about claims of privilege." And it seems that the committee notes accompanying the original rule in 1993 and the revision of Rule 26(f) in 2006 speak to the concerns raised by the LCJ submission.

Introductory Discussion at Advisory Committee Meeting

At the Advisory Committee's October meeting, there was considerable discussion of the burdens and costs of privilege logs. Lawyer members of the Advisory Committee, in particular, reported that privilege logs can raise serious problems, particularly if the parties fail to work out an agreed method of satisfying Rule 26(b)(5)(A). At the same time, some judicial members reported not seeing problems frequently, but also that the lawyers (and perhaps magistrate judges) would be more likely to have experience with possible problems.

The resolution was to pursue the subject and study both the extent of the problems and the possibility that a rule change could make things better. There was no enthusiasm for going back to the pre-1993 situation in which no notice about withheld materials was required, but it was unclear how a rule change could materially improve matters. These issues remain under study, and would benefit from Standing Committee input.

B. Sealing Court Records
Suggestion 20-CV-T

Prof. Eugene Volokh (UCLA) has submitted a proposal for adoption of a Rule 5.3 on sealing of court records, on his own behalf and also on behalf of the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation. The rule proposal is presented in the Appendix below. It is being carried forward for further study.

The focus of this rule proposal is sealing of materials filed in court. In a broad sense, it focuses on a topic that has been on the Advisory Committee's agenda repeatedly over the last few decades. In the mid 1990s, there were two published drafts of possible amendments to Rule 26(c) that would have modified the standards for protective orders, in part by addressing the question of stipulated protective orders and filing confidential materials under seal pursuant to such orders or local rules. These proposals drew much attention and caused some controversy, and were eventually withdrawn. In March 1998 the Advisory Committee concluded that it would no longer pursue possible rule amendments on this topic.

Meanwhile, in Congress there have been various versions of a Sunshine in Litigation Act during recent decades, directed toward

protective orders regarding materials that might bear on public health.

Around 15 years ago, the Standing Committee appointed a subcommittee made up of representatives of all Advisory Committees that responded to concerns then that federal courts had "sealed dockets" in which all materials filed in court were kept under seal. The FJC did a very broad review of some 100,000 matters of various sorts, and found that there were not many sealed files, and that most of the ones uncovered resulted from applications for search warrants that had not been unsealed after the warrant was served.

In short, there has been considerable controversy and concern about sealed court files and discovery confidentiality, but the civil rules have not been amended to address those concerns.

The Civil Rules do not have many provisions about sealing court files. Rule 5(d) does direct that various disclosure and discovery materials not be filed in court until they are used in the action. When filing does occur, that can raise an issue about filing confidential materials under seal. Rule 5.2 provides for redactions from filings and for limitations on remote access to electronic files to protect privacy. In that context, Rule 5.2(d) does say that the court "may order that a filing be made under seal without redaction." The committee note to that provision says that it "does not limit or expand the judicially developed rules that govern sealing."

This submission, however, does propose a rule governing sealing that might limit or expand such judicially developed rules. An initial question might be whether there is a need for such a rule. Prof. Volokh's cover letter says that "[e]very federal Circuit recognizes a strong presumption of public access" that is "founded in both the common law and the First Amendment." It adds that more than 80 districts have adopted local rules governing sealing, and says that the rule proposal "borrows heavily from those local rules." Footnotes to the proposal provide voluminous case law authority for these propositions and cite a large number of existing local rules.

According to the cover letter, nevertheless "a uniform rule governing sealing is needed; despite these local rules and the largely unanimous case law disfavoring sealing, records are still sometimes sealed erroneously."

There is no question that inappropriate sealing of court records is an important concern. But it is not clear that the problem is so widespread that an effort to develop a national rule is warranted. And if a national rule were promulgated, it is worth

noting, that could affect the validity of the cited local rules. *See* Rule 83(a)(1) ("A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075 [the Rules Enabling Act]"). Nor is it clear that a national rule would much reduce the frequency of inappropriate sealing, depending in part on what might be defined as inappropriate.

If there is a problem that warrants an effort to develop a national rule, the draft language submitted by Prof. Volokh would require extensive work. The following are examples of some of the issues:

Possible additional burdens on courts: Various features of the proposal require courts to make "particularized findings." Rule 52(a)(1) directs a court after a nonjury trial to enter findings of fact and conclusions of law. Rule 23(b)(3) does say a court should certify a class only on finding that the superiority and predominance of common questions standards are met (though it does not have a specific findings requirement). It is not clear that there is a "particularized findings" requirement elsewhere in the civil rules. Cases under Rule 26(c) do say that a party seeking a protective order must make a particularized showing to justify entry of the order. *See* 8A Fed. Prac. & Pro. § 2035 at 157-58. But these cases do not require the court to make particularized findings when entering such an order.

