MINUTES

CIVIL RULES ADVISORY COMMITTEE
MARCH 29, 2022

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

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

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

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

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

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

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

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

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

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

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

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

Legislative Update

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

October 2021 Minutes

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

Rule 87

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 12(a)(4)(A)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 15(a)(1)

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

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

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

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

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

Rule 72(b)(1)

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

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

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

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

Rule 6(a)(6)(A)

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

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

Rule 9(b) Subcommittee Report

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

The proposal would amend the second sentence:

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

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

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

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

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

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

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

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

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

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

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

Judge Lioi thanked the Subcommittee for its work.

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

Multidistrict Litigation Subcommittee Report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Subcommittee will carry on its work.

Discovery Subcommittee Report

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

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

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

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

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

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

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

Joint Subcommittee on Appeal Finality After Consolidation Report

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

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

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

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

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

Defining the End of the Last Day for e-Filing

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

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

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

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

Rules 38, 39, 81(c)

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

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

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

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

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

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

Rule 41(a)(1)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 55

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

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

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

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

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

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

Rule 63

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

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

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

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

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

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

Amicus Curiae Briefs

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

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

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

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

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

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

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

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

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

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

In Forma Pauperis Status

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

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

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

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

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

Rule 4

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

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

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

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

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

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

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

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

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

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

Pro se e-Filing

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

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

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

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

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

Dismissal of Unfounded Actions

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

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

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

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

This proposal was removed from the agenda without dissent.

Rule 7.1

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

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

Rule 73(b)(1)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Actual Knowledge, not Service

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

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

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

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

Set Time to Decide

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

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

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

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

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

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

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

Mandatory Initial Discovery Pilots

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

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

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

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

Respectfully submitted,

Edward H. Cooper
Reporter