Minutes

Civil Rules Advisory Committee
October 5, 2021

The Civil Rules Advisory Committee met by Teams teleconference on October 5, 2021. 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; Hon. Brian M. Boynton; David J. Burman, Esq.; Judge David C. Godbey; Justice Thomas R. Lee; Judge Sara Lioi; 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; Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq., represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. Susan Soong, Esq., participated as Clerk Representative. The Department of Justice was further represented by Joshua E. Gardner, Esq. Julie Wilson, Esq., S. Scott Myers, Esq., Bridget M. Healy, Esq., and Burton DeWitt, Esq., represented the Administrative Office. John S. Cooke, Director, Dr. Emery G. Lee, Dr. Tim Reagan, and Jason Cantone, Esq., represented the Federal Judicial Center.

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

Judge Dow opened the meeting with messages of thanks and welcome. He expressed regret that it had not proved wise to meet in person and the hope that the March meeting will be in person. "Technology has saved us. We owe special thanks to Brittany Bunting for keeping the trains running and on schedule."

Judge Dow welcomed two new members. Judge Cathy Bissoon sits on the Western District of Pennsylvania in Pittsburgh. She is a law school classmate of Judge Dow -- the class is "surely overrepresented on the Committee." Judge David Proctor sits on the Northern District of Alabama in Birmingham. Judge Proctor has participated in many of the Committee's MDL activities, both as an experienced MDL judge and as a member of the Judicial Panel on Multidistrict Litigation.

Burton DeWitt is the new Rules Law Clerk. He has already engaged in e-mail exchanges with the reporters. "The Rules Law Clerks are a gift to all committees."

Judge Jordan is unable to attend today's meeting because he is President of the American Inns of Court and must preside over their meeting in London. He has been a tireless chair for the CARES Act Subcommittee, and will have more work in that role as comments come in on the draft emergency rule, Rule 87, that was published last

August.

Judge Dow further noted the long list of observers. "Their interest is appreciated." They should remember that they also can participate by commenting on published proposals and by sending in suggestions. The representatives from Capitol Hill were particularly welcomed.

Judge Dow reported on the Standing Committee meeting last June. All advisory committees other than the Evidence Rules Committee recommended publication of emergency rules. Hard work by Reporters Struve and Capra produced a high level of uniformity among the proposals, with only a few departures at specific points. Civil Rule 87 was approved for publication. But it should be remembered that in recommending publication this Committee reserved the question whether it will be best to proceed toward adoption of Rule 87, instead to recommend amendments of Rules 4 and 6, or to abandon the proposal. The comments on the published proposal will provide helpful guidance. The Supplemental Rules for Social Security cases were given final approval. If they proceed through the remaining stages of the process smoothly, they will take effect on December 1, 2022. Discussion of the recommendation to adopt proposed Rule 12(a)(4) as published found a division of views similar to the divisions expressed in this Committee at the April meeting. The proposal was essentially remanded for further consideration, and will be considered today.

The Standing Committee Report to the Judicial Conference essentially mirrors the same points. It reflects the approval at the January Standing Committee meeting of the recommendation to publish proposed amendments to Rules 15 and 72 when a suitable package of proposals can be presented. The package was formed with Rule 87, and they too were published in August.

Legislative Update

Julie Wilson delivered the legislative update. The update tracks legislation that would amend court rules outside the Rules Enabling Act process. There have been no new bills to add to those described in the chart in the agenda materials.

April 2021 Minutes

The draft minutes for the April 23, 2021 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Juneteenth National Independence Day

Congress has made Juneteenth National Independence Day a new statutory holiday. It can be added to the list of statutory holidays in Rule 6(a)(6)(A):

Rule 6. Computing and Extending Time; Time for Motion

Papers * * *

(a) COMPUTING TIME. * * *

(6) *"Legal Holiday" Defined.* "Legal Holiday" means:

(A) the day set aside by statute for observing * * * Memorial Day, Juneteenth National Independence Day, Independence Day, * * *.

