Agenda E-19 (Summary)
Rules
March 2021

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:

Approve the proposed amendment to Civil Rule 7.1 and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 9-10

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

- Impact of the COVID-19 Pandemic on Jury Operations..... pp. 2-3
- Emergency Rules..... pp. 3-6
- Federal Rules of Appellate Procedure .....p. 6
- Federal Rules of Bankruptcy Procedure..... pp. 6-9
- Federal Rules of Civil Procedure..... pp. 10-12
- Federal Rules of Criminal Procedure..... pp. 13-14
- Federal Rules of Evidence .....p. 14
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Agenda E-19
Rules
March 2021

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 January 5, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay 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; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Kevin Crenny, Law Clerk to the Standing Committee; and John S.

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, and Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five advisory committees and two joint subcommittees. The Committee also discussed the Rules Committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281. Additionally, the Committee discussed an action item regarding judiciary strategic planning and was briefed on the judiciary's ongoing response to the COVID-19 pandemic.

IMPACT OF THE COVID-19 PANDEMIC ON JURY OPERATIONS

The Committee considered a proposal from the jury subgroup of the judiciary's COVID-19 Task Force addressing the impact of COVID-19 on jury operations in criminal proceedings. In August 2020, the Executive Committee referred the proposal to this Committee, the Committee on Court Administration and Case Management, the Committee on Criminal Law, and the Committee on Defender Services, to consider whether rules amendments or legislation should be pursued that would allow grand juries to meet remotely during the pandemic. The chairs of the four committees discussed the proposal after consulting with their respective committees and, in a letter dated August 28, 2020, advised the Executive Committee that they did not recommend pursuing efforts to authorize remote grand juries. The letter

explained that although the pandemic has impacted the ability of courts around the country to assemble grand juries, courts have found solutions to the problem including using large spaces in courthouses, masks, social distancing, and other protective measures. Such measures protect public health to the greatest extent possible without compromising the secrecy and integrity of grand jury proceedings, and they have allowed investigations and indictments to proceed where needed.

EMERGENCY RULES

Section 15002(b)(6) of the CARES Act 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. A significant portion of the Committee's meeting was dedicated to reviewing the draft rules developed by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules in response to that directive. The advisory committees began their work by soliciting public comments on challenges encountered during the COVID-19 pandemic in state and federal courts by lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. The advisory committees also formed subcommittees to begin work on the issue. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with:
(1) identifying rules that might need to be amended to account for emergency situations; and
(2) developing drafts of proposed rules for discussion at each advisory committee's fall 2020 meeting.

In the intervening months, the subcommittees collectively invested hundreds of hours to develop draft emergency rules for consideration at the fall 2020 advisory committee meetings.

At its January 2021 meeting, the Committee was presented with a report describing this process and was asked to provide initial feedback on the draft rules. The report reached several preliminary conclusions; among the most important was that an emergency rule was not needed for all rule sets. Early on, the Evidence Rules Committee concluded that its rules are already flexible enough to accommodate an emergency. And, although both the Appellate and Civil Rules Committees drafted emergency rules for consideration, they have left open the possibility that no emergency rule is needed in their rule sets.

The advisory committees also concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts "when the President declares a national emergency under the National Emergencies Act," the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended. Their initial consensus was that the Judicial Conference in particular (or the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference) is the most appropriate judicial branch entity to make such determinations, in order to promote consistency and uniformity in declaring rules emergencies. In addition, the advisory committees concluded that any emergency rules should only be invoked for emergencies that are likely to be lengthy and serious enough to substantially impair the courts' ability to function under the existing rules.

A guiding principle in the advisory committees' work was uniformity. Considerable effort was devoted to drafting emergency rules that are uniform to the extent reasonably

practicable, given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. Notably, in the following respects, the proposed draft rules are uniform. First, the term "rules emergency" is used in each rule set to highlight the fact that not every emergency will trigger the emergency rule. Second, the basic definition of a rules emergency is largely uniform among the four rule sets. A rules emergency is found 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." (Draft Criminal Rule 62 contains an additional element discussed below). Third, the draft rules were reviewed in a side-by-side analysis by the Standing Committee's style consultants with a view toward implementing style guidelines and eliminating differences that are purely stylistic.

