefendant case are regarded as separate cases.

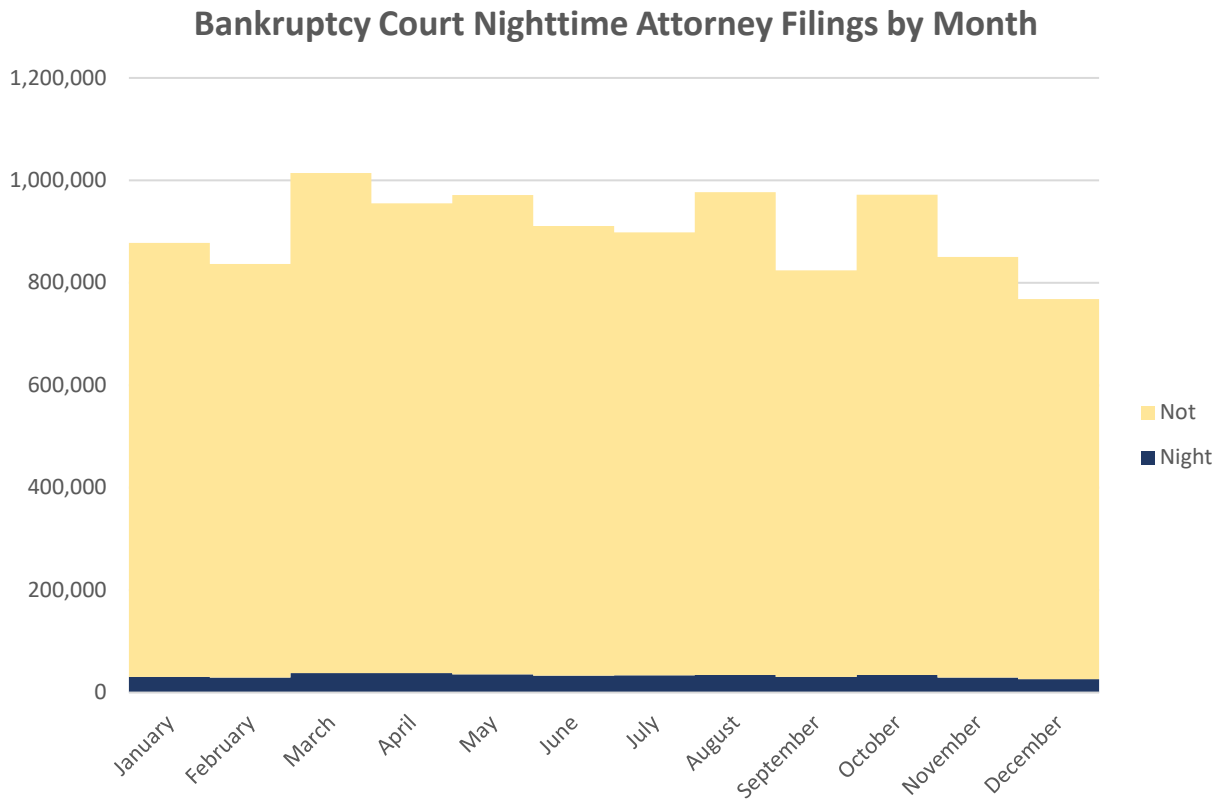
Following those examples are four example charts showing how we illustrated nighttime filings by attorneys. We charted the number of docket entries made by attorneys each month, using color to show the docket entries made after 8:00 p.m. Following each chart showing number of filings is a chart showing percentage of filings that were made after 8:00 p.m. Usually the chart range is from 0% to 16%, but for some courts we expanded the range to 40% and used red value labels as a signal that the chart range was atypical. We made similar charts for days of the week, usually using 40% as the top of the range for percentage of fillings made on a day of the week, but sometimes using 50% as the top of the range.

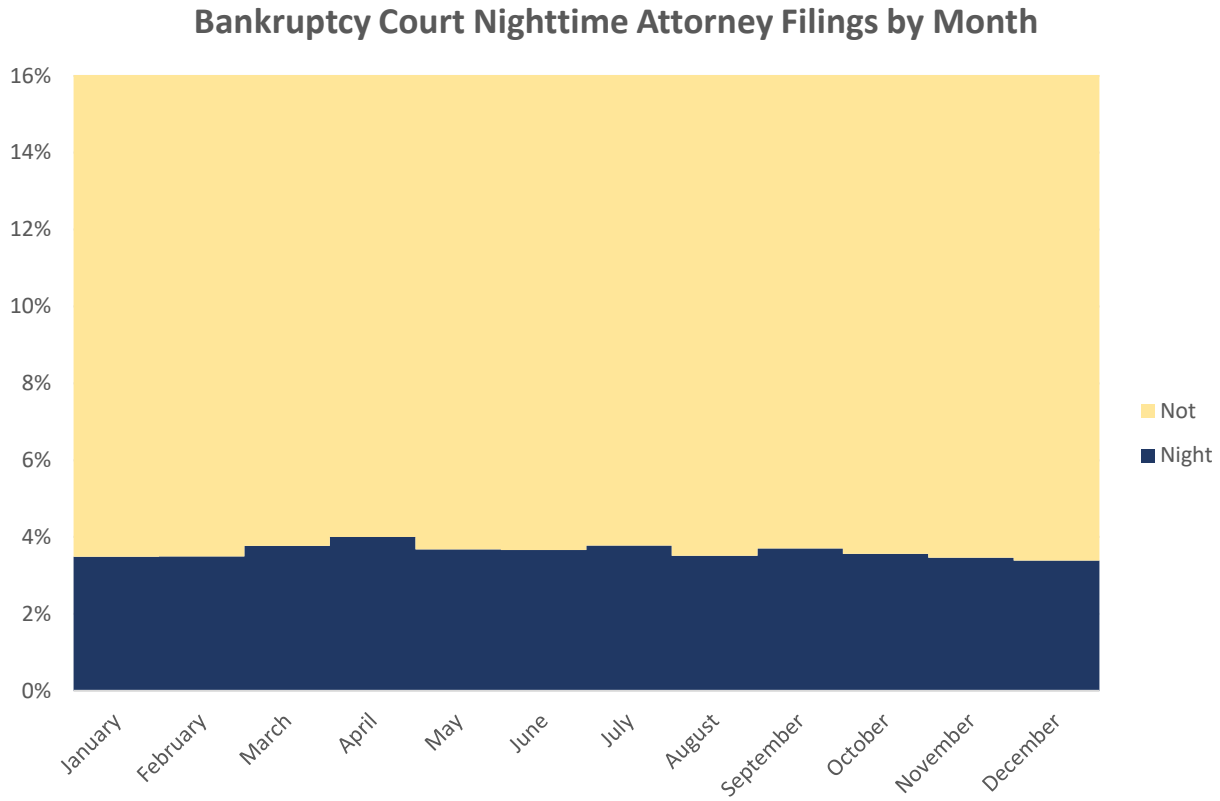

Filings by Hour of Day in the District Courts
800,000
700,000
600,000
500,000
400,000
300,000
200,000
100,000
0
12 AM
1 AM
2 AM
3 AM
4 AM
5 AM
6 AM
7 AM
8 AM
9 AM
10 AM
11 AM
12 PM
1 PM
2 PM
3 PM
4 PM
5 PM
6 PM
7 PM
8 PM
9 PM
10 PM
11 PM
By Attorneys

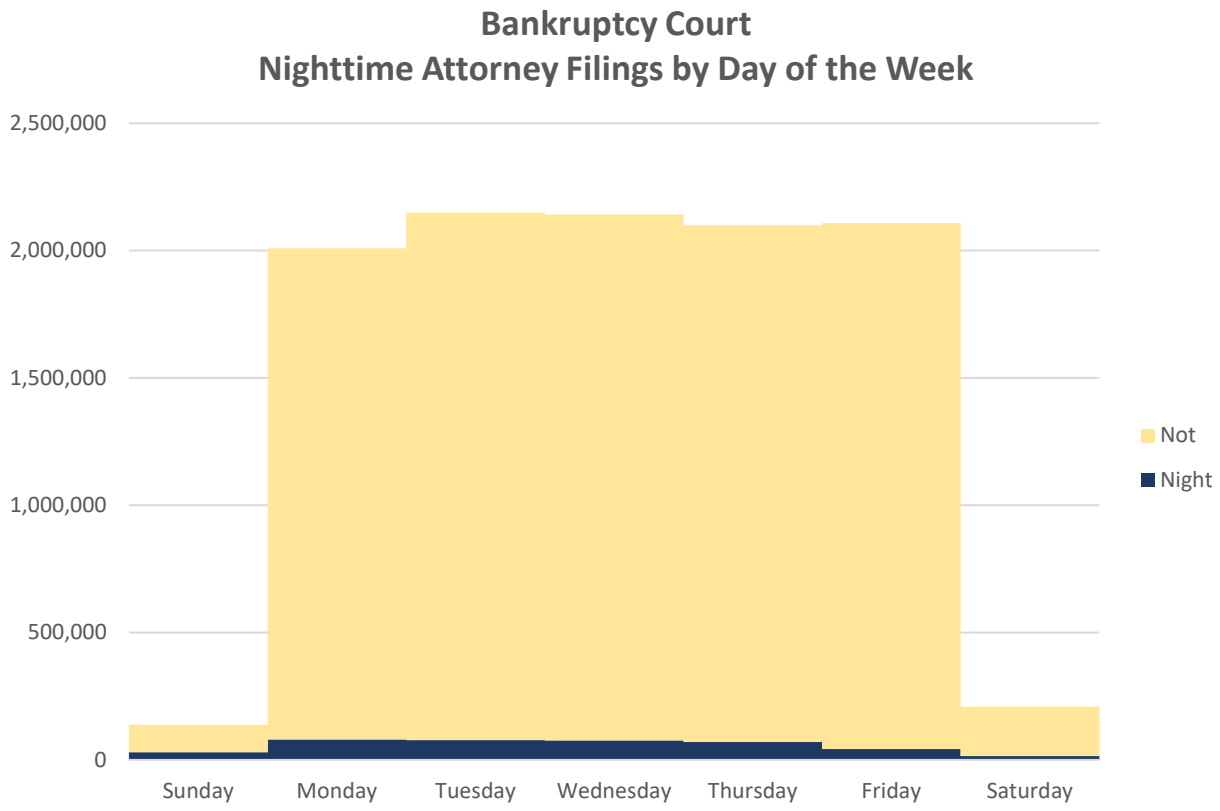

Filings per Hour by Time Period in the District Courts
1,400
1,200
1,000
800
600
400
200
0
0 to 1
1 to 8
8 to 5
5 to 6
6 to 8
8 to 11
11 to 12
By Attorneys

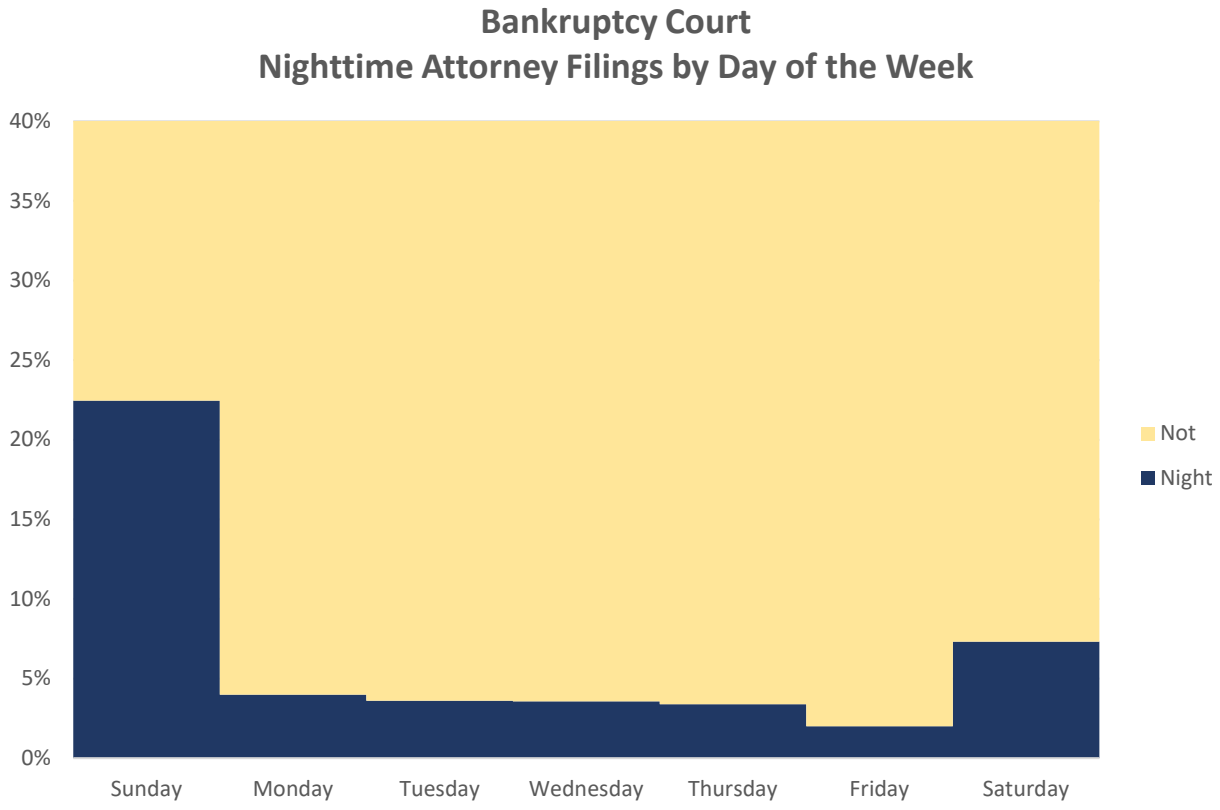

District of Columbia District Court
Filings in 2018 by Hour of Day
20,000
18,000
16,000
14,000
12,000
10,000
8,000
6,000
4,000
2,000
0
12 AM
1 AM
2 AM
3 AM
4 AM
5 AM
6 AM
7 AM
8 AM
9 AM
10 AM
11 AM
12 PM
1 PM
2 PM
3 PM
4 PM
5 PM
6 PM
7 PM
8 PM
9 PM
10 PM
11 PM
All Filers
Grand Jury
Miscellaneous
Mutual Assistance
Surveillance
Magistrate
Criminal
Civil


District of Columbia District Court
Filings per Hour in 2018 by Time Period
40
35
30
25
20
15
10
5
0
0 to 1
1 to 8
8 to 5
5 to 6
6 to 8
8 to 11
11 to 12
All Filers
Grand Jury
Miscellaneous
Mutual Assistance
Surveillance
Magistrate
Criminal
Civil


Bankruptcy Court Nighttime Attorney Filings by Month
1,200,000
1,000,000
800,000
600,000
400,000
200,000
0
January
February
March
April
May
June
July
August
September
October
November
December
Not
Night


Bankruptcy Court Nighttime Attorney Filings by Month
16%
14%
12%
10%
8%
6%
4%
2%
0%
January
February
March
April
May
June
July
August
September
October
November
December
Not
Night


Bankruptcy Court
Nighttime Attorney Filings by Day of the Week
2,500,000
2,000,000
1,500,000
1,000,000
500,000
0
Sunday
Monday
Tuesday
Wednesday
Thursday
Friday
Saturday
Not
Night


Bankruptcy Court
Nighttime Attorney Filings by Day of the Week
40%
35%
30%
25%
20%
15%
10%
5%
0%
Sunday
Monday
Tuesday
Wednesday
Thursday
Friday
Saturday
Not
Night

TAB 16

16. Standards and procedures for deciding ifp status

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

There is strong evidence of divergent practices that seem difficult to justify. But it is far from clear this is a rules problem, or that there is a ready solution to this problem. For example, the stark disparities in cost of living in different parts of the country make articulating a national standard a major challenge. And in terms of court operations, there may be significant inter-district differences that bear on how ifp petitions are handled. But one might have difficulty explaining significant divergences between judges in the same district in resolving such applications.

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

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

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

TAB 17

17. Rule 17(a) and (c)

Christopher Cross submits a proposal to amend Rule 17(a) and (c). As presently written, Rule 17(a)(1) and (c)(1) regarding 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 an 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 court 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 legal 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).

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 legal 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 federal rule." He also says that even though he presented one judge with "8th Circuit Court 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 proposes 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 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 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 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.

It is recommended that 22-CV-G be dropped from the agenda.

22-CV-G

From: Christopher
To: RulesCommittee Secretary
Cc: C. Cross
Subject: Suggested changes to Fed.R.Civ.P. Rule 17
Date: Monday, June 13, 2022 9:51:08 PM

RulesCommittee_Secretary@ao.uscourts.gov

To Whom It May Concern,

I am sending this email to suggest changes to Fed.R.Civ.P. Rule 17(a) and (c). Below is the issue and the reasons I am making my suggestions.

I am a duly court appointed legal guardian of an adult ward with severe disabilities. My statutory authority derives from Section 475.120.3 et seq., and 475.123 RSMo. For purposes of litigation, Fed.R.Civ.P. Rule 17(a) and/or (c) permits me to file and litigate a case as the real party of interest even though my ward benefits from the litigation.

However, despite the statutory scheme and federal rule that permits me to sue and defend against a suit as a real party of interest, two federal trial court judges I have encountered have flat out refused to comply with the federal rule. The argument used is that because my ward would have benefited from the suit, I was required to be represented by an attorney in order to file and litigate the case as the real party of interest.

Once a person files a suit as a real party of interest, he or she has the constitutional right to proceed pro se if he or she makes this choice. By depriving guardians this constitutional right and forcing guardians to hire attorneys under the argument that we must be represented by an attorney for no other reason than the fact our wards will benefit from the litigation, violates our rights of immunity under state guardianship laws and ultimately deprives due process, equal protection of law, and equal access to the courts.

Rules 17(a) and (c) must state in explicitly clear terms that a duly court appointed legal guardian is permitted to act pro se in filing and litigating the case even if the case will benefit the guardians ward, and if a trial court is to assert the guardian must be represented by an attorney, then the trial court shall (not may, or can) appoint the guardian an attorney.

Moreover, Rule 17 must also explicitly state that the guardian is duly entitled to file and litigate a case for and on his or her own behalf independent of their ward without having to be represented by an attorney. Many times, the rights of guardians themselves are violated but the barrier we face is that we are barred from litigating

the case because trial court judges say the litigation benefits the wards and thus, we are required to be represented by an attorney.

In the last federal case I litigated, I provided a laundry list of case laws including an 8th Circuit Court case law on the subject and showing how contradicting case laws are -- some saying guardians are to be substituted for the ward in the litigation, some saying we are to be enjoined in the case, and some saying we can litigate the case independent of our wards. The judge did not care about any case law and dismissed the case because he refused to permit me to litigate the case for damages and injuries that I suffered, and those that my ward also suffered.

Respectfully,

Christopher Cross, M.A., C.M.A., D.S.P. (ret.)
Court appointed legal guardian, with full powers &
Federally appointed payee
Cell: (816) 805-9259
430039
P.O. Box 1409
Jefferson City, Missouri 65102

TAB 18

18. 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 is "parallel and identical" with Civil Rule 63. Submission 21-CV-R and the not-officially-reported Federal Circuit decision are included in this agenda book.

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 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 that is included in this agenda book. 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 along these lines.

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 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 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 trial before a judge who subsequently retired, and the case was reassigned to a different judge of the Court of Federal Claims. It appears that no tax had actually been paid, and accordingly that no refund was due. But since the judge who presided over the trial had not yet decided 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, and had the trial court simply said that it appears that the court of appeals would have been satisfied.

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 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 Rule 43(a) and 30(b)(4), mentioned at the beginning of this agenda item, 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.

It is recommended that this submission be dropped from the agenda.

From: Richard Hertling [redacted]
Sent: Friday, July 23, 2021 9:56 AM
To: Robert Dow [redacted]
Subject: FRCP 63 comment

Good morning, Judge Dow. I write to you in your capacity as chair of the Civil Rules Advisory Committee to broach an issue regarding Rule 63. Although the Court of Federal Claims has its own set of procedural rules, they are based on and follow the Civil Rules unless a deviation is warranted due to the court's distinctive jurisdiction with the United States being the only defendant.

As you know, Rule 63 provides that "[i]f 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.:

In an appeal interpreting the parallel and identical Rule 63 of the Rules of the Court of Federal Claims, the Court of Appeals for the Federal Circuit held yesterday in a non-precedential opinion that "must" in Rule 63 means "must." *Union Telecom, LLC v. United States*, No. 20-1052 (Fed. Cir. July 22, 2021). The case involved a trial conducted by a former judge of the Court of Federal Claims. Upon her retirement, the case was reassigned to another judge of the court, who was able to review a videotape of the trial and, as a result, declined the plaintiff's request to recall witnesses after finding he could make the necessary findings and evaluate credibility based on the videotape. The Court of Appeals found the successor judge's decision to be incompatible with the plain language of Rule 63. The Court of Appeals affirmed, however, finding the error to have been harmless.

I wish to raise for possible consideration by the Civil Rules Advisory Committee whether, in the wake of the increased reliance during the course of the pandemic on virtual proceedings that have been videotaped, Rule 63 might be ripe for an amendment by which the current "must" is softened to allow the successor judge some discretion when video is available and the successor judge makes appropriate findings on the record that's/he is able to reach an appropriate decision based on the videotape and without need to recall any witnesses.

The current rule made sense in a world without videotaped proceedings, but the increased availability and use of technology, such as video, has rendered the current mandatory nature of Rule 63 overbroad in some instances. There are now circumstances in which judges ought to be allowed to exercise discretion over the recall of witnesses, even when a party requests recall, when the witness's testimony has been preserved on video.

I am a relatively new judge (two years on the Court of Federal Claims), and have no direct experience with Rule 63. To be clear, I am not advocating that Rule 63 be changed, but I am proposing that the Civil Rules Advisory Committee review the mandatory nature of the current Rule 63 and consider whether it ought to be revised to allow discretion in appropriate cases in light of the broader use of technology that has been accelerated by the pandemic and the remote proceedings we have all had to undertake to keep our dockets moving. The members of the Committee you chair have far more experience and expertise than me and can make solicit broader input on the proposition.

I serve on my Court's Rules Advisory Committee and I consulted with the Chair of that Committee. He advised that our Court will not consider revising our own Rule 63 in the absence of a revision to the FRCP version, so I thought I would broach the topic with you.

I would be pleased to discuss the matter further if you would like.

With best regards,

Richard A. Hertling
Judge
U.S. Court of Federal Claims
National Courts Building
717 Madison Place NW
Washington DC 20439

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

UNION TELECOM, LLC,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2020-1052

Appeal from the United States Court of Federal Claims in No. 1:16-cv-01409-TCW, Judge Thomas C. Wheeler.

Decided: July 22, 2021

ANDREW PAUL KAWEL, Kawel PLLC, Miami, FL, argued for plaintiff-appellant.

JULIE CIAMPORCERO AVETTA, Tax Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by DAVID A. HUBBERT, JOAN I. OPPENHEIMER.