The Bankruptcy Rules Committee has voted to recommend addition of the new holiday to Bankruptcy Rule 9006(a) as a technical change without publication. It is expected that the same addition will be recommended for Appellate Rule 26(a)(6)(A) and Criminal Rule 45(a)(6)(A). The recommendation as to publication of Rule 6(a)(6) should be the same as recommended by the other advisory committees, but adoption without publication seems appropriate. It was noted that even without amending Rule 6(a)(6)(A), subparagraph (B) defines as a legal holiday "any day declared a holiday by the President or Congress," so Juneteenth National Independence Day is already covered in the rules.

The Committee unanimously voted to recommend addition of the new holiday to Civil Rule 6(a)(6)(A) as a technical change without publication.

Rule 12(a)(4)

Judge Dow introduced the discussion of Rule 12(a)(4) by noting that this proposed amendment was requested by the Department of Justice and published for comment in August, 2020:

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

* * * * *

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 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; or

This proposal is straight-forward. It extends the time to respond from 14 days to 60 days in all of the cases it describes, without attempting to distinguish between motions that raise an immunity defense and other motions. There were only three public comments, but two of them objected to the proposal. Discussion at the April Committee meeting raised two questions: whether any extended time should be less than 60 days, and whether any extended time should be available only when the motion raises an immunity defense. A motion to allow the extended period only when "a defense of immunity has been postponed to trial or denied" failed, six votes for and nine votes against. The motion to recommend the proposal for adoption as published passed, ten votes for and five votes against. The Standing Committee was troubled by the same concerns, and after thorough discussion asked for further consideration by this Committee, with a particular focus on the length of any extended period to respond that might be recommended.

Discussion opened with a reminder that this topic has proved more difficult than it initially seemed. If it continues to present challenges that are not readily resolved in this meeting, it can be carried forward to the March meeting without losing impetus. If it were presented to the Standing Committee in January with a renewed recommendation for adoption, it would be presented to the Judicial Conference in October 2022, the same time as if a recommendation for adoption were approved by the Standing Committee at its spring meeting.

When it made its proposal, the Department of Justice offered two reasons. The broader general reason was that, as compared to other law firms and organizations, it intrinsically needs more time to decide on a responsible course of action after denial of a motion to dismiss claims against an individual official. That is why Rule 12(a)(3) sets a 60-day period to file a responsive pleading when there is no motion. The more specific reason is that motions to dismiss claims against an individual official regularly include an official immunity defense. Denial of an immunity motion supports a collateral-order appeal. The time to appeal in these actions was extended to 60 days by Appellate Rule 4(a)(1)(B)(iv) by analogy to Rule 12(a)(3) and with the support of Congress through an amendment of 28 U.S.C. § 2107. For like reasons, the time to file a responsive pleading should be 60 days after a motion to dismiss is denied.

The reason for setting the appeal period at 60 days, moreover, reflects a concern unique to the Department of Justice. Department regulations require approval of any appeal by the Office of the

Solicitor General. Review is essential to ensure deliberate consideration of the legal positions that will be taken, and to maintain national control that establishes uniform practices across all United States Attorney offices. One dimension of this practice is a concern described in the agenda materials: decision of what may be important legal questions on the sketchy record afforded by a complaint may be intrinsically unsatisfactory, and may go wasted when any further proceedings that ensue show that the question decided on the pleadings need not have been decided.

The argument for a 60-day response period was further supported by describing a routine practice of seeking an extension of the present 14-day period, and the routine experience of winning extensions. This practice was framed in discussion at the April meeting as something that can be seen as a choice between competing "presumptions." The current rule presumes that a 14-day response period suffices in these cases, leaving it to the government to justify an extension. The published rule shifts the presumption, giving the government 60 days and leaving it to the plaintiff to win a shorter time by showing a need for expedition. If experience indeed shows that motions are routinely made and generally granted, it may be more efficient to set the presumption at 60 days. This practice, further, will alleviate the uncertainty that prