MINUTES
CIVIL RULES ADVISORY COMMITTEE
October 16, 2020

The Civil Rules Advisory Committee met by Teams teleconference on October 16, 2020. The meeting was open to the public. Participants included Judge Robert Michael Dow, Jr., Chair, and Committee members Judge Jennifer C. Boal; Hon. Jeffrey B. Clark; Judge Joan N. Ericksen; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.; Joseph M. Sellers, Esq.; Dean A. Benjamin Spencer; Ariana Tadler, Esq.; and Helen E. Witt, Esq. Incoming Committee members David Burman, Esq., and Judge David Godbey, also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge John D. Bates, Chair; Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq., represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Professor Daniel J. Capra participated as liaison to the CARES Act Subcommittees. Susan Soong, Esq., participated as Clerk Representative. The Department of Justice was further represented by Joshua E. Gardner, Esq. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., Kevin Crenny, Esq., and Bridget M. Healy, Esq., represented the Rules Committee Staff. John S. Cooke, Director, Dr. Emery G. Lee, and Jason Cantone, Esq., represented the Federal Judicial Center.

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

Judge Dow opened the meeting by noting that there is a long agenda, and with messages of thanks and welcome.

The Administrative Office staff were thanked for all the work in arranging, training members in, and monitoring the wonders of technology that make a remote meeting possible. Preparation for this first meeting as chair showed that the work of assembling the agenda book is more challenging than would have been imagined.

The next meeting will likely be scheduled for some time during the week of March 22 - 26, 2021. Perhaps it will be possible to resume meeting in person.

In the ranks of comings and goings, Judge Bates counts for both. He is leaving our Committee, but will continue to be involved with the work in his new role as Chair of the Standing Committee. The Chief Justice “kept him for us.”

Virginia Seitz has provided great help as a veteran of many subcommittees. Judge Goldgar has been a friend for long before he or Judge Goldgar became judges, and is “my bankruptcy guru.”

New members are Judge David Godbey, Northern District of Texas, and David Burman, Esq., of Perkins Coie in Seattle. They are engaging with this meeting while pandemic-related delays have forestalled completion of the process that will establish full voting status. They are welcome additions.

The new "rules clerk" is Kevin Crenny. The Committee will make as much use of his talents as it can manage in the competition with other committees.

Professor Capra, Reporter for the Evidence Rules Committee, has taken on new responsibilities as coordinator of the CARES Act Subcommittees established by the other four advisory committees. He has provided invaluable service in coordinating their approaches and moving divergence toward convergence.

Judge Dow reported on the June meeting of the Standing Committee. The CARES Act was a major topic of discussion. The proposal that the new diversity disclosure rule, Rule 7.1(a)(2) be recommended for adoption was remanded for further consideration of the provision that attempts to direct the parties' attention to the need to provide information about citizenships as they exist at the moment that controls the existence of complete diversity. That question is on today's agenda. The proposals to amend Rule 12(a)(4) and to adopt Social Security review rules were approved for publication. Approval marked the success of long and hard work by the Social Security Review Subcommittee.

Legislative Report

Julie Wilson reviewed the chart of pending legislation that would affect one or another of the sets of rules. The only new event since the report last April is passage of the Due Process Protections Act, which adds a new subdivision (f) to Criminal Rule 5. The bill awaits the President's signature.

The many other bills summarized on the chart may lapse without further action when this Congress expires and gives way to a new Congress next January.

April 2020 Minutes

The draft Minutes for the April 1, 2020 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Rule 7.1

The remand of Rule 7.1 by the Standing Committee was introduced by a summary of the provision that proved troublesome. Proposed new Rule 7.1(a)(2) requires a statement that, in actions in which jurisdiction is based on diversity under 28 U.S.C.

§ 1332(a), a party or intervenor must name and identify the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The immediate impetus for the proposal, which reflects current practice in many courts, is to reflect the rule that for diversity purposes the citizenship of an LLC is the citizenship of all of its owners, including citizenships that are attributed to an owner. The proposal reaches beyond LLCs, however, to include every situation in which a nonparty's citizenship is attributed to a party for the determination whether there is complete diversity.

The published proposal called for disclosure of citizenships "at the time the action is filed." Several public comments suggested that defendants often remove state-court actions without giving adequate thought to the complexities of attribution rules, and that the rule should be revised to point to the time of removal. The draft considered at the April meeting looked to disclosure "at the time the action is filed in, or removed to, federal court." Discussion of this draft pointed out that it remained incomplete. The rules that measure the existence of complete diversity for establishing or defeating jurisdiction occasionally look to a time different from the time of initial filing or removal. The draft was revised to reflect this complication.

The proposal taken to the Standing Committee called for disclosure of citizenships attributed to a party:

> (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.

The Standing Committee was concerned that some lawyers are not sophisticated students of the somewhat obscure elaborations of the rules that may require a determination of citizenships at a time different from filing the action or removing it; "at another time that may be relevant" was intended to point lawyers toward the need to be alert to these rules. But this provision might provoke many lawyers to engage in unnecessary research in the vast majority of cases in which diversity is established or defeated at the time of first filing or removal.

A somewhat different concern also was raised. The requirement to disclose citizenships "at the time[s]" described in subparagraphs (A) and (B) might be mistaken as speaking only to the time for making the disclosure, not to the "time" of the citizenships that must be disclosed. Although this mistake should not be made, thought might be given to adding a redundant but perhaps helpful cross-reference to the provisions of Rule 7.1(b) that govern the time for making a Rule 7.1 disclosure:

> * * * a party or intervenor must, unless the court orders otherwise, file at the time set by Rule 7.1(b) a disclosure statement * * *

Although there should be no mistaking the meaning of the rule without these words, good drafting may at times be improved by adding redundant words for the benefit of those who will not read carefully. This question will be presented to the Committee for further consideration by e-mail exchanges after this meeting concludes if warranted by new rule text.

The simplest way to address the potential confusion that troubled the Standing Committee would be to eliminate any reference to the time of the attributed citizenships that must be considered in measuring complete diversity. A rule that refers only to the time of initial filing, or to the time of initial filing and the time of removal, would be incomplete and could divert attention from the need to consider additional or renewed disclosures when diversity must be measured as of a time different from initial filing or removal. No rule could set out all the diversity rules as they stand now, much less as they may be further elaborated in the future. Nor can an Enabling Act rule modify any part of the rules of subject-matter jurisdiction. And any general formula that adverts to the need to consult the diversity rules is likely to be subject to the same risks as "relevant to determining the court's jurisdiction."

A committee member suggested that it is important to retain rule text that signals the need to consider the rules that in some cases require that jurisdiction be measured by citizenships as they exist at some time other than filing or removal. This proposal read:

> (A) at the time the action is filed in or removed to federal court; or
> (B) at any other time that controls the determination of jurisdiction.

The member who advanced this proposal explained that the "any other relevant time" approach seems misleading on its face. The Committee Note explains it, but we cannot expect that people will read the note. Still, it will help to retain an improved version of the reminder to think about the diversity rules. The Standing Committee was worried about forcing parties to do unnecessary work in researching diversity jurisdiction lore, but most cases are simple and will not prod the parties into research they do not need.

Discussion began by considering whether this revised formulation of subparagraph (B) would allay the Standing Committee's concerns. It is more direct than "may be relevant to determining." It clearly identifies "time" as part of the diversity

calculation, not the procedural matter of the time to make disclosure. But "the easier way" would be to delete subparagraph (B) entirely. "Advocacy would be required" to advance any likely version of subparagraph (B).

The next observation was that it is important to have a diversity disclosure rule. It is not as important to provide a reminder in rule text that the rules for determining complete diversity are not always simple. A rule shorn of subparagraph (B) will capture almost all cases. The same view was expressed by another participant. "Doing something is important. Subparagraph (B) is designed to pick up the rare and complicated cases." It should not be allowed to impede adoption of a disclosure rule that is needed because lawyers do miss the need to consider citizenships attributed to an LLC.

These initial observations were followed by the suggestion that whatever version emerges as the Committee's first choice, it will be important to present both alternatives to the Standing Committee. That is particularly so if the preferred version includes some version of subparagraph (B).

A new question was raised by asking whether the "or" between subparagraphs (A) and (B) should be "and." Disclosures should begin at the time of filing or removal. Subparagraph (B) addresses the possibility that an additional disclosure will be needed as an action progresses through intervention, other changes of parties, and the like. The style convention directs that "or" includes "and," but (B) seems likely to be always an addition, not an alternative. Other committee members supported "and." "or" may seem to send a signal that once a party has made a disclosure, the requirement is satisfied and need not be considered again. Disclosure is a continuing obligation because the rules that control subject-matter jurisdiction demand continuing inquiry. But "or" also was supported by the observation that new circumstances should not require a renewed disclosure of circumstances that have not changed since a first disclosure. For example, a plaintiff who has filed a diversity disclosure and later amends to join a new defendant should not have to file a second disclosure if its citizenships have not changed.