Before MOORE, *Chief Judge*, REYNA and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Union Telecom, LLC, sued the IRS for a refund of taxes on prepaid phonecards. After the testimony portion of a bench trial, a new judge was assigned to the case at the trial court, but the judge denied the plaintiff's request to recall witnesses under Rule 63. The trial court then denied the plaintiff's claim for a refund. Union Telecom appeals the denial of its request to recall witnesses. We hold that the trial court erred in its decision but that the error was harmless. Accordingly, we affirm.

I

The IRS assesses taxes on toll telephone services. 26 U.S.C. § 4251(a)(1), (b)(1)(B). Section 4252(b)(1) defines such services as "telephonic quality communication[s] for which (A) there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication and (B) the charge is paid within the United States." For prepaid phonecards, the tax is paid by the first non-carrier to purchase cards from a carrier. 26 U.S.C. § 4251(d)(1)(B) (assessing the tax "when the card is transferred by any telecommunications carrier to any person who is not a carrier"); 26 C.F.R. § 49.4251-4(a).

Until 2006, the IRS interpreted the "distance" and "time" variables of § 4252(b)(1) in the disjunctive. *Union Telecom, LLC v. United States*, 144 Fed. Cl. 477, 480 (2019) *(Decision*). Therefore, the IRS interpreted the statute to cover sales of prepaid phonecards that billed by the amount of elapsed time, even if charges did not vary by distance. *Id.* However, in 2006, the IRS altered its interpretation, recognizing that, to be subject to the tax, providers must vary charges by both time and distance. *Id.* This change entitled those that had paid such tax to a refund. *Id.*

Union Telecom purchased prepaid phonecards from a group of corporate entities arranged in a structure designed to avoid the tax. IDT Corporation (IDT) is a

telecommunications carrier that distributes prepaid phonecards. *Id.* at 481. IDT formed a subsidiary carrier in Puerto Rico (IDT PR) and transferred the cards to that subsidiary. *Id.* at 481–82. This transaction was not taxable because it was between carriers. IDT PR then sold the cards to Union Telecard Alliance (UTA), a non-carrier partially owned subsidiary of IDT. *Id.* at 482. This transaction was not taxable because it was outside of the United States. *Id.* UTA then sold these cards to Union Telecom, a non-carrier. *Id.* This transaction was not taxable because it was between non-carriers. Union Telecom then sold these cards to consumers. *Id.* The IRS was aware of this arrangement and raised no issues. *Id.* at 483.

After the IRS altered its interpretation regarding the tax on prepaid telephone cards, Union Telecom sued the IRS for a refund in the United States Court of Federal Claims. Judge Susan Braden presided over a three-day trial. J.A. 205–346. All testimony regarding the relevant transactions indicated that none of the entities in the chain remitted the tax to the IRS or were required to do so. *Decision*, 144 Fed. Cl. at 483–85. For example, Joseph Farber, IDT's CFO of U.S. retail operations, testified that "there was no excise tax paid." J.A. 324.

Nevertheless, the CEO of Union Telecom, Peter Shah, testified that Union Telecom was entitled to a refund. Shah lacked personal knowledge regarding whether IDT paid the tax. J.A. 244 ("I don't talk to anybody in IDT. I have no idea."). Indeed, UTA had informed Shah in a letter that "IDT did not pay any federal excise taxes on the . . . prepaid calling cards." J.A. 485. Shah contended, however, that IDT included the tax in the price it charged UTA, which was then passed on to Union Telecom, regardless of whether the government ever received those payments. J.A. 245, 250. The invoices for the cards Union Telecom purchased did not include a line item for the tax, but Shah testified that in the phone card industry, carriers do not itemize taxes. J.A. 245.

Before Judge Braden issued her ruling, the case was transferred to Judge Thomas Wheeler. *Decision*, 144 Fed. Cl. at 483. Union Telecom then requested that Judge Wheeler recall witnesses Farber and Shah under Rule 63 of the Court of Federal Claims. The trial court denied the motion. J.A. 1–2. The trial court then issued a final judgment that Union Telecom was not entitled to a refund. *Decision*, 144 Fed. Cl. at 489. The trial court's opinion gave two alternative grounds for its decision. First, no entity in the chain paid or was required to pay the tax, so no refund was warranted. *See id.* at 484 ("Plaintiff certainly purchased the cards from UTA, but the Government's swath of uncontroverted evidence shows that IDT never included [the tax] in those cards' price during the relevant period.") (citation omitted). Second, even if the tax had been paid, Union Telecom was not the first non-carrier transferee and therefore lacked standing. *Id.* at 486.

Union Telecom appeals, arguing that the trial court erred by not recalling the witnesses. Although we agree that the trial court's analysis of Rule 63 was erroneous, we hold that the error was harmless.

II

Rule 63 applies when a new judge takes over a hearing or trial at the Court of Federal Claims. In relevant part, the rule reads: "In a hearing or 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 phrasing of the rule is mandatory ("must"), and 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. If a party makes a request under Rule 63, the trial court must find one of these exceptions in order to refuse to recall witnesses.

Here, the trial court did not mention any of the three exceptions in its opinion. Instead, the trial court stated:

> The Court is familiar with the record and has extensively reviewed the audio recordings of live testimony given during the three-day trial and the accompanying transcripts. The limited amount of testimony coupled with the Court's access to these audio recordings well-positions the Court to render a decision on any purported credibility determinations.

J.A. 1–2.

Rule 63 does not grant an exception for when the court is familiar with the record. 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.

But the trial court's error was harmless. None of the testimony that the plaintiff requested be reheard could have altered the outcome of the case. One of the reasons for the trial court's judgment was that the chain of entities in this case was designed to avoid the tax on prepaid phonecards, and with no entity responsible to pay the tax, Union Telecom was not entitled to a refund. None of the witnesses that Union Telecom seeks to recall have personal knowledge to the contrary.