Much of the Standing Committee's discussion addressed the advisory committees' request for input on substantive differences among the draft rules and whether those differences were justified. For example, in addition to the basic definition of a rules emergency, draft new Criminal Rule 62 (Criminal Rules Emergency) includes the requirement that "no feasible alternative measures would eliminate the impairment within a reasonable time." As another example, all of the draft rules provide that the Judicial Conference can declare a rules emergency and subsequently terminate that declaration; however, the draft amendment to Appellate Rule 2 (Suspension of Rules) also gives that authority to the court of appeals (acting directly or through its chief judge), and draft Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) includes emergency-declaring authority for both the chief bankruptcy judge in a district where an emergency occurs and the chief judge of a court of appeals.

At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the

Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action). At this time, it remains to be seen which, if any, of the advisory committees will recommend publication of draft rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met by videoconference on October 20, 2020. In addition to discussion of the emergency rules project and possible related amendments to existing rules, agenda items included a review of previously-published proposed amendments. In addition, the Advisory Committee reviewed the criteria for granting in forma pauperis status, including potential revisions to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In response to a recent suggestion, the Advisory Committee also discussed a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to deal with premature notices of appeal. The issue was considered by the Advisory Committee ten years ago, but it is reviewing the issue again to determine if conditions have changed to justify an amendment. Finally, the Advisory Committee continued its comprehensive review of Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) regarding hearings and rehearings en banc and panel rehearings. Several options for amendment are under consideration in an attempt to align the two rules more closely.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3011 and 8003, and Official Form 417A, with a request that they be published for public

comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's request.

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 (Bankruptcy Committee), redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) that requires the clerk of court to provide searchable access on the court's website to data about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). The rule change would mirror a pending amendment to the *Guide to Judiciary Policy*, Vol. 13, Ch. 10, § 1050.10(c), which would require courts to provide notice of unclaimed funds on their websites (pursuant to that Committee's efforts to reduce the balance of unclaimed funds and limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds). The Bankruptcy Committee suggested an accompanying rules amendment because the *Guide* is not publicly available and Bankruptcy Rules are often the first place an attorney or pro se claimant looks to determine how to locate and request disbursement of unclaimed funds; a rule change would therefore inform the public where to access unclaimed funds data.

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

The proposed amendment revises Rule 8003(a) to conform to the pending amendment to Appellate Rule 3. The Appellate Rules amendment (which is on track to take effect on December 1, 2021 if adopted by the Supreme Court and Congress takes no contrary action) revises requirements for the notice of appeal in order to reduce the inadvertent loss of appellate rights. The proposed amendment to Bankruptcy Rule 8003(a) takes a similar approach and will help to keep the Part VIII Bankruptcy Rules parallel to the Appellate Rules.

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

Parts 2 and 3 of Official Form 417A would be amended to conform to the wording of the proposed amendment to Rule 8003.

Retroactive Approval of Technical Conforming Amendments to Official Form 309A - I

The Rules Committee Staff was notified that the web address for PACER (Public Access to Court Electronic Records) was changed from pacer.gov to pacer.uscourts.gov. Because the PACER address is incorporated in several places on the eleven versions of the "Meeting of Creditors" forms (Official Forms 309A - I), the forms needed to be updated with the new web address.

Although the old PACER address is currently redirecting users to the new address, the Advisory Committee shared the Rules Committee Staff's concern that users will experience broken links in the year or so it would take to update the forms via the normal approval process. Accordingly, the Advisory Committee approved changing the web addresses on the forms using the delegated authority given to it by the Judicial Conference to make non-substantive, technical, or conforming changes to the Bankruptcy Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. The Standing Committee unanimously approved the form changes.

Information Item

The Advisory Committee met by videoconference on September 22, 2020. In addition to its recommendations discussed above, discussion items included an update on the restyling of the Bankruptcy Rules. Notably, the 1000 and 2000 series of the restyled Bankruptcy Rules were published for comment in August 2020, and the Advisory Committee will be reviewing the comments on those rules at its spring 2021 meeting.

The Restyling Subcommittee has completed its initial review of restyled versions of the 3000 and 4000 series of rules, and received feedback from the Standing Committee's style consultants on the subcommittee's proposed changes. The subcommittee received an initial draft of the 5000 series of restyled rules from the style consultants at the end of December 2020, and it expects to receive the initial draft of the 6000 series of restyled rules from the consultants by February 2021.

At its upcoming spring 2021 meeting, the Advisory Committee will consider recommending for publication in August 2021 the 3000 and 4000 series of restyled rules, along with the 5000 and 6000 series of restyled rules if those rules are ready. The Advisory Committee plans to continue work on the remaining rules (the 7000, 8000, and 9000 series) with the intent of recommending them for publication in August 2022, so that final approval of all the Restyled Bankruptcy Rules can be considered by the Standing Committee at its summer 2023 meeting, and by the Judicial Conference at its fall 2023 session.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 7.1 (Disclosure Statement) for final approval. An amendment to subdivision (a) was published for public comment in August 2019. 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 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 Appellate Rule 26.1 (effective December 1, 2019) and Bankruptcy Rule 8012 (effective December 1, 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. The proposal published for public comment identified the time that controls whether complete diversity exists as "the time the action was filed." In light of public comments received, as well as discussion at the Committee's June 2020 meeting, the Advisory Committee made clarifying and stylistic changes to the proposal to further develop the rule's reference to the times that control for determining complete diversity. As approved by the Standing Committee at its January 2021 meeting, paragraph (a)(2) would require that a disclosure statement be filed "when the action is filed in or removed to federal court" and "when any later event occurs that could affect the court's jurisdiction under § 1332(a)."

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 7.1 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 7.1 as set forth in the Appendix, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 15 and Rule 72, with a request that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 15(a)(1) (Amendments Before Trial – Amending as a Matter of Course)

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. 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).

The difficulty lies in the use of the word "within." A literal reading of "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 (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment seeks to preclude this interpretation by replacing the word "within" with "no later than."

Rule 72(b)(1) (Dispositive Motions and Prisoner Petitions – Findings and Recommendations)

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).

Information Item

The Advisory Committee met by videoconference on October 16, 2020. In addition to the action items discussed above, the Advisory Committee spent a majority of the meeting hearing the report of its CARES Act Subcommittee and discussing its draft Rule 87 (Procedure in Emergency). Other agenda items included an update on the Multidistrict Litigation (MDL) Subcommittee's ongoing consideration of suggestions that rules be developed for MDL proceedings.

The MDL Subcommittee reported on the status of its three remaining areas of study:

1. Screening claims in mass tort MDLs – whether by using plaintiff fact sheets and defendant fact sheets or by using a "census" approach that employs a simplified version of a plaintiff fact sheet;

2. Interlocutory appellate review of district court orders in MDL proceedings; and

3. Settlement review, attorney's fees, and common benefit funds.

At the Advisory Committee's meeting, the MDL Subcommittee reported its conclusion that the second area of study – interlocutory appellate review – should be removed from the study agenda. The original suggestion was for a rule that would create a right to immediate review. Such a route would bypass the discretion that 28 U.S.C. § 1292(b) currently provides to the district court (whether to certify that § 1292(b)'s criteria are met) and to the court of appeals (whether to accept the appeal). The idea of creating a right to immediate review was quickly disfavored, with the subcommittee focusing instead on whether some other type of expanded interlocutory review might be worth pursuing. The subcommittee reviewed submissions from proponents and opponents of expanding appellate review. Subcommittee representatives attended multiple conferences addressing the topic, including a June 2020 meeting that included lawyers and judges with extensive experience in MDL proceedings beyond the mass tort context. The subcommittee found insufficient evidence to justify proposing an expansion of appellate review, especially in light of the many difficulties that would be involved in crafting such a proposal.

The Advisory Committee agreed with the subcommittee's recommendation that expanded interlocutory review be removed from the list of topics under consideration; the remaining two topics continue to be studied by the subcommittee. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Item

The Advisory Committee on Criminal Rules met by videoconference on November 2, 2020. The meeting focused on the emergency rules project and the Advisory Committee's draft Rule 62 (Criminal Rules Emergency). The agenda also included a report from the Rule 6 Subcommittee.

At its May 2020 meeting, the Advisory Committee formed a subcommittee to consider two suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee's agenda in 2012. As previously reported to the Conference in September 2020, the suggestions seek to add additional exceptions to the secrecy provisions in Rule 6(e). A group of historians and archivists seeks, in part, an amendment adding records of "historical importance" to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." The question of inherent authority has also been raised in recent Supreme Court cases. First, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.* Second, the respondent in *Department of Justice v. House Committee on the*

Judiciary, No. 19-1328 (cert. granted July 2, 2020), has relied on the courts' inherent authority as an alternative ground for upholding the lower court's decision.

The Advisory Committee has now received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances.

The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ's proposal that courts be given the authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers).

FEDERAL RULES OF EVIDENCE

Information Items

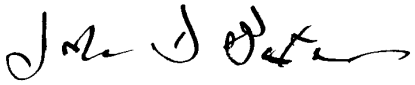
The Advisory Committee on Evidence Rules met by videoconference on November 13, 2020. Discussion items included possible amendments to Rule 106 (Remainder of or Related Writings or Recorded Statements) to exempt the "completing" portion of a statement from the hearsay rule and to extend the rule of completeness to oral as well as written statements; possible amendments to Rule 615 (Excluding Witnesses) to clarify the application of sequestration orders to out-of-court communications to sequestered witnesses; and possible amendments to Rule 702 (Testimony by Expert Witnesses) to clarify that the admissibility requirements must be found by a preponderance of the evidence, and to prohibit "overstatement" by forensic experts.

OTHER ITEMS

An additional action item before the Standing Committee was a request by Chief Judge Jeffrey R. Howard, Judiciary Planning Coordinator, that the Committee review the 2020 *Strategic Plan for the Federal Judiciary* and submit suggestions regarding prioritization of strategies and goals. The agenda materials included a copy of the *Plan* for Committee members to review prior to the meeting. After opportunity for discussion, the Standing Committee did not identify any particular strategies or goals to recommend for priority treatment over the next two years. This was communicated to Chief Judge Howard by letter dated January 11, 2021.

The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

Respectfully submitted,



John D. Bates, Chair

Richard P. Donoghue	William K. Kelley
Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra Jr.	Gene E.K. Pratter
Frank M. Hull	Kosta Stojilkovic
William J. Kayatta Jr.	Jennifer G. Zipps
Peter D. Keisler	

Appendix – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

~~(1)~~(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

~~(2)~~(B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a

[1] New material is underlined in red; matter to be omitted is lined through.

disclosure statement. The statement must name—and identify the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:

(A) when the action is filed in or removed to federal court, and

(B) when any later event occurs that could affect the court's jurisdiction under § 1332(a).

(b) Time to File; Supplemental Filing. A party, intervenor, or proposed intervenor must:

(1) file the disclosure statement * * *.

Committee Note

Rule 7.1(a)(1). Rule 7.1 is amended to require a disclosure statement by a nongovernmental corporation that seeks to intervene. This amendment conforms Rule 7.1 to similar recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Rule 7.1(a)(2). Rule 7.1 is further amended to require a party or intervenor in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The disclosure does not relieve a party that asserts diversity

jurisdiction from the Rule 8(a)(1) obligation to plead the grounds for jurisdiction, but is designed to facilitate an early and accurate determination of jurisdiction.