Concerns were expressed about the approach that would discard both subparagraphs (A) and (B). It could force more legal analysis by those who are uncertain about the rules for determining diversity jurisdiction. Retaining both subparagraphs will alert people to the nuances of subject-matter jurisdiction rules that allow no shortcuts. It is important to draft the best possible version of subparagraph (B) and then undertake to persuade the Standing Committee to accept it. Other committee members agreed that "the more detail the better," and that this "is too important an issue" to avoid spelling it out in detail. At the same time, "it is imperative to have clarity."

This strong consensus of many committee members was found to support going back to the Standing Committee with some version of subparagraph (B). However (B) comes to be drafted, it will be only an incremental change from the version that raised doubts in the Standing Committee. But the care taken in discussing and revising the proposal justify taking it back to the Standing Committee.

Further discussion focused on revising subparagraph (B). "any other time that controls the determination of jurisdiction" was questioned: it is not time but the court that determines jurisdiction. "time of the citizenship that establishes" jurisdiction was suggested as an alternative. Or perhaps "that establishes whether there is jurisdiction.

Alternatives using "relevant" were brought back to the discussion. One formulation called for disclosure of citizenships attributed to a party "whenever relevant to determining the court's jurisdiction, including the time the action is filed in or removed to federal court." Why shy away from "relevant"? This formulation also addresses the "and - or" choice. Parties tend to shy away from revealing the owners of LLCs, and this imposes a clear continuing burden.

A judge suggested that the language should key to events that affect jurisdiction. Further disclosure is required if you create an event that affects jurisdiction. This language could do that:

> * * * 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.

With brief further discussion, the Committee agreed unanimously on this version.

Presenting this version to the Standing Committee must take account of their concern with the "relevant to" version of subparagraph (B). They may have similar concerns with the new version, even though the focus on a "subsequent event" sends a clear signal that in most cases there will be no occasion to look beyond the time the action is filed in federal court or removed to it. It will be important to provide as an alternative, although without recommending it, the second-best approach that discards both subparagraphs (A) and (B).

It remains to be determined whether to report this proposal to the Standing Committee at its January meeting or to wait for its spring meeting. The choice will be made by the Committee Chair in consultation with the Standing Committee Chair.

Rule 12(a)

Rule 12(a) establishes the times for serving a responsive pleading. Paragraph 12(a)(1) begins by deferring to statutes that set different times: "Unless another time is specified by this rule or a federal statute * * *." This qualification does not appear in either of the next paragraphs, (2) and (3). It is clear, however, that there are federal statutes that set different times than paragraph (2) for some actions brought against the United States or its agencies or officers or employees sued in an official capacity. No statutes have yet been uncovered that set a different time than paragraph (3) for an action against a United States officer or employee sued in an individual capacity.

Although it might be argued that the provision in paragraph (1) that recognizes different statutory times carries over to paragraphs (2) and (3), that is not the way the rule is structured. Nor is it wise to rely on this argument. Reading Rule 12(a) in this way to achieve a sound result would pave the way for disregarding clear drafting in other rules.

It is easy to draft a correction. The provision for federal statutes could be moved into subdivision (a) so that it applies to all of paragraphs (1), (2), and (3):

(a) TIME TO SERVE A RESPONSIVE PLEADING. ~~(1)*In General.*~~ Unless another time is specified by ~~this rule or~~ a federal statute, the time for serving a responsive pleading is as follows:
(1) *In General.*
(A) a defendant must serve an answer * * *.

Discussion of this question at the April meeting came to a close balance. The present text is wrong at least as to paragraph (2). The Freedom of Information Act and Government in the Sunshine Act both establish a 30-day time to respond, not the general 60-day period set out in paragraph (2). There is no reason to supersede these statutes. It is better to make rule text as accurate as it can be made.

The question is somewhat different as to paragraph (3) because no statutes that set a different time have been found. But such statutes may exist now, or may be enacted in the future. Here too, there is no reason to supersede these statutes, nor to encounter whatever risks that might arise from the rule that a valid rule supersedes an earlier statute while a valid rule is superseded by a later statute. Including paragraph (3) in the general provision will do no harm if there is not, and never will be, an inconsistent statute. And including it is desirable in the event of any inconsistent statute.

The counter consideration is the familiar question whether it is appropriate to address every identifiable rule mishap by corrective amendment. A continuous flow of minor or exotic

amendments may seem a flood to bench and bar, and distract attention from more important amendments. This consideration conduces to proposing changes only when there is some evidence that a misadventure in rule text causes problems in the real world.

This topic was brought to the agenda by a lawyer who encountered difficulty in persuading a court clerk to issue a summons providing a 30-day response time in a Freedom of Information Act action. The clerk was ultimately persuaded. The Department of Justice said in April that it is familiar with the statutes, and honors them, but that it often asks for an extension, and particularly seeks an extension in actions that involve both FOIA claims and other claims that are not subject to a 30-day response time. From their perspective, paragraph (2) does not present a problem.

Discussion began with the observation that Rule 15(a)(3) also governs the time to respond to an amended pleading. But this does not seem to conflict with the federal statute question presented by Rule 12(a). Rule 15(a)(3) simply calls for a responsive pleading "within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." If more than 14 days remain in the time set by Rule 12(a), including its incorporation of different statutory times, Rule 15(a)(3) makes no difference. If fewer than 14 days remain, Rule 15(a)(3) extends the time.

The Department of Justice renewed the observations made at the April meeting. There is no need to fix this minor break in the rule text. There is a risk that if the change is made, a court might be misled as to its discretion to extend the time to respond to a FOIA claim in cases that combine FOIA claims with other claims that are subject to the 60-day response time. The Committee Note to an amended rule could say that the amendment merely fixes a technical problem and does not affect the court's discretion, but "we welcome the chance for a longer period in resource-constrained cases." Another committee member agreed with this view.

The contrary view was expressed. If there is a chance that this is tripping people up, why not fix it? It does seem a mistake in the rule text that deserves correction.

This view was questioned by suggesting that the problem described by the Department of Justice is a bigger one than the inconvenience described by the lawyer who brought this problem to us. It is nice to make the rules as perfect as can be, but "I don't like to create problems for the Department of Justice to fix what may be a rare problem for plaintiffs."

A proponent of amending Rule 12(a) suggested that the question is close. But the problem described by the Department of Justice does not seem real. The Department position was renewed in reply.

"Inherently, it's a prediction. We have no experience with the proposed rule." But a number of career Department lawyers are concerned. "Hybrid" cases do arise with both a shorter statutory period and the longer Rule 12(a)(2) period. This is a "predictive point."

The proposed amendment failed of adoption by an equally divided vote of 6 committee members for, and 6 against. The proposal will be carried forward for further consideration at the March meeting.

CARES Act Subcommittee Report

Judge Jordan presented the report of the CARES Act Subcommittee that was appointed to take up the invitation in § 15002(b)(6) of the CARES Act to "consider rules amendments * * * that address emergency measures that may be taken by the Federal Courts when the President declares a national emergency * * *." He began by expressing admiration and thanks for the hard, constant, and imaginative work of subcommittee members Boal, Lioi, and Sellers, and of the Administrative Office staff and the reporters. Judge Bates and Judge Campbell provided useful insights. Professor Capra was closely involved but was respectful of the subcommittee's role in working through differences with the approaches taken by the parallel subcommittees for the Appellate, Bankruptcy, and Criminal Rules Committees.

The first question is whether we need a general emergency rules provision in the Civil Rules. The CARES Act directs us to consider rules amendments, but does not say that any must be proposed.

The time frame for this work is set for all advisory committees. Draft emergency rules are to be presented to the Standing Committee in January for general and comparative discussion. The goal is to have each advisory committee propose rules drafts for publication at the spring meeting of the Standing Committee. Subcommittee work will continue during the weeks that lead to the report to the January meeting, taking account of the progress made this fall by the other advisory committees and seeking to resolve differences in common draft provisions that seem to involve more style than substance.