Shah, as the CEO of Union Telecom, has no personal knowledge regarding the tax liability of the entities earlier in the corporate structure. Union Telecom argues that his testimony could still alter the outcome because Shah has personal knowledge that phone card companies do not separately list taxes on invoices. But, even if fully credited, this generalized knowledge of the industry could not alter the outcome. General practices regarding owed taxes are irrelevant because there is undisputed testimony that IDT designed a corporate structure to avoid owing the tax and that no party paid the tax. We therefore agree with the trial court that "[g]iven the lack of . . . first-hand knowledge, Shah's assessment is not probative. In short, Union

Telecom ignores the reality of the situation here—IDT structured its business to avoid paying the [tax]." *Decision*, 144 Fed. Cl. at 484.

Farber's testimony also could not have altered the holding. He testified that IDT did not pay the tax and that it structured its business as to not owe the tax. Thus, his testimony supported the government on the key issue. However, even if his testimony were fully discredited, it was only one piece of evidence in a "swath of uncontroverted evidence show[ing] that IDT never included [the tax] in [the] cards' price during the relevant period." *Id.*

III

We have considered Appellant's other arguments and find them unpersuasive. We hold that the trial court erred by refusing to recall witnesses under Rule 63 without finding any of the exceptions to the rule. But because none of the witnesses that the plaintiff requested be recalled could have altered the outcome, that error was harmless. Therefore, we affirm.

AFFIRMED

No costs.

To: Judge Dow, Advisory Committee on Civil Rules
From: Allison W. O'Neill
Date: September 1, 2022
Re: Proposed Rule 63 Amendment

Although not a frequently invoked rule, Rule 63 provides that "[i]f 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." Fed. R. Civ. P. 63 (emphasis added).

Rule 63 "provides an opportunity to recall witnesses to any litigant who believes that the credibility of a particular witness is material to the accuracy of a successor judge's factual findings and that such credibility may be properly assessed only via new testimony." *Atl. Specialty Ins. Co. v. Coastal Env't Grp., Inc.*, 945 F.3d 53, 65 (2d Cir. 2019). The 1991 Advisory Committee notes indicate that Rule 63 "allows successor judges to make findings of fact based on evidence heard by a predecessor judge … only 'in limited circumstances,' such as when a witness has become unavailable or when the particular testimony is undisputed or immaterial." *Mergentime Corp. v. Wash. Metro Area Transit Auth.*, 166 F.3d 1257, 1266 (D.C. Cir. 1999).[1] The "propriety" of proceeding under one of these limited exceptions "may be marginally affected by the availability of a videotape record; a judge who has reviewed a trial on videotape may be entitled to greater confidence in her or her ability to proceed." *See* Fed. R. Civ. P. 63, Committee Comment to 1991 Amendments.

At the request of Judge Dow, I reviewed a 2021 Rule 63 comment out of the Court of Federal Claims looking at the impact of virtual proceedings on the language of Rule 63. Given the court system's increased reliance on virtual proceedings throughout the course of the pandemic, this comment asks whether the mandatory language ("must") found in Rule 63 ought to be softened to permit a successor judge the discretion to not recall witnesses whose prior remote testimony was recorded and available for the successor judge to view—enabling that judge to reach an appropriate decision based on the videotaped proceedings alone.

I. Brief Summary and Recommendation

Recent, on-point caselaw centered on this videotaped testimony aspect is unfortunately limited. Based on what I did find, it is my opinion that the Rule 63 language, as currently written, affords substantial discretion to the district court judge through judicial determinations of (1) what testimony is material and (2) disputed, as well as whether (3) the witness is available to testify again without undue burden. The Committee Comments to the 1991 amendment to Rule 63 support this interpretation and signal that the Committee had video testimony in mind at the

[1] AWO Note: This is a thorough case written specifically about Rule 63. Although it is more than twenty years old, it walks through the progression of Rule 63, including the impact of the 1991 amendment.

time of amendment. *See* Fed. R. Civ. P. 63, Committee Comment to 1991 Amendments ("[T]he successor judge may determine that particular testimony is not material or is not disputed, and so need not be reheard. The propriety of proceeding in this manner may be marginally affected by the availability of a videotaped record; a judge who has reviewed a trial on videotape may be entitled to greater confidence in his or her ability to proceed.").

II. Recent Commentary on Video Testimony

Although not the primary focus of the requested research, it is helpful to situate this Rule 63 inquiry within the broader debate about the merits of videoconference testimony. Under Federal Rule of Civil Procedure 43, witness testimony at trial must be taken in open court unless otherwise permitted. Looking to Rule 43(a), "the judge has discretion to allow live testimony by video for 'good cause in compelling circumstances and with appropriate safeguards.'" *Thomas v. Anderson*, 912 F.3d 971, 977 (7th Cir. 2018).

Like so many of the accommodations made in response to pandemic-related challenges, it is not a perfect solution. "Conducting a trial by videoconference is certainly not the same as conducting a trial where witnesses testify in the same room as the factfinder." *In re RFC & ResCap Liquidating Trust Action*, 444 F. Supp. 3d 967, 970 (D. Minn. 2020). "[V]irtual reality is rarely a substitute for actual presence and … even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005) (quoting *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001)). Technological advances, however, minimize the impact of these concerns. "The near-instantaneous transmission of video testimony through current technology" enables the jury or the court in a bench trial to "see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration." *In re RFC*, 444 F. Supp. 3d at 970.

Relevant to this research question, the Advisory Committee notes to Rule 43(a) point out that, even when good cause and compelling circumstances exist, "[t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." Fed. R. Civ. P. 43(a) Advisory Committee Note to 1996 Amendment. At the time of COVID trials, good cause and compelling circumstances justified the use of contemporaneous remote video testimony. Whether this determination does (or should) extend to bringing a successor judge up to speed upon reassignment, especially at a time when the need for remote arrangements is no longer as acute, is an open question to consider. Permitting continued reliance on COVID-related video testimony would promote judicial economy on one hand, but would also extend the distracting, disruptive, and detrimental aspects of video testimony on the other. Some courts take the position that, although "the pandemic led to the greatly increased use of video testimony, it cannot be maintained that video testimony has become the norm or should be routinely employed on a going-forward basis." *J.D. v. Price*, No. 20-cv-00749, 2022 WL 3048787 (W.D. Pa. Aug. 3, 2022).