Two examples of attributed citizenship are provided by § 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as parties a legal representative of the estate of a decedent, an infant, or an incompetent. Identifying citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or are sued as an entity. A familiar example is a limited liability company, which takes on the citizenship of each of its owners. A party suing an LLC may not have all the information it needs to plead the LLC's citizenship. The same difficulty may arise with respect to other forms of noncorporate entities, some of them familiar – such as partnerships and limited partnerships – and some of them more exotic, such as "joint ventures." Pleading on information and belief is acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction exists and to protect against the waste that may occur upon belated discovery of a diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties and intervenors.

What counts as an "entity" for purposes of Rule 7.1 is shaped by the need to determine whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued in a common name, or is treated as no more than a collection of individuals for all other purposes. Every citizenship that is attributable to a party or intervenor must be disclosed.

Discovery should not often be necessary after disclosures are made. But discovery may be appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a disclosure's list of persons or the accuracy of their described citizenships. This rule does not address the questions that may arise when a disclosure statement or discovery responses indicate that the party or intervenor cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.

The rule recognizes that the court may limit the disclosure in appropriate circumstances. Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties to go behind the disclosure.

Disclosure is limited to individuals and entities whose citizenship is attributed to a party or intervenor. The rules that govern attribution, and the time that controls the determination of complete diversity, are matters of subject-matter jurisdiction that this rule does not address. A supplemental statement is required if an event occurs after initial filing in federal court or removal to it that requires a determination of citizenships as they exist at a time after the initial filing or removal.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provisions in Rule 7.1(a) that extend the disclosure obligation to proposed intervenors and intervenors.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

MEMORANDUM

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

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

RE: Report of the Advisory Committee on Civil Rules

DATE: December 9, 2020 (revised January 5, 2021)

Introduction

The Advisory Committee on Civil Rules met on a teleconference platform that included public access on October 16, 2020. Draft minutes from the meeting are attached to this report.

Part I of this report presents three items for action. The first recommends approval for adoption of amendments to Rule 7.1 that were published for comment in August 2019.

* * * * *

I. Action Items

A. For Final Approval: Amendment to Rule 7.1

Two distinct proposals to amend Rule 7.1(a) were published in August 2019. Further consideration of the proposal in light of the public comments demonstrated the wisdom of making a conforming amendment of Rule 7.1(b). The amendments were brought to the Standing Committee with a recommendation for adoption in June 2020. The topic was remanded for further consideration of the part of Rule 7.1(a)(2) that addresses the time of the citizenships that establish or defeat complete diversity. A revised version of that provision was developed after lengthy deliberation. The revised version is recommended for adoption, and is transmitted along with an alternative that takes the simpler approach of omitting any reference to the times of the citizenships.

The proposed amendment to Rule 7.1(a)(1) and the conforming amendment to Rule 7.1(b) are discussed first. They have not presented any difficulty, but the report that recommended them for adoption at the June meeting is presented again for convenience. The more complicated questions raised by Rule 7.1(a)(2) are discussed after that.

The proposed full rule text recommended for adoption, marked to show changes since publication by double underlining, is:

Rule 7.1 Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

(~~1~~A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(~~2~~B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* ~~Unless the court orders otherwise, a party i~~In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement that names—and identifies the citizenship of —every individual or entity whose citizenship is attributed to that party or intervenor ~~at the time~~ when:

(A) the action is filed in or removed to

federal court, and

(B) any subsequent event occurs that could affect the court's jurisdiction.

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:

(1) file the disclosure statement * * *.

Rule 7.1(a)(1)

The proposal to amend Rule 7.1(a)(1) published in August 2019 reads:

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

~~(1)~~ (A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

~~(2)~~ (B) states that there is no such corporation.

This amendment conforms Rule 7.1 to recent similar amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a). It drew three public comments. Two approved the proposal. The third suggested that the categories of parties that must file disclosure statements should be expanded for both parties and intervenors, a subject that has been considered periodically by the advisory committees without yet leading to any proposals for amending the parallel rules.

The Advisory Committee recommends approval for adoption of the Rule 7.1(a)(1) amendment.

Rule 7.1(b)

Discussion of public comments on the time to make diversity party disclosures under proposed Rule 7.1(a)(2) led the Advisory Committee to recognize that the time provisions in Rule 7.1(b) should be amended to conform to the new provision for intervenor disclosures in Rule 7.1(a)(1):

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:

(1) file the disclosure statement * * *.