The argument for not proposing a general emergency rules provision is that the measures of flexibility and discretion deliberately and pervasively built into the Civil Rules have proved adequate to the challenges presented by the Covid-19 pandemic. Lawyers and courts, working together, have made use of remote means of communication to continue with effective pretrial work. Trials present a greater challenge, but the rules may well accommodate any practically workable approaches that may be adopted. It may suffice to identify a few Civil Rules provisions that present

insurmountable obstacles and address them directly without framing a more general rule. This approach, however, will depend on continuing experience with responses to pandemic circumstances and on our ability to understand the lessons presented by experience.

At its most recent meeting, the subcommittee reached a consensus of equipoise on the question whether a general emergency rule should be proposed, either along the lines of the current draft or in some other form.

Even if the conclusion is that it is better not to adopt a general emergency rule, it will remain important to craft the best general rule we can manage. Important advantages could be gained from publishing a general rule for comment next summer even with a recommendation that it not be adopted. Public comment may provide a broader base of experience that identifies problems that we have not yet considered, and also difficulties created by rules texts that seem to impede suitable responses to the problems.

Drafting a general emergency rule has proceeded through a series of stages. The first draft was very broad, looking for a declaration of emergency at a level higher than action by a single judge in a particular case, but recognizing great responsibilities for both court and parties. This approach was whittled back. The next steps presented alternatives. One version was to authorize departures from any rule, subject to a list of rules that could not be varied. The alternative version authorized departures only from a specific list of rules.

Those versions were succeeded by the draft Rule 87 in the agenda book. This draft authorizes only a small number of Emergency Rules and provides specific texts for them. An Emergency Rule would take the place of the general rule for the period covered by a declaration of a rules emergency. Only six Emergency Rules are provided, and two of them are presented in overstrike form with a suggestion that they should be considered but then dropped from the set. The three Emergency Rules for service of process begin with the full text of the present rule and add alternative means of service that are available by court order. Emergency Rule 6(b)(2) would allow the court to extend the time for making post-judgment motions, but presents difficult issues of integration with Appellate Rule 4(a)(4) that will require close work with the Appellate Rules Committee. The remaining two address “open court” provisions in Rules 43(a) and 77(b), but ongoing experience with the Covid-19 pandemic suggests that the present rule texts have not impeded courts from responding with all appropriate accommodations.

This draft was informed by general experience of committee and subcommittee members, by reports from many sources that include court opinions, and by responses to a general survey published by the Administrative Office.

The subcommittees for other advisory committees are taking different approaches. The current Appellate Rule 2 draft is essentially wide open, authorizing departure from any Appellate Rule. The current draft Criminal Rule 62 is quite different, listing the only rules that can be modified, prescribing the greatest modifications that can be permitted, and allowing lesser modifications. It is "very careful, very locked down, very specific."

The report continued with the observation that there are good reasons why different sets of rules should take different approaches to an emergency rule. Common provisions are likely to emerge, for equally good reasons. But the Appellate Rules operate in a setting that may support broad freedom to adjust practice on a nearly case-by-case basis. The Criminal Rules, on the other hand, operate in a setting and internal tradition that impose grave restraints arising from constitution, statute, received practice, and the overwhelming importance of conviction for each defendant that comes before the court. The Bankruptcy Rules involve some functions that are nearly administrative, while other functions are full-blown adversary proceedings that frequently rely on the Civil Rules.

These differences among the contexts of the different sets of rules will be an important influence in shaping the elements of uniformity and divergence in the corresponding emergency rules.

Obviously common questions ask how to define an emergency and who is responsible for declaring an emergency. In the end it may seem that some variations are desirable, but the subcommittees have worked hard to converge on common provisions.

Definitions of an emergency began with the formula in the CARES Act invitation to rulemaking. An emergency would emerge when the President declares a national emergency under the National Emergencies Act. This formula was quickly discarded. One problem is that national emergencies are declared with some frequency, and some of them endure for many years. Most of them have no connection to circumstances that may interfere with judicial functions. This definition of an emergency would create no effective constraint on the power to declare an emergency.

Another shortcoming of the national emergency approach is that it does not respond to the prospect that many emergencies may arise that severely impair court operations in a particular part of the country. Severe weather events, local epidemics, a courthouse bombing, civil unrest, disruptions of travel or electronic communications, and still other events are familiar.

Recognizing the need to adapt to local or regional emergencies might lead only to depending on emergency declarations by state or local officials or legislatures. But that course, in common with

the national emergency approach, would leave courts at the mercy of the executive or perhaps legislative branches. It is better to rely on judicial authority to address judicial needs.

Different judicial authorities have been considered. Reliance might be placed on judges acting in individual cases; a district court acting as a court or through its chief judge; a circuit court acting as a court, through its chief judge, or through a circuit council; or the Judicial Conference of the United States. Draft Rule 87 and draft Criminal Rule 62 have settled on the Judicial Conference as the sole body with authority to declare an emergency and to establish its contours. The Bankruptcy Rules draft adds other actors, and the Appellate Rules draft does not involve the Judicial Conference except to authorize it to overrule a local circuit emergency declaration.

The definition of an emergency began by speaking of a "judicial emergency." That term, however, is used in other contexts that do not resemble the kinds of emergencies that may justify departures from general rules texts. The several committees have adopted instead the "rules emergency" term.

The rules emergency concept is functional. Draft Rule 87(a) reads:

> (a) RULES EMERGENCY. The Judicial Conference of the United States may declare a rules emergency 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.

This formula was accepted from a Criminal Rule 62 draft. Criminal Rule 62 goes on to add a further element:

> and (2) no feasible alternative measures would eliminate the impairment within a reasonable time.

The Criminal Rules Subcommittee report says clearly that this element refers only to alternative measures that are in compliance with the Criminal Rules. The Civil Rules Subcommittee believes that alternatives must be considered as an inherent part of determining whether the court can perform its functions in compliance with the rules. This added emphasis does not seem necessary — the Judicial Conference can be trusted to proceed carefully and may be confusing because it seems to add something different but actually does not.

A declaration of a rules emergency must designate the court or courts affected by the emergency. This feature is common to all of the sets of rules, recognizing the prospect of local or regional or national emergencies. Rule 87(b)(2) allows a declaration to

authorize only one of the Emergency Rules specifically defined in Rule 87(c). The declaration must be limited to a stated period of no more than 90 days. It "may be renewed through additional declarations * * * for successive periods of no more than 90 days * * * ." This renewal provision departs slightly from Criminal Rule 62(b)(3)(A), which allows the Judicial Conference to "issue additional declarations if emergency conditions change or persist." This variance is an example of the style issues that should be worked out among the subcommittees before committee reports are prepared for the January Standing Committee meeting. (The provisions of Criminal Rule 62(c) appear to authorize specific actions in the discretion of the court in a specific case. At least two paragraphs in Rule 62(d) require authorization by the chief judge of the district, or if the chief judge is not available the most senior active judge of the district or the chief judge or circuit justice of the circuit. These additional gatekeepers do not fit into the structure of the current Civil Rule 87 draft, which prescribes specific Emergency Rule texts that can be implemented in any case by order of a court that is included in the declaration of emergency.)

After this introduction, the first question was whether the three Emergency Rule 4 provisions were created in response to reports of real world difficulties in serving process. And have the other subcommittees considered similar problems?

Judge Jordan responded that the Rule 4 provisions, and also the Rule 6(b)(2) provision for extending the time for post-judgment motions, did not emerge from empirical concerns. Instead they emerged from a survey of all the rules that looked for absolute requirements or limits that cannot be applied flexibly or varied as a matter of discretion. Committee member Sellers drew up a long list of possible barriers in the rules, but for now it appears that few of them cannot be managed in ways that surmount or bypass the barriers.

Professor Capra added that the Evidence Rules Committee decided early on that there is no need for an emergency provision in the Evidence Rules. Civil Rule 43(a) and the corresponding Criminal Rule allow for remote testimony. The Evidence Rules support that approach. And there are no other Evidence Rules issues. The subcommittees for the other four advisory committees began with quite different approaches, influenced by the structure, character, and traditions of the different rules sets. But they have continually moved closer together. At present, the proposed revision of Appellate Rule 2 is quite open-ended. The Bankruptcy rule focuses on the opportunity to extend the time limits for acting under the rules. The Criminal Rules draft is developed in more detail than the others, looking to such matters as the number of alternate jurors, substitution of a summons for an arrest warrant, bail hearings, and the like. "It's a very careful rule." Some of the abundant differences are matters of style that will be

resolved readily, at least for such simple matters as the rule caption.

Other differences may lie at the margin of substance and style — an example is that Criminal Rule 62(a) defines a rules emergency in the abstract, and then relies on Rule 62(b) to authorize a declaration of emergency. Civil Rule 87(a), on the other hand, combines these elements by providing that the Judicial Conference may declare a rules emergency "when" the elements of the definition are satisfied.

The subcommittees have discussed at length a provision for a "soft landing" when an emergency ends while an action begun under authority of an emergency departure from the general rule has not been completed. Civil Rule 87 may not need this provision, set out in the current draft as subdivision (d), if the only Emergency Rules that survive govern service of process. The provision may be more important if Emergency Rule 6(b)(2) is adopted in some form, addressing extension of the time for post-judgment motions and affecting the time to appeal, but the provision might be incorporated in the Emergency Rule text rather than carry forward as a separate subdivision.

The Bankruptcy Rule draft authorizes declaration of an emergency by the Judicial Conference, the chief judge of the circuit, or the chief bankruptcy judge. Whether or not the alternatives to the Judicial Conference make sense for Bankruptcy Rules, they do not seem necessary for the Civil Rules.

Discussion progressed to the question whether to propose any general emergency rule. It was noted that after considering the long list of rules that might be so inflexible as to create significant problems in a time of emergency, the subcommittee concluded that almost all seem flexible enough, particularly when combined with the sweeping provisions for pretrial orders in Rule 16. But the subcommittee surely does not have complete information about experience in practice around the country. Publishing a general rule proposal will be a good way to attract information about rules that in fact have presented worrisome problems.

This comment concluded by noting that if some version of Emergency Rule 6(b)(2) is adopted, it will be important to provide a means of protecting against the possibility that the end of the emergency might defeat both the right to prevail on the post-judgment motion and any opportunity to appeal.

The Committee was reminded that a decision to recommend against adoption of the best Rule 87 draft that can be crafted need not mean abandoning the effort to protect against the problems identified in the Emergency Rules spelled out in Rule 87(c). The Rule 4 alternatives easily could be achieved by adopting them as amendments of the corresponding present rules provisions, and doing

so on the same time table as proposed for Rule 87. This possibility may indeed be a reason for recommending against adoption of Rule 87. The post-judgment motions provision of Rule 87(c)(4) would be more difficult to achieve as a stand-alone provision so long as it does not seem wise to add some flexibility outside of emergency circumstances. A revision limited to emergency circumstances would have to provide some definition of the qualifying circumstances, and if the word "emergency" is used there would be an obvious risk of confusion with any general emergency rule provision adopted in rules other than the Civil Rules.

Publication, even with a negative recommendation, was supported by pointing out that "the situation is still evolving." Review of current experience seems to show that the Civil Rules are so flexible as to adapt well to a nationwide emergency. But it may be too early to rely on what we think we know about present experience. Much might be learned in the public comment process.

This view was supplemented by a report that one participant has sought out the experience of court clerks around the country. No problems with Rule 4 or 6(b)(2) have been reported, and the view is that the Civil Rules are working well.

Professor Capra reported that all of the other subcommittees are moving forward toward recommending publication of a general emergency rule, although that prospect is somewhat uncertain for the Appellate Rules Committee. That will likely become clear after their meeting next week.

Judge Jordan agreed that "there are excellent arguments for putting it out there." The experience and reactions of practitioners can teach us. But so far, the Civil Rules seem to be working quite well. In response to a question, he agreed that state courts may provide valuable experience as well. The subcommittee has not had time for a systematic survey of state experience, but has considered the scraps of information that have become available. Justice Lee noted that Utah has not found a need to amend their civil rules, and added that good sources of information will be the National Center for State Courts and the Conference of Chief Justices. This discussion was extended, repeating the hope that publication will provide the benefit of wider comments that may spur the committee's imagination.

Some doubt was expressed. There could be some value in publishing a general emergency rule that the Committee recommends not be adopted. But we must be sure to reassure judges and lawyers that flexibility is available under the general rules as they are. We are doing well so far.

Attention turned to the fit of Rule 87(d) with the rest of the rule. It says that a "proceeding" not authorized by rule but commenced under an emergency rule may be completed under the

emergency rule when compliance with the rule would be infeasible or work an injustice. Does service of process under any of the three Emergency Rules 4 amount to a "proceeding"? Perhaps "procedure" would be a better word. More generally, is this "soft landing" provision necessary? Other subcommittees have similar provisions, at least for the time being. But if Emergency Rule 6(b)(2) survives through Rule 87(c)(4), it may be the only rule that needs this survival provision. If so, subdivision (d) might be folded into draft Rule 87(c)(4). But additional emergency rules may be added to the list in the present draft. Subdivision (d) will remain as a separate provision for the time being.

Discussion of Emergency Rule 6(b)(2) turned to the problem of integration with Appellate Rule 4(a)(4)(A). What happens if a court acts under the emergency rule to extend the time to file a post-judgment motion? Does a motion filed under an extension qualify as a motion filed within the time allowed by Rules 50, 52, 59, or 60 for purposes of Rule 4(a)(4)(A)? It was recognized that this question must be addressed in tandem with the Appellate Rules Committee. The Appellate Rules Committee Reporter, Professor Hartnett, said that the question would be discussed at the upcoming meeting of that committee. The subcommittees will work together to ensure an appropriate integration of the rules.

A question was raised as to the fit of the three Emergency Rules that take the place of the corresponding general provisions in Rule 4 with the Bankruptcy Rules. Rule 4 applies to adversary proceedings. The tentative answer was that there should not be a problem. The Emergency rule takes the place of the general rule. It should be absorbed into bankruptcy practice, remembering that the additional means of service authorized by the Emergency Rules are available only "if ordered by the court."

The discussion of draft Rule 87 concluded with recognition that the subcommittee will continue to pursue further development in coordination with the other emergency rules subcommittees, including attempts to achieve still greater uniformity. At the same time, it was recognized that there may be advantages in presenting different approaches to the Standing Committee in January. Consideration of drafts that actually differ on some points may provide a stronger basis for deliberation than a more abstract description of drafting history and possible variations that remain worthy of consideration.

MDL Subcommittee Report

Judge Dow, chair of the MDL Subcommittee, delivered the Subcommittee Report.

Three issues remain on the subcommittee agenda: "Early vetting"; adding new provisions to expand opportunities for interlocutory appeals; and adopting explicit rules provisions for

judicial involvement in settlement, perhaps conjoined with provisions for appointing lead counsel that define lead counsel functions, responsibilities, and compensation.

Early "vetting" "Early vetting" has encompassed a variety of proposals that rest on the perception that MDL consolidations tend to attract a worrisome fraction of cases that would not be brought as stand-alone actions because there is no reasonable prospect of success. The means of addressing this concern have evolved continually in practice, largely as a result of cooperation among plaintiffs and defendants with approval and adoption by MDL courts. The means that have been adopted may indeed help to cull out cases that lack merit, but they serve other purposes and are not always used to achieve early dismissals of individual actions.

The major means of eliciting information about individual cases involved into a practice of requiring "plaintiff fact sheets." This practice was widely, almost universally, adopted in the MDLS that aggregated the greatest number of cases, particularly in mass tort actions growing out of pharmaceutical products and drugs. The form of the fact sheets was negotiated at length on a case-by-case basis. It commonly took months to settle on the form, and the form often called for a great deal of information. Defendant fact sheets evolved in parallel.

More recently, a new approach called an "initial census" has been tested. The initial census forms have tended to require less detail than plaintiff fact sheets. They may be used to manage cases by structuring initial disclosures, providing information that helps in creating a leadership structure, identifying different categories of claims, guiding first-wave discovery, and still more. This practice is evolving and can spread from the initial few MDLs that have embraced it to others as it proves successful and as MDL practitioners carry it from one proceeding to another.

Judge Rosenberg described the initial census procedure she has adopted for the Zantac MDL. The consolidated actions were transferred to her in February, 2020. The first initial census order was entered on April 2. It provides for a 2-page initial census form, to be followed by a 4 -page "census-plus" form. All of the forms are uploaded to a registry operated by a third-party provider. The forms must be filed for all filed cases, and also for claims by all clients of any attorney who applies for a leadership position even though an action has not been filed. The 2-page forms identify the category of the claims — personal injury, consumer, medical monitoring. They identify the plaintiff, the kind of product each plaintiff took, what type of physical injury is alleged. The 4-page forms expand the information to identify what drug was used when, where it was purchased, and what documentation is available to support the allegations. Defendants simultaneously provide census data. When the data provided by the defendants match with the information provided by a plaintiff in the registry, that

helps. It also helps if, for example, the plaintiff alleges purchase of a product at a time when the product was not available. There are now more than 600 filed actions, but tens of thousands more claims are in the registry. It is much easier to manage the 600 actions than it would be to manage a proceeding that attracted actual filings of tens of thousands more cases. The registry provides another attraction for plaintiffs by tolling the statute of limitations.