III. Overview of Relevant Caselaw

As of the date of this memo, there were 369 federal cases listed under the citing references for Rule 63. Of those, only 25 postdate the onset of the pandemic.[2] To the extent seeing how the issue arises in litigation is helpful to the Committee, I have focused on recent invocations of Rule 63 and summarized the following cases that appear at least tangentially relevant.

A. Rule 63 and Recorded Testimony

Direct references to successor judges reviewing recorded testimony after a Rule 63 reassignment were limited. I did find one passing reference to Rule 63 and a successor judge "listening" to a trial in order to gain familiarity with the record during the COVID-19 pandemic timeframe. In *In re Sepielli*, No. 19-02685, 2020 WL 5407769 (M.D. Fl. Sept. 8, 2020), the first case footnote states that "[t]he Honorable Cynthia C. Jackson presided over the trial of this matter but is unable to issue a decision at this time." Invoking Rule 63 (applicable to this bankruptcy proceeding through Federal Rule of Bankruptcy Procedure 9028), the successor bankruptcy judge affirmed that he "has listened to the recording of the trial and is otherwise familiar with the record of the case." *Id.* at *1 n.1. Although more information is not readily available because WestLaw and Bloomberg do not link to court filings, the litigation occurred during the pandemic—the bankruptcy court conducted a trial in early February 2020 and these findings of fact and conclusions of law were entered in early September 2020. The avenue to gaining record familiarity did not warrant any in-depth discussion of Rule 63.

B. Current Rule 63 Discretion: Materiality & Undue Prejudice

Next, I came across several cases that signal Rule 63, as written, encompasses at least some degree of discretion. As mentioned above, under Rule 63, the "must" is qualified—judges can sidestep this mandatory language when testimony is immaterial, not in dispute, or imposes an undue burden. With respect to materiality, "[t]he premise underlying Rule 63—that the successor judge may be unable to assess with security that significance or credibility of what his predecessor heard—is amply justified in complex litigation." *Thompson v. Sawyer*, 678 F.2d 257, 269 (D.D.C. 1982). The trial judge has the discretion to review the record for any indication that the testimony in question was immaterial. *See Mergentime*, 166 F.3d at 1266. "Rule 63 is not violated when no material facts are in dispute and the successor judge rules as a matter of law." *Patelco Credit Union v. Sahni*, 262 F.3d 897, 906 (9th Cir. 2001).[3]

[2] Even those cases with a publication date after January of 2020 still relate to testimony that occurred prior to the pandemic and the related increased usage of remote video testimony. I worked with the library to use the Bloomberg Law docket search function, but I did not have luck sourcing more on-point rulings. This may be an additional area for research, if anyone has suggestions for other ways to search district court dockets.

[3] The first sentence of Rule 63 states that "[i]f 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." Fed. R. Civ. P. 63. The party prejudice inquiry may also be an opening for judicial discretion. In *Home Placement Service, Inc. v. Providence Journal Co.*, 819 F.2d 1199 (1st Cir. 1987), the court

C. Other Rule 63 Circumstances

From the post-pandemic short list of Rule 63 cases, there were two cases worth summarizing. Although they are not directly on point, they flagged another litigation posture Rule 63 appears to arise in: expert testimony and credibility determinations. To the extent videotaped and remote *Daubert* hearings are common, this may also be of interest. First, in *Moore v. Intuitive Surgical, Inc.*, No. 15-cv-00056, 2021 WL 3739168 (M.D. Ga. Aug. 24, 2021), some video evidence accompanied expert testimony at a pre-reassignment *Daubert* hearing, but the expert testimony itself was not video recorded.

In this case, plaintiff brought a products liability action against defendant, the maker of a surgical robot. The initial judge granted, in part, defendant's *Daubert* motions to exclude expert witnesses—as relevant here, finding an expert named Dr. Hall could not opine on causation and granting defendant's motion for summary judgment. After plaintiff filed an appeal, the intitial judge learned their spouse was a stockholder in defendant's company. A replacement judge was subsequently assigned. After this re-assignment, the Eleventh Circuit issued a published opinion and reversed the initial judge's prior ruling excluding Dr. Hall's expert testimony and vacating the entry of summary judgement in favor of defendant. The circuit court held that "Dr. Hall is qualified to testify as to the cause of [defendant's] injury" and "that the district court abused its discretion in excluding the testimony of Dr. Hall based on his qualification."

Upon remand, the parties disputed whether Rule 63 required a new *Daubert* hearing. Plaintiff argued that the district court could not simply resolve the previously filed motions, but instead the parties should be allowed to refile dispositive and *Daubert* motions. The plaintiffs note that it would be insufficient for the court to simply read the briefs and review the transcript of the prior *Daubert* hearing because a key part of Dr. Hall's testimony involved a video that the district court does not have. The defendant argued that the video plaintiff alluded to can be provided to the district court, and Rule 63 is typically invoked where a witness's credibility is at issue. *See Emerson Elec. Co. v. Gen. Elec. Co.*, 846 F.2d 1324, 1325 (11th Cir. 1988) ("Absent consent of the parties, a successor judge cannot make credibility determinations."). Plaintiff asserts that, in this case, reliability—asking whether expert arrived at opinion through a scientifically valid methodology, *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1342 (11th Cir. 2003)—is at issue, not credibility, *see, e.g.*, *Andrews v. Rosewood Hotels & Resorts, LLC*, 575 F.

reasoned that "an appellate court must be free to balance the costs and benefits of remanding the case to the same judge" and if "the appellate court believes that the balance tips in favor of remanding the case to a different judge for whatever reason, and if the litigants would not be *prejudiced* by a determination on the existing record, then a new trial is not required and the appellate court may leave the decision as to whether to grant a new trial to the sound discretion of the district court." *Id.* at 1204 (emphasis added). In clarifying that statement, the court stated, in a footnote, that "[u]ndue prejudice to the litigants might exist if, for instance, the determination to be made by the new district judge turned substantially on the credibility of witnesses whom the judge did not have the opportunity to observe in the context of the original trial. The instant case, however, turns not on witness credibility, but on the legal sufficiency of largely uncontradicted damage evidence proffered by the plaintiffs through the testimony of expert witnesses." *Id.* at 1204 n.6.