Motion or objection by any "member of the public" without a need first to move to intervene: The rule would empower any "member of the public" to make a motion to unseal documents filed under seal "at any time." The proposed rule would explicitly excuse a motion to intervene for this purpose. There is a developed body of case law on intervention to challenge the seal on filed materials. *See* 8A Fed. Prac. & Pro. § 2044.1. This rule would evidently supplant that body of case law.

Challenges to sealing would be authorized by any "member of the public" at any time: The rule would direct that a motion is timely at any time, "regardless of whether the case remains open or has been closed." With CM/ECF it may be that accessing a closed case presents little difficulty, but such open-ended re-opening of cases is not the norm in the rules. Compare Rule 60(c)(1) (limiting a motion under Rule 60(b) to "a reasonable time," and for mistake, newly discovered evidence, or fraud to one year).

Defining "member of the public" could be challenging: The draft does not provide a more specific definition. Ordinarily

a proposed intervenor under Rule 24 must make some showing in support of a motion to intervene. If that is not required, it could become important to determine who is a "member of the public" entitled to challenge filing under seal without intervening. Would that right belong only to U.S. citizens or permanent residents? Would there be a ground for requiring that such a "member of the public" show some recognized interest in the contents of the sealed filing?

Materials filed under seal would automatically be "deemed unsealed" 60 days after "final disposition" of a case: This "final disposition" standard might resemble the final judgment standard for appeals. It likely means completion of all trial court proceedings and exhaustion or disregard of any proceedings on direct appeal, including a petition for certiorari. It might be taken to resemble Rule 54(a) ("'Judgment' a used in these rules includes a decree and any order from which an appeal lies"). But surely that standard would not apply if there were an appeal under 28 U.S.C. § 1292(a)(1) (preliminary injunctions) or § 1292(a)(2) (appointing receivers). It presumably would not apply to interlocutory orders certified for immediate appeal by the district court under 28 U.S.C. § 1292(b). How it would work in cases gathered pursuant to an MDL transfer if final judgment were entered in some but not all is uncertain. Whether the "final disposition" occurs only after all appeals have been exhausted might raise questions. It is not clear who would monitor these developments; if after a notice of appeal was filed, for example, there were a settlement, the clerk's office might not be aware of that development and the need to set the "60 days clock" running.

Motions to renew the seal are presumptively invalid unless filed more than 30 days before automatic unsealing: Coupled with the automatic unsealing mentioned above, this provision could mean, in effect, that 31 days after "final disposition" of a case the court would be without power to keep the materials under seal.

A special website, or a "centralized website" might be required: The proposal seems to direct that there be some special method of posting motions to seal, and suggests that "a centralized website maintained by several courts" might be useful. It also directs that this posting occur "within a day of filing."

A review of the proposal in the Appendix will likely suggest other issues. It does not seem that these issues must arise merely because a sealing rule is promulgated. To the contrary, a rule could likely be drafted that would not raise the specific issues

identified above. But any such rule might be expected to generate considerable controversy. For example, trade secrets and other commercially valuable information are placed under seal with some frequency. Limiting that protection might prompt serious concerns. Although there may presently be occasions in which sealing decisions appear, in retrospect, to be debatable, that alone does not make this topic different from others governed by the rules, on which it may sometimes happen that a court makes a decision later found to be erroneous.

Besides considering whether there is a need for such a rule, one might also reflect on how the rule would relate to existing and future case law on these subjects. The submission emphasizes that the case law is based on the Constitution and a common law right of access. Those grounds for access have developed over decades, and can be found in many cases cited in footnotes in the submission. If a rule were adopted, that might raise questions about whether it is different from that case law. If in a given circuit the case law is arguably more permissive about filing under seal and does not require all that a rule requires, does that mean the rule is supplanting that case law? If the rule is solely implementing the case law, does the rule change if the case law changes?

During the Advisory Committee's October meeting, discussion focused on the importance of court transparency. At least some matters would raise concerns. For example, the False Claims Act directs that a qui tam action be filed under seal. Another example that came up is that petitions to enforce arbitration awards that (which themselves are generally confidential) could raise concerns.

It was also noted that somewhat similar issues might be pertinent to the Appellate Rules. Indeed, there may be notable differences among the circuits on sealing. The Appellate Rules Committee studied these issues a few years ago, but did not conclude that any rule change was indicated.

For the present, the Advisory Committee concluded that the topic deserved further study. In particular, a review of local rules on sealing might shed light on (a) whether there is any need for a national rule along the lines proposed, and (b) whether divergences among local rules themselves are a reason for giving serious thought to a nationally uniform rule.

The Advisory Committee would welcome insights from members of the Standing Committee on the sealing issue.