The initial census process, aided by Professor Jaime Dodge as special master, is working well. It has been developed with the collaboration of counsel and many agreed orders. The census information "is a pillar of managing this MDL." Information about the types of claims helped in designating a leadership team that represents different claim types and provides a balance of expertise.

Judge Dow noted that other judges as well have reported positive experiences with initial census procedures. There is a real prospect that the work of the subcommittee through years of participating in many meetings with MDL lawyer and judges has helped focus attention and to promote progress in "early vetting" practices.

Judge Rosenberg added that both sides in the Zantac MDL wanted early vetting. There has been only one discovery dispute. The initial census and registry have helped. "There is so much voluntary exchange of information."

A committee member asked whether it would be useful to attempt to draft a court rule addressing initial census practices in MDL proceedings, or whether it would be better to rely on judge training, manuals, JPML guidance, and other devices to encourage continued development? It was agreed that it is too early to make this choice. It is important that there be a robust forum for judges and practitioners to keep up with ongoing developments, with widespread sharing of information. The question whether a formal court rule would be helpful will remain on the agenda.

Interlocutory Appeals Judge Dow noted that the question whether greater opportunities for interlocutory appeals should be made available in MDL proceedings has occupied most of the subcommittee's attention for the last year. The subcommittee had heard a lot about the topic from those involved in mass tort and pharma MDLs, but not much from judges and lawyers involved in the wide variety of other MDLs. A day-long meeting to hear from those involved in these other types of MDLs was arranged by Professor Dodge and her Emory institute last June. It involved many lawyers the subcommittee had not heard from earlier, and both more MDL judges and appellate judges.

A few of the judges thought it might be helpful to do "some tinkering at the margins" because the specific criteria for discretionary interlocutory appeals under 28 U.S.C. § 1292(b) may be too narrow to meet the needs of MDL proceedings. A larger group thought there is no need to change — § 1292(b), Rule 54(b) partial final judgments, and at times mandamus provide sufficient opportunities for review. Even Rule 23(f) may help at times, although it is limited to orders that grant or deny class-action certification. Still others thought that the proposed cure is worse than the disease. Interlocutory appeals impose often lengthy delays, reduce the opportunities for coordination with parallel state litigation as state courts become impatient with the delay, and confuse continuing proceedings in the MDL court.

After considering these arguments, the subcommittee decided to forgo any effort to expand interlocutory appeal opportunities by an Enabling Act rule. Subcommittee members had disparate views at the outset, but converged on this outcome. If this recommendation is accepted, the proponents of expanded appeal opportunities will be wise to attempt maximum use of current appeal opportunities. If those efforts establish an empirical basis for new rules, the topic can be taken up again.

Discussion concluded with the observation of a subcommittee member that hard work had been done. "It was a comprehensive lot of work. We looked at all the issues."

Supervising Leadership and Reviewing Settlement The third subject that remains at the front of the subcommittee agenda is framed by a very preliminary sketch of a rule that would spell out the authority routinely exercised by MDL courts in structuring leadership responsibilities and compensation, and also address the authority exercised by some MDL courts in reviewing and commenting on settlement terms that are negotiated by lead counsel to be offered to plaintiffs who are not their clients. The subcommittee is only beginning to consider this topic. The draft rule was created as a means of identifying issues and focusing discussion. There is no sense whatever whether study of these issues will lead to any proposal to recommend a new rule.

The extrinsic challenges to this undertaking are formidable. Almost no one among experienced MDL practitioners wants it, either those who typically represent plaintiffs or those who typically represent defendants. Most experienced MDL judges do not want it, and fear that any rule would impede the desirable evolution of practice that has emerged from continuing efforts of counsel, courts, and the JPML. The only support comes from a few MDL judges and many academics who believe there is a serious need to provide protections for individuals caught up in MDL proceedings that as a practical matter function in much the same ways as class actions without providing the protections that Rule 23 provides for class members. On their view, the theoretical distinction between a class

judgment or settlement that binds all class members and MDL proceedings that require individual disposition or settlement of each individual action is a distinction without practical meaning.

Equally formidable intrinsic challenges face any attempt to draft a useful rule. Rule 23 provides a model for some of the questions, but by no means all. Current practices reveal a number of issues of professional responsibility that are in large part confided to state law and that require sensitive judgment. And apart from that, there is a risk of improper interference with attorney-client relationships. The task would be to frame a rule that does not stifle desirable practices but instead is authorizing and liberating. The subcommittee has only begun to consider the challenges.

The subcommittee is considering the possibility that, as with its past work, important information and insights can be gained from arranging another conference of judges and lawyers experienced with these issues.

A committee member agreed that it will be desirable to gather more information, and noted that "it is gentle to say that some attorney-client relationships in MDLs are more real than others. Some who nominally have a lawyer are not getting thoughtful advice."

The discussion concluded with the subcommittee's agreement that it should arrange to gather more information. All committee members should help in identifying people who can provide a wide range of views and experience at a meeting.

Appeal Finality After Consolidation Subcommittee Report

Judge Rosenberg delivered the report of the Joint Civil-Appellate Subcommittee on Appeal Finality after Consolidation.

The subcommittee was formed to consider the potential impact of the appeal finality ruling in *Hall v. Hall*, 138 S. Ct. 1118 (2018). The Court ruled that when originally independent actions are consolidated under Rule 42(a), complete disposition of all claims among all parties to what began as an independent action is a final judgment for purposes of appeal. The appeal must be timely taken or the opportunity for review is lost. This rule had been followed by some circuits, but a large majority of circuits followed one or another of three different approaches. The Court relied on a consolidation statute enacted in 1813 that, long before Rule 42 was adopted in 1938, established this rule as part of the definition of what "consolidation" is. At the same time, the Court noted that the determination whether this definition of finality causes problems is better made in the Rules Enabling Act process that in § 2072(c) establishes authority to adopt rules that define when a ruling is final for the purposes of appeal under § 1291.

The subcommittee has engaged the Federal Judicial Center and Dr. Emery Lee to engage in docket research to identify the nature of current Rule 42 consolidation practices and to look for related appeal finality issues. The search included all civil actions filed in 2015, 2016, and 2017. Not all of those actions have concluded, but those years produced approximately equal numbers of actions that terminated before *Hall v. Hall* was decided and actions terminated after it was decided. That could provide a good basis for comparing the effects of the new rule with the effects of the prior rules.

Excluding MDL consolidations, the search found 20,730 originally independent actions that became consolidated into 5,953 "lead" actions. A sample of 400 lead actions was prepared that included 385 that were suitable for study. Forty-eight percent of the lead actions were resolved by settlement, and another nineteen percent were voluntarily dismissed. The dispositions of those that remained included nine in which an originally independent action was finally concluded before final disposition of the whole consolidated action. Appeals were taken in six of these. Study of these cases did not reveal any appeal problems arising from the new finality rule.

The subcommittee met in August. It recognized that the absence of any identified appeal problems is not definitive. As a simple example, a party may have wished to appeal only to discover that appeal time had lapsed before the effects of the new rule were recognized. But it would be costly to expand the sample drawn from the 2015-2017 period, and still more costly to launch a study of later years.

The subcommittee has launched informal inquiries to see what can be learned from clerks' offices in a few circuits with representatives in the committee.

The rule in *Hall v. Hall* is clear. It should be easy to follow, at least when it becomes clear in district court proceedings that all elements of an originally independent action have been resolved before final resolution of other parts of the consolidation. But one difficulty may be that lawyers who have no regular appellate practice may not know of it, or fail to remember it in time. Other problems may be quite independent of appeal time problems, and almost impossible to observe. The need to take an immediate appeal may deprive the appellant of allies on appeal as to issues that affect other parties whose cases have not been completely resolved, interfere with efficient management of the parts that remain in the district court, and face the court of appeals with the prospect of two or even more appeals in the same case.

The subcommittee will continue its work, recognizing that there is no immediate need to consider rules changes. If changes

are undertaken, the most likely approach will consider both Rule 42(a) and Rule 54(b). It will work to ensure that the liaison from the Bankruptcy Rules Committee is kept in touch with this work, given the impact any rules amendments will have on bankruptcy practice.

Information Items

Judge Dow noted that the meeting was switching to consider information items. The information items include some familiar topics that might have advanced further had it not been for pandemic circumstances in general and the need to devote special efforts to the CARES Act emergency rule work.

Rule 4(c)(3)

Rule 4(c)(3) may be ambiguous on the question whether the plaintiff in an in forma pauperis or seaman's action must move for an order for service of process by the marshal or whether the court most make the order without a motion. This topic was added to the agenda on a suggestion in the January, 2019 Standing Committee meeting.