Supp. 728, 733 (N.D. Tex. 2021) (citing Fed. R. Evid. 702 Advisory Committee Notes (2000 Amendments)) ("[I]n reviewing a *Daubert* challenge, the court makes no credibility determinations.").

The district court concluded that a new *Daubert* hearing was not automatically required. The court reasoned that a new hearing may be helpful (for example, in a complex case with multiple experts), neither the Federal Rules of Evidence or caselaw require a court to hold a hearing before ruling on a *Daubert* motion. In support of this point, the district court cited to *Stiefel v. Malone*, No. 18-cv-01540, 2021 WL 426217 (N.D. Ala. Fed. 8, 2021). *Stiefel*, however, did not involve a successor judge and does not involve testimony at a prior hearing. The district court opted to proceed with resolving previously filed motion, leaving the option open to order production of the video used at the initial *Daubert* hearing or set a new *Daubert* hearing if useful.

Second, in *Alta Wind I Owner Lessor C v. United States*, 154 Fed. Cl. 204 (Cl. Ct. 2021), the court undertook an extensive Rule 63[4] analysis before concluding that, in response to the plaintiff's request to recall four fact and two expert witnesses, it must allow witness recall. The court noted, however, that the government may object to any testimony believed to be inappropriate for a fact witness or that was not presented at the first trial. *Id.* at 222–23.

In this case, plaintiffs, the owners of six windfarm facilities in southern California allege that the government underpaid them by over $200 million pursuant to § 1603 of the American Recovery and Reinvestment Act of 2009. *Id.* at 207. The court held a nine-day trial in 2016, hearing testimony from eleven witnesses—including James Pagano, George Revock, Damon Huplosky, Anthony Johnston, Dr. Edward Maydew, and Dr. Colin Blaydon. The Claims Court excluded a government expert after concluding the expert "attempted to conceal articles he wrote for Marist and East German publications" and thus "provided untruthful testimony under oath to the Court." The Claims Court ultimately found in favor of the plaintiffs and awarded them in excess of $200,000 in damages. The government appealed, and the Federal Circuit reversed and remanded this case. The Federal Circuit concluded that the Claims Court had misapplied the law around exclusion of experts on credibility grounds under Rule 702 grounds; the Federal Circuit clarified the relevant rule—"while there may be some circumstances where a judge can properly evaluate an expert's general credibility as part of Rule 702's reliability inquiry, the credibility must relate to the reliability of the methodology at issue, which is the core of the Rule 702 inquiry." 897 F.3d 1365, 1379–80 (Fed. Cir. 2018). In remanding the case, the Federal Circuit noted that reassignment was appropriate to preserve the appearance of fairness, because "[a]n expert's credibility generally is not relevant to determining the admissibility of his or her testimony." *Id.* at 1379.

The case was reassigned to a second judge on July 2019. In July 2020, parties identified several pending discovery-related issues, including "plaintiffs' request to recall certain fact and expert

[4] According to the Rules Committee Notes for the Rules of the United States Court of Federal Claims ("RCFC"), RCFC 63 is essentially identical to the Federal Rule of Civil Procedure 63. Thus, I have included the analysis.

witnesses pursuant to Rule 63 of the Rules of the United States Court of Federal Claims." 154 Fed. Cl. At 210. The parties both acknowledged that if the Claims Court deemed testimony material and disputed, the Court must recall the witnesses. Plaintiffs claim the testimony is both material and disputed because the government rejected 123 of 165 proposed stipulations; the government rejects this formulation, arguing that the plaintiffs' stipulations were not supported by the cited evidence or were misleading. *Id.* at 218.

The court concluded all of the witnesses that plaintiffs sought to recall would provide testimony at trial that is material and disputed, and there is no issue with availability to testify again without undue burden. *Id.* at 222–23. The Claims Court reaffirmed that rehearing testimony under Rule 63 is only for testimony from the original trial, not for new issues. *Id.* at 219.

In addition, I came across references to Rule 63 in two other postures: failure to certify familiarity with the record, *see, e.g.*, *Canseco v. United States*, 97 F.3d 1224, 1225–26 (9th Cir. 1996) ("The plain language of the amended rule [63] indicates that the certification of familiarity requirement applies to all cases in which a successor judge replaces another judge unable to proceed with a trial or hearing that has commenced."); *In re Tri-State Fin., LLC*, 519 B.R. 759, 766 (8th Cir. 2014) ("In this case, the bankruptcy court did not certify familiarity with the record and determine the case could be completed without prejudice to the parties before entering its judgment.") and failure to request witness recall, *see, e.g.*, *Atl. Specialty Ins. Co.* at 945 F.3d at 62 (noting plaintiff's suggestion that the judge "may wish to hear from" a witness "without more, does not rise to the level of a recall request triggering the obligations of Rule 63"). Neither scenario is relevant to the posed research question.

IV. Conclusion

In sum, there are few cases addressing the interaction between prior videotaped testimony and witness recall under Rule 63. Trial judges appear to have at least some discretion in declining to recall witnesses, but a change to Rule 63's language may be helpful as part of a broader policy choice on the extent the judiciary wishes to carry forward remote testimony—considering the ongoing debate about its merits and detriments.

I hope the above research is helpful. Please feel free to reach out to discuss. I am more than happy to do additional research on the topic.

TAB 19

19. Mandatory Initial Discovery Project

This will be an oral report. It is possible that the FJC study on the pilot project will be circulated as a supplement to the agenda book.