This is a technical amendment to conform to adoption of amended rule 7.1(a)(1) and can be approved for adoption without publication.

Rule 7.1(a)(2)

Rule 7.1(a)(2) is a new disclosure provision designed to establish a secure basis for determining whether there is complete diversity to establish jurisdiction under 28 U.S.C. § 1332(a). The Advisory Committee recommends that it be approved for adoption with changes suggested by the public comments, as revised to address the concerns raised in the Standing Committee discussion last June.

The core of the diversity jurisdiction disclosure lies in the requirement that every party or intervenor, including the plaintiff, name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The proposed rule text has been modified to identify more accurately the time that is relevant to determining the citizenships that control diversity jurisdiction.

The citizenship of a natural person for diversity purposes is readily established in most cases, although somewhat quirky concepts of domicile may at times obscure the question. Section 1332(c)(1) codifies familiar rules for determining the citizenship of a corporation without looking to the citizenships of its owners.

Noncorporate entities, on the other hand, commonly take on the citizenships of all their owners. The rules are well settled for many entities. The rule also seems to be well settled for limited liability companies. The citizenship of every owner is attributed to the LLC. If an owner is itself an LLC, that LLC takes on the citizenships of all of its owners. The chain of attribution reaches higher still through every owner whose citizenship is attributed to an entity closer along the chain of owners that connects to the party LLC. The great shift of many business enterprises to the LLC form means that the diversity question arises in an increasing number of actions filed in, or removed to, federal court.

The challenges presented by the need to trace attributed ownership are a function of factors beyond the mere proliferation of LLCs. Many LLCs are not eager to identify their owners——the negative comments on the published rule included those that insisted that disclosure is an unwarranted invasion of the owners' privacy. Beyond that, the more elaborate LLC ownership structures may make it difficult, and at times impossible, for an LLC to identify all of the individuals and entities whose citizenships are attributed to it, let alone determine what those citizenships are. But if it is difficult for an LLC party to identify all of its attributed citizenships, it is more difficult for the other parties

and the court, whose only likely source of information is the LLC party itself.

As difficult as it may be to determine attributed citizenships in some cases, the imperative of ensuring complete diversity requires a determination of all of the citizenships attributed to every party. Some courts require disclosure now, by local rule, standard terms in a scheduling order, or more ad hoc means. And there are cases in which inadvertence, indifference, or perhaps strategic calculation have led to a belated realization that there is no diversity jurisdiction, wasting extensive pretrial proceedings or even a completed trial.

Disclosure by every party when an action first arrives in federal court, or at a later time that may displace the relevance of the time of filing the complaint or notice of removal, is a natural way to safeguard complete diversity. Most of the public comments approve the proposal, often suggesting that it will impose only negligible burdens in most cases. Summaries of the comments were attached to the June report.

The public comments indirectly illuminated the value of developing further the published rule text that identified the time that controls the existence of complete diversity as "the time the action is filed." Many of the comments supporting the proposal suggested that defendants frequently remove actions from state court without giving adequate thought to the actual existence of complete diversity. Some of these comments feared that the published rule text did not speak clearly to the need to distinguish between citizenship at the time a complaint is filed in federal court and citizenship at the time a complaint is filed in state court, to be followed by removal. Removal, for example, may become possible only after a diversity-destroying party is dropped from the action in state court.

Committee discussion of this question last April emphasized the rules that require complete diversity at some time other than the original filing in federal court or removal to it. One example is changes in the parties after an action is filed. Other and more complex examples may arise in determining removal jurisdiction. Disclosure should aim at the direct and attributed citizenships of each party at the time identified by the complete-diversity rules. The time at which the court makes the determination is not relevant, although the purpose of requiring disclosure is to facilitate determination as early as possible.

These observations led to revising the rule text to the form presented to the Standing Committee last June, calling for disclosures of citizenships:

(A) at the time the action is filed in or removed to federal court; or

(B) at another time that may be relevant to determining the court's jurisdiction.

Discussion in the Standing Committee focused on two perceived problems with this formulation.

The first problem arose from concern that the rule would be misread, taking it to address the time for filing the disclosure statement rather than the time of the citizenships that must be considered in determining diversity jurisdiction. That concern could be met by adding redundant but perhaps helpful words to the rule text: " * * * a party or intervenor must, unless the court orders otherwise, file at the time set by Rule 7.1(b) a disclosure statement * * *." But it is better met by substituting a new formula for "at the time" and "at another time" in the rule text. That change is shown in the revised rule text.

The second problem arose from concern that many parties would be confused by the reference to "another time that may be relevant to determining the court's jurisdiction." Diversity will be determined in most cases by the citizenships that exist at the time the action is initially filed in federal court, or at the time it is removed. But many lawyers know that the rules that govern diversity jurisdiction can be complicated, and fear that they must undertake time-consuming and costly research to be sure that their cases do not come within one of the variations on the basic rule. Some might be simply bewildered. The proposal was remanded for further consideration of this concern.

The Advisory Committee's deliberations on remand are summarized in the draft October Minutes. The Advisory Committee renewed its belief that it is useful to adopt rule text that directs attention to the problem that diversity jurisdiction is not permanently fixed by the citizenships that exist at the time a case first comes to the federal court, whether by initial filing or removal. And it concluded that clear language can reduce, indeed virtually eliminate, the risk that lawyers will be driven to undertake unnecessary research into diversity jurisdiction doctrine. The recommended new language focuses on events subsequent to filing or removal, providing assurance by focusing directly on changes in the shape of the litigation. Substituting "when" for "at the time" also should address the concern about confusion between the time for making disclosure and the times of the citizenships to be disclosed:

* * * must file a disclosure statement * * * when:

(A) the action is filed in or removed to federal court, and
(B) any subsequent event occurs that could affect the court's jurisdiction.

Although the Advisory Committee recommends this revised version for adoption, it offers an alternative recommendation for adoption in the event that the revised version does not assuage the concerns that led the Standing Committee to remand. The alternative would simply omit everything in subparagraphs (A) and (B) as shown above. The rule text would say nothing about the times of the citizenships that determine whether there is diversity jurisdiction. This version does what is required to establish a disclosure practice that will provide a secure foundation for prompt and accurate determinations of jurisdiction. That is the most important task set for the rule.

This alternative version also responds to the problem presented by any attempt to use rule text to remind the parties of the complexities that occasionally arise from the more esoteric corners of diversity jurisdiction requirements. No court rule can change those requirements. Any attempt to provide a comprehensive digest would inevitably be incomplete, and might well be inaccurate on one or another points. Referring to "another time that may be relevant" showed the risks of a simple reference. Referring to "any subsequent event" may not fully allay this concern. Rule 7.1(b) provides an indirect reminder of the need to supplement an earlier disclosure "if any required information changes." That includes a change in the information that is required as well as a change in the information itself. The committee note can point to the general issue, providing a rough guide of the need to remain alert for developments in the litigation that may call for additional disclosures.

Two additional paragraphs from the June report may be provided to fill out the reminder of other issues that have not been challenged in earlier discussions.

A problem remains when a party's disclosure statement, perhaps illuminated by responses to follow-up discovery, shows that the party cannot identify all of the citizenships that may be attributed to it. The committee note observes that the disclosure rule does not address this problem. Renewed committee discussion rejected a suggestion that the Note should be revised to suggest that a party could ask the court to order that no more than reasonable inquiry is required. The rule cannot reduce the informational burdens required by the doctrines of subject-matter jurisdiction. Nor does it seem wise to attempt to answer the questions that will arise when the party asserting jurisdiction is unable to pry complete information from another party who has far better access to information about its owners, members, or others whose citizenships are attributed to it.