It is easy to draft around the ambiguity. The rule could clearly adopt one of at least three options: The plaintiff must move for an order; the court must make the order without a motion; or there is no need for an order — the marshal must make service whenever i.f.p. status is accorded or a seaman is a plaintiff.

Choice among the alternatives is not so easy. Making service is a burden on the Marshals Service, particularly in districts that include large sparsely populated areas. When counsel is appointed, it appears that counsel frequently prefer to make service. Efforts have been undertaken to learn more from the Marshals Service, but the current pandemic has impeded those efforts. Better information may yet be available

One additional reason to carry this subject forward is the work of the CARES Act Subcommittee. One of the possibilities being studied by the subcommittee is a general revision of Rule 4 that would expand opportunities to make service by mail or commercial carrier. An amended rule could be drafted in a way that authorizes electronic service in circumstances that include sufficient assurances of actual receipt. If such rules come to be adopted, it may be possible for service to be made as a routine function of the clerk's office, acting under the authority of § 1915(d).

Judge Dow noted that the Northern District of Illinois has an informal arrangement with the United States Attorney to accept service in certain i.f.p. cases.

This topic will be carried forward.

Rule 17(d)

An outside proposal suggested that Rule 17(d) be amended to require using the official title rather than the name of a public official who sues, or is sued, in an official capacity:

> A public officer who sues or is sued in an official capacity ~~may~~ must be designated by official title rather than by name, but the court may order that the officer's name be added.

Two primary reasons were offered to support this proposal. The first is that it will avoid the need for an automatic substitution of the successor in office when the originally named officer leaves the office. The second is that retaining a single caption will make it easier to track the progress of a case by name without having to adjust for what may be a long chain of successive officers.

This proposal was discussed at the April meeting, leaving the matter uncertain. The advantages seem worthy. But there are potential disadvantages.

One range of difficulties arises from the uncertainty as to just when an "official title" represents an office that can be sued independently of the incumbent. Rule 17(d) applies to plaintiff and defendant officers, whether federal, state, or local. Many of them have titles. Whether the title represents something more than an adjective for the job may be uncertain. An official might have the capacity to claim benefits for a public entity, or to take remedial action when ordered by the court, but not have a status that carries over to a successor. Allowing a plaintiff to choose between official title and name may avoid complicated disputes. In addition, special problems arise when a public officer is sued as a substitute for suing a state under the fiction of *Ex parte Young* that the action is not one against the state. The Committee Note to the 1961 amendments of Rule 25 suggests a confident view that these problems are not significant, but it may be better to avoid the arguments that might be made when suit is effectively brought against an office described by an officer's title.

The earlier discussion suggested that few practical problems arise from automatic substitution under Rule 25. The process is usually seamless. If so, there is little reason to revise a practice that has endured for many years.

Discussion began with comments for the Department of Justice opposing the proposal. "The real world is more complicated than a job title." Consider a range in one familiar setting: there may be an Attorney General who has been confirmed in office by the Senate. Or there may be an Acting Attorney General, also officially approved in that post. Or there may be inferior officials who perform the duties of those offices but are not entitled to be

called “acting.” “There is no off-the-shelf alternative.”

A different suggestion was that substituting “must” may confuse unsophisticated litigants, particularly pro se plaintiffs, who believe that the rule not only describes naming practices but also requires the plaintiff to sue a defendant that the plaintiff otherwise would not choose to sue.

The question was put: do members of the committee believe that further efforts should be made to gather more information? And where might we look for it?

The answer was that there is little reason to look further. This topic will be removed from the agenda.

Rule 5(d)(3)(B)

Rule 5(d) was amended in 2018 to govern electronic filing. It distinguishes between parties that are represented by an attorney and unrepresented parties. The prospect that unrepresented parties should have reasonably free access to electronic filing was discussed at some length. It was recognized that when done properly, electronic filing is a benefit to the party that files, to all other parties, and to the court. But the committee — and other advisory committees that worked on parallel proposals at the same time — was concerned that unsophisticated pro se filers could create significant problems. The outcome was to allow electronic filing only if allowed by court order or by local rule.

The Covid-19 pandemic created many circumstances that made physical filing still more difficult. The problems included the need to risk exposure to the virus in making a filing. Some courts responded by expanding the opportunities for electronic filing. The question is whether this experience provides reasons to reconsider Rule 5(d)(3).

Susan Soong surveyed the district court clerks within the 9th Circuit to gather their experiences. The common element was the belief that Rule 5(d)(3) is flexible enough to enable a district to establish the practices that best fit its circumstances. The Northern District of California has adopted a local rule that presumes electronic filing is permissible. Other courts rely instead on e-mail filing, a process that requires more work in the clerk’s office and lacks the safeguards that protect direct electronic filing. In all, it seems desirable to take more time to gather information on experience around the country.

The Committee agreed to carry this topic forward on the agenda.

In Forma Pauperis Disclosures

Last October the Committee considered a lengthy set of proposals to establish uniform standards for in forma pauperis status and adopt other new measures. One part of the proposals challenged on several fronts the information required by common i.f.p. application forms, including the forms offered as models by the Administrative Office. The Committee concluded that these proposals should be removed from the agenda, as matters better studied in the first instance by the Administrative Office forms committee and perhaps the Committee on Court Administration and Case Management. The only qualification was that the Committee should continue to follow deliberations in the Appellate Rules Committee. Appellate Rules Form 4 calls for extensive disclosures and is being studied by the Appellate Rules Committee.

The topic has returned with a direct challenge to the many items of information that Appellate Form 4 requires be disclosed as to a party's spouse. The party must disclose such items as a spouse's income from diverse sources, gifts, alimony, child support, public assistance, and still others; the spouse's employment history; the spouse's cash and money in bank accounts or in "any other financial institution"; the spouse's other assets; and persons who owe money to the spouse and how much. The challenge asserts that requiring these disclosures violates the constitutional rights of the spouse and also the party.

No action is called for now. The topic will carry forward to consider the deliberations of the Appellate Rules Committee.

Rule 6(a)(4)(A): End of the Last Day

The several committees have a subcommittee that is studying the provisions that, like Rule 6(a)(4)(A), set the end of the last day for electronic filing "at midnight in the court's time zone."

The project was inspired by court rules in Delaware and in the District of Delaware that set earlier times. One possibility would be to set the time for electronic filing at the close of the clerk's physical office.

Further work by the subcommittee is on hold pending completion of an elaborate study undertaken by the Federal Judicial Center to learn a great deal about actual filing patterns. Among the questions are the frequency of last-day electronic filings after regular office hours, whether differences can be identified among the types of actions and firms that file after regular office hours, and what practices have developed with "drop boxes" outside clerks' offices. Attorneys' experiences and evaluations also are being sought.

Subcommittee work is expected to resume when the FJC provides enough information to support further deliberations.

Rule 9(b): Pleading Conditions of Mind

This topic came to the agenda as a suggestion by Dean Spencer, a Committee member, based on a law review article he wrote that proposes amending Rule 9(b)'s second sentence: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The amendment would change this to read: "may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred."

Dean Spencer provided an overview of the article, A. Benjamin Spencer, *Pleading Conditions of the Mind under Rule 9(b): Repairing the Damage Wrought by Iqbal*, 41 Cardozo L. Rev. 2015 (2020). As the title suggests, the article addresses the interpretation of Rule 9(b) adopted in Ashcroft v. Iqbal, 556 U.S. 662, 686-687 (2009). The plaintiff alleged discriminatory intent in placing him in administrative maximum security confinement, relying on the provision that intent can be alleged generally. The Court ruled that a simple allegation of discriminatory intent is a mere conclusion that fails under the pleading standards established by the decision for Rule 8(a)(2). "Generally" is used in Rule 9(b) only to distinguish allegations of intent from the first sentence: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

The Court's interpretation seems to defy the ordinary meaning of generally. It "is not defensible in language or history." But lower courts are implementing the Court's interpretation, many of them "with zeal." A plaintiff must allege facts from which malice, intent, knowledge, or another condition of mind can be inferred. The effect places undesirable obstacles in the way of many plaintiffs, who cannot plead sufficient facts without access to discovery.

The Court's interpretation also ignores the meaning described by the 1938 Committee Note. The Committee Note invokes a British statute. The statute in its own terms and in its consistent interpretation has allowed a simple allegation of intent or the like as a fact. The proposed revision of Rule 9(b) draws substantially from the language of the British statute.

Brief comments followed. The *Iqbal* standard has been found helpful in bankruptcy practice, which involves many attempts to spin nonpayment claims into fraud claims to avoid discharge.

Skepticism was expressed about the proposed language on the ground that it seems to fall below the general *Twombly-Iqbal* pleading standard. Perhaps new language should be found that establishes an "in-between" standard.

This item was added to the agenda to prepare the way for discussion and possible action at the spring meeting. The Committee agreed that it should be carried forward for close study.

Rule 26(b)(5)(A): Privilege Logs

Two outside suggestions, 20-CV-R, and 20-CV-DD which draws on the first, describe practical difficulties in compiling privilege logs and suggest that amendments are in order. The vast and continually growing expansion of electronic discovery has generated pressures that add great expense while yielding unsatisfactory logs that in turn generate unnecessary litigation.

Professor Marcus presented the topic. Rule 26(b)(5)(A) was adopted in 1993 to address the problem of over-reliance on general claims of privilege that did not even inform other parties whether anything was actually being withheld from discovery. The topic was considered in 2008, without finding any way to improve the rule text.

The central question is whether it is possible to do something that is more helpful than the present rule? No one wants to go back to practice as it was before 1993. Leading judges have observed that privilege logs are expensive but are largely worthless. The constant laments about cost, however, may be overblown. A party responding to a discovery request must search all the information that is responsive and relevant. Then the information must be screened if anything is to be withheld as privileged or protected as work product. How much extra does it cost to compile a log of the items that have been determined to be privileged or protected?

Another element bears on the question whether an amendment should be proposed. As with so many other discovery issues, lawyers generally work out the problems. That may work better than anything that could be captured in rule text.

In short, three questions should be addressed: How big is the problem? Are people in fact working out the problems that do arise? Even if the problems are worked out, is there something to be learned by studying the process that can be captured in new rule text that reduces the number of problems and eases the way to resolving the problems that remain?

A judge started the conversation by observing that he does not see much of these problems, but important information is likely to be better known to litigators and magistrate judges.

A committee member said that privilege logs are a huge practical problem. With electronic discovery there are privilege logs with millions of lines. We may be able to do something that helps.

Another committee member agreed that this is a hot topic. Privilege disputes are a bane for plaintiffs, defendants, and judges. Back in 2009 there was a sudden enthusiasm for logging documents by categories, but the experiment failed in practice. More information was needed to evaluate the claims of privilege or protection than could be gleaned from categorical descriptions. "Where is this a problem? Where not?" Electronic discovery may facilitate review, but it is necessary to know what has been withheld in order to challenge the assertion of privilege or other protection. Thousands of log pages may reveal nothing. Courts do not want to do in camera reviews.

Two more member lawyers agreed that there are many concerns with privilege logs. Further study is indicated.

A judge said that a lot of time is spent with privilege logs. Some are useful. Some are not. They are time consuming. The question should be studied further.

Judge Dow closed the discussion by agreeing that further study will be done, and by thanking Lawyers for Civil Justice and Jonathan Redgrave for raising these matters for attention.

Rule 45: Nationwide Subpoenas

This question arises from federal statutes that authorize nationwide service of subpoenas. Among the statutes, it seems likely that more actions arise under the False Claims Act than any of the others.

Nationwide service seems designed to include nationwide compliance. A majority of the decisions agree. The False Claims Act provision was added in 1978 on a recommendation by the Department of Justice. The problem described by the Department was that a False Claims Act action often depends on the testimony of many witnesses located all around the country, outside the state where the court is located. They need to be brought to the trial.

The question is whether the 2013 amendments of Rule 45 inadvertently created an uncertainty as to enforcing these nationwide statutory subpoenas. One feature of the amendments was to eliminate the "3-ring circus" that required issuance of a discovery or trial subpoena from the court where the witness is to be served, even though the action is pending in a different federal court. Rule 45 now provides nationwide service of subpoenas issued by the court where the action is pending. The problem, however, arises from the provisions of Rule 45(c) that seem to limit the place of compliance far short of statutory nationwide compliance provisions. These provisions were carried forward from the earlier rule, with modest changes. Neither the former rule nor the current rule address compliance with statutory nationwide subpoenas.

There was no intent to supersede the statutes. Before 2013, former Rule 45(b)(2)(D) authorized service of a subpoena "at any place * * * that the court authorizes on motion and for good cause, if a federal statute so provides." It addressed only service, not the place for compliance. It was omitted because Rule 45(b)(2) now provides that "[a] subpoena may be served at any place within the United States." The new rule, indeed, does not carry forward the former provision that seemed to limit statutory authority by requiring a motion and good cause.

The question is whether Rule 45(c) should be amended to clarify a question that has never been directly addressed by the rule. No one has suggested that Rule 45(c) should limit the reach of statutes that provide for nationwide compliance. Need that be stated in explicit new rule text?

The Department of Justice stated that no problems have been encountered in False Claims Act cases, and advised that there is no need to amend Rule 45.

This item was removed from the agenda.

Sealing Court Records

Professor Marcus introduced 20-CV-T, a proposal by Professor Eugene Volokh for a new Rule 5.3 to govern filing documents under seal. This proposal is joined by the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation. The draft rule that accompanies the proposal begins with a presumption that all documents filed in a case shall be open to the public. It adds "an especially strong presumption" as to several categories of filings, including those "that are relevant or material to judicial decisionmaking or prospective judicial decision1making."

The concern that underlies this proposal is that too many documents are sealed in federal courts, and that initially justified seals are maintained for too long after the reasons for sealing have vanished.

The proposal recognizes that all federal courts understand the common-law and First Amendment constraints that limit sealing practices. It notes that a large majority of federal courts have local district rules that address sealing. But it urges that mistakes are made, even with agreement on general principles.

One effect of a national rule would be to jeopardize all parts of current local rules that are not consistent with, or that duplicate, the national rule.

The proposed rule would allow any member of the public to move to unseal at any time. It provides that all sealed documents will be deemed unsealed 60 days after final disposition of a case,

unless the seal is renewed. A motion to renew must be filed 30 days before the expected unsealing date. Several other demanding requirements are included. One requirement is that the court not rule on a motion to seal until at least 7 days after the motion is posted on the court's website "or on a centralized website maintained by several courts."

The question is whether this topic should be retained on the agenda for further work. The FJC did a detailed study of sealed dockets — a matter distinct from, but related to sealed documents — in 2007. The only problem it found was frequent failure to unseal warrants after the need for protection expired.

The first comment was that sealing comes up with actions to enforce arbitration awards. Confidentiality is one of the key reasons for resorting to arbitration. A general rule addressing sealing could have a real and undesirable impact on arbitration practices.

Another member noted that the 2007 FJC study resulted in a booklet on sealed cases. That is a different problem from sealed documents within a case. One phenomenon is that discovery documents commonly are not filed when produced, but are filed later. If they were governed by a confidentiality order before filing,should there be a presumption that the protection carries over after filing? The District of Minnesota has a local rule. The rule works, but involves a lot of effort. The proposed rule "would drive a lot of parties out of court." It is useful to work through these problems at the district court level. And it should be remembered that often a document is filed by a party that does not have an interest in confidentiality, posing problems for another party or nonparty that does have an interest.

Another judge supported the proposal. "What we do is important to many people. We should be as transparent as possible." The public should know who the parties to an action are. It would be useful to explore a rule establishing a presumption of openness.

The Department of Justice understands the open government aspects of sealing. But account must be taken of the False Claims Act, which directs that a qui tam action be filed under seal. Any rule must be drafted to take statutory issues into account.

These problems arise as well at the appellate level. There are particular problems in complex cases where all parties share an interest in confidentiality. There may be difficulties, however, with "shifting burdens around."

The Appellate Rules Committee studied sealing a few years ago. It found considerable differences among the circuits. The Seventh Circuit has a strong policy of openness. Other circuits do not. And many circuits have strong views about their own approaches. In the

end the Appellate Rules Committee decided that its Chair, Judge Sutton, should write a letter to the chief circuit judges describing three categories of approaches. Several circuits treat materials that were sealed below as presumptively sealed on appeal. The Seventh Circuit applies an opposite presumption, unsealing all materials in the appellate record unless a party requests omission of the material from the record as not germane to the appeal or moves the court of appeals to seal. The D.C. Circuit and the Federal Circuit require the parties to jointly identify parts of the record that need not be sealed on appeal, and to present that agreement to the court below.

Discussion concluded on the question whether there are divergences in district court practice that should be addressed by a new Civil Rule? Some help may be found in studying local district rules. Perhaps the Rules Law Clerk can be enlisted in this task.