Some public comments opposed adoption of the diversity disclosure proposal. Two of them came from bar groups that have provided helpful advice on many occasions in the past, the American

College of Trial Lawyers and the City Bar of New York. Each suggested that a better answer to the dilemma of determining the citizenship of LLCs would be for Congress or the Supreme Court to treat them as corporations. In addition, they suggested that some LLCs may experience great difficulty in determining all attributed citizenships, making it better to rely on targeted discovery in the few cases that present genuine puzzles about citizenship. They also observed that the LLC form is often adopted to protect the privacy of the owners, a point supplemented by other comments suggesting that privacy is particularly important for "non-citizen" owners. An added concern was that expansive diversity disclosures may include so much information that they distract attention from the information that is important in considering judicial recusal, the original purpose of Rule 7.1.

The proposed disclosure rule is recommended for adoption in one of the two forms advanced for discussion. The version that alerts the parties to the need to consider subsequent events that may change the calculus of diversity is the first recommendation. But if it still seems too risky, little is likely to be gained by considering still further variations on subparagraphs (A) and (B). The alternative recommendation is to forgo any attempt to allude to "subsequent events" in rule text by simply omitting subparagraphs (A) and (B) revised. It is not a perfect answer to the puzzles created by the requirement of complete diversity. But it will go a long way toward eliminating inadvertent exercise of federal jurisdiction in cases that should be decided by state courts, and——at least as important——toward protecting against tardy revelations of diversity-destroying citizenships that lay waste to substantial investments in federal litigation.

Clean Rule Text[1]

Rule 7.1 Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene must file a statement that:

(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders

[1] Revised to reflect stylistic changes made during the January 5, 2021 meeting of the Committee on Rules of Practice and Procedure.

otherwise, file a disclosure statement. The statement must name——and identify the citizenship of——every individual or entity whose citizenship is attributed to that party or intervenor:

(A) when the action is filed in or removed to federal court, and

(B) when any later event occurs that could affect the court's jurisdiction under § 1332(a).

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party, intervenor, or proposed intervenor must:

(1) file the disclosure statement * * *.

COMMITTEE NOTE

Rule 7.1(a)(1). Rule 7.1 is amended to require a disclosure statement by a nongovernmental corporation that seeks to intervene. This amendment conforms Rule 7.1 to similar recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Rule 7.1(a)(2). Rule 7.1 is further amended to require a party or intervenor in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The disclosure does not relieve a party that asserts diversity jurisdiction from the Rule 8(a)(1) obligation to plead the grounds for jurisdiction, but is designed to facilitate an early and accurate determination of jurisdiction.

Two examples of attributed citizenship are provided by § 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as parties a legal representative of the estate of a decedent, an infant, or an incompetent. Identifying citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or are sued as an entity. A familiar example is a limited liability company, which takes on the citizenship of each of its owners. A party suing an LLC may not have all the information it needs to plead the LLC's citizenship. The same difficulty may arise with respect to other forms of noncorporate entities, some of them familiar——such as partnerships and limited partnerships——and some of them more exotic, such as "joint ventures." Pleading on information and belief is acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction exists and to protect against the waste that may occur upon belated discovery of a diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties and intervenors.

What counts as an "entity" for purposes of Rule 7.1 is shaped by the need to determine whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued in a common name, or is treated as no more than a collection of individuals for all other purposes. Every citizenship that is attributable to a party or intervenor must be disclosed.

Discovery should not often be necessary after disclosures are made. But discovery may be appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a disclosure's list of persons or the accuracy of their described citizenships. This rule does not address the questions that may arise when a disclosure statement or discovery responses indicate that the party or intervenor cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.

The rule recognizes that the court may limit the disclosure in appropriate circumstances. Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties to go behind the disclosure.

Disclosure is limited to individuals and entities whose citizenship is attributed to a party or intervenor. The rules that govern attribution, and the time that controls the determination of complete diversity, are matters of subject-matter jurisdiction that this rule does not address. A supplemental statement is required if an event occurs after initial filing in federal court or removal to it that requires a determination of citizenships as they exist at a time after the initial filing or removal.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provisions in Rule 7.1(a) that extend the disclosure obligation to proposed intervenors and intervenors.

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