Rule 15(a)(1)(B)

Rule 15(a)(1)(B) provides an illustration of a drafting mishap that is easily fixed. The question whether to undertake the fix divides into two parts: How much real-world trouble is likely to be generated by the mishap? And what should be the threshold for adding yet another amendment to the steady flow of amendments that compete for the attention of bench and bar?

Rule 15(a)(1):

> (1) *Amending as a Matter of Course.* 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.

The culprit is “within.” It works well for (A) — the 21-day period begins with service of the pleading. But taken literally, it creates an odd gap that opens the period, closes it, and then reopens it. An amendment within 21 days after serving a pleading to which a responsive pleading is required is allowed by (A). But (B) starts a new period of 21 days after service of a responsive pleading or one of the enumerated Rule 12 motions. Service of the responsive pleading or motion may be made after 21 days from service of the original pleading, whether as a matter of laxity, party agreement, order, or a 60- or even 90-day period set by Rule 12(a). Counting 21 days from service of the responsive pleading or motion begins on service; anything before that is not “within” 21 days “after” service. The right to amend once as a matter of course, having expired, is revived. But in between, literal reading of the rule would require leave of court under Rule 15(a)(2).

The result mandated by literal reading makes no sense. The right to amend once as a matter of course should begin with serving the pleading and carry through uninterrupted until 21 days after service of the responsive pleading or Rule 12 motion. This reading makes so much sense that it must be asked whether anyone could be misled, unless it be for the purpose of pointless motion practice.

Alas, it appears that several courts have been forced to struggle with this question. How many litigants have wrestled with it, even if only to come to the inevitably correct conclusion, can only be guessed.

The cure is simple. "no later than" can be substituted for "within." That leaves no doubt.

The Committee agreed that the proposed amendment should be advanced with a recommendation to publish when the proposal can be added to a package that includes other proposals. It is not so urgent as to be published alone without any companion proposals.

Rule 72(b)(1)

Rule 72(b)(1) provides that a magistrate judge must enter a recommended disposition of a pretrial matter covered by the rule, and that "[t]he clerk must promptly mail a copy to each party."

Mailing a copy is inefficient. Rule 77(d)(1) provides that immediately after entering an order or judgment, "the clerk must serve notice of the entry, as provided by Rule 5(b), on each party * * *." Criminal Rule 59(b)(1), which addresses a magistrate judge's recommendation for disposing of dispositive matters, is similar, directing the clerk to serve copies on all parties.

Rule 72(b)(1) somehow was overlooked when Rule 77(d)(1) was revised. This is another illustration of a rule that can readily be improved.

The Committee approved a proposal to amend Rule 72(b)(1), to be recommended for publication when it can be added to a package that includes other proposals. The amended rule would read:

> * * * The clerk must immediately serve a copy on each party as provided in Rule 5(b).

Mandatory Initial Discovery Pilot Projects

The mandatory initial discovery pilot projects in the District of Arizona and the Northern District of Illinois stopped assigning new cases to the pilot in May and June.

Dr. Lee provided a description of progress in the ongoing FJC project to evaluate the projects.

About 20% of the pilot project cases remain pending. The FJC will continue to track them.

The FJC surveys attorneys in pilot project cases after their cases conclude. The response rate in the most recent survey, which was completed during the Covid-19 pandemic, came gratifyingly close to the response rate in the last survey completed before the pandemic.

The preliminary results of the FJC work “are tricky, so do not make too much of them.”

There can be disputes about the initial discovery disclosures. One way to identify them is by looking to the Rule 26(f) reports. “We aren’t finding many.” Other matters are described in the letter in the agenda materials.

Judge Dow expressed pleasure that the Northern District of Illinois had participated in the project, but thought it wise to defer any comments until the FJC provides a final report.

The next meeting will be held, in person at a place yet to be determined, or by an online platform, during the week of March 22-26 next year.

Respectfully submitted

Edward H. Cooper
Reporter

Meeting of the Advisory Committee on Civil Rules
October 16, 2020

ATTENDEES & OBSERVERS

1. Committee Members and Invited Participants

	Name	Title
1.	Robert M. Dow, Jr.	Judge, Chair
2.	Edward H. Cooper	Professor, Reporter
3.	Richard L. Marcus	Professor, Associate Reporter
4.	Jennifer C. Boal	Judge, Member
5.	Jeffrey B. Clark	DOJ ex officio representative
6.	Joshua E. Gardner	DOJ alternative representative
7.	Joan N. Ericksen	Judge, Member
8.	Kent A. Jordan	Judge, Member
9.	Thomas R. Lee	Judge, Member
10.	Sara Lioi	Judge, Member
11.	Brian Morris	Judge, Member
12.	Robin L. Rosenberg	Judge, Member
13.	Virginia A. Seitz	Attorney, Member
14.	Joseph M. Sellers	Attorney, Member
15.	Dean A. Benjamin Spencer	Member
16.	Ariana J. Tadler	Attorney, Member
17.	Helen E. Witt	Attorney, Member
18.	A. Benjamin Goldgar	Judge, Bankruptcy Committee Liaison
19.	Peter D. Keisler	Attorney, Standing Committee Liaison
20.	Susan Y. Soong	Clerk Representative
21.	John D. Bates	Judge, Standing Committee Chair
22.	Catherine T. Struve	Professor, Standing Committee Reporter
23.	Daniel R. Coquillette	Professor, Standing Committee Consultant
24.	Daniel J. Capra	Professor, Liaison to the CARES Act Subcommittees
25.	John S. Cooke	Director, FJC
26.	Emery G. Lee	Senior Research Associate, FJC
27.	Jason Cantone	Senior Research Associate, FJC
28.	Jerome Kalina	Staff Attorney, Judicial Panel on Multidistrict Litigation
29.	David Godbey	Judge, Incoming Committee Member (Oct 2020)
30.	David Burman	Attorney, Incoming Committee Member (Jan 2021)
31.	Rebecca Womeldorf	Chief Counsel, AO-RCS

32.	Julie M. Wilson	Counsel, AO-RCS
33.	Bridget M. Healy	Counsel, AO-RCS
34.	Kevin Creeny	Rules Law Clerk, AO-RCS
35.	Brittany Bunting	Administrative Analyst, AO-RCS
36.	Kenneth Wannamaker	Technical Support Staff, AO-DTS

2. Members of Public Joining via MS Teams

	Name	Organization / Affiliation	Display Name	Alt. Telephone Number
1.	John Hawkinson	Freelance Journalist	**John Hawkinson**	
2.	Stacy Cloyd	Director of Policy and Administrative Advocacy, NOSSCR	**Stacy Cloyd**	
3.	Karen Escalante	Assistant Professor, California State University	**Karen Escalante**	
4.	Susan Steinman	Senior Director of Policy & Senior Counsel American Association for Justice	**Susan Steinman**	
5.	Alex Dahl		**Alex Dahl**	
6.	Jordan Singer	Professor, New England Law	**Jordan Singer**	
7.	Robert L. Levy	Executive Counsel Legal Policy & Administration, Exxon Mobil Corporation	**Robert Levy**	
8.	William T. Hangley	American Bar Association, Litigation Section	**William Hangley**	
9.	Amy Brogioli	Associate General Counsel American Association for Justice	**Amy Brogioli**	
10.	Alexandra (Alex) Moss	Electronic Frontier Foundation	**Alex Moss**	
11.	Jonathan Redgrave	Managing Partner, Redgrave LLP	**Jonathan Redgrave**	
12.	Matt Robinson	Subcommittee on Courts, Intellectual Property, and the Internet Committee on the Judiciary U.S. House of Representatives	**Matt Robinson**	
13.	Susan Jensen	Attorney Advisor, OLA	**Susan Jensen**	
14.	Joseph D. Garrison	Liaison from the National Employment Lawyers Association	**Joseph Garrison**	
15.	Caitlin Gullickson	Managing Director, CLS Strategies	**Caitlin Gullickson**	
16.	Sai	Pro se litigant	**Sai**	
17.	Jakub Madej	Member of the public	**Jakub Madej**	
18.	Bob Chlopak	CLS Strategies	**Bob Chlopak**	

19.	Holly Barker	Legal Reporter, Bloomberg Law	**Holly Barker**	
20.	Benjamin Robinson	Lawyers for Civil Justice	**Ben Robinson**	

3. Members of Public Joining by Phone

	Name	Organization / Affiliation	Telephone Number
1.	Jerome Scanlan	Asst. General Counsel EEOC	
2.	Fred Buck	American College of Trial Lawyers Federal Civil Procedure Committee	
3.	Julia Sutherland	Senior Advisor, CLS Strategies	
4.	Joe Cecil	Retired FJC, fellow at Berkeley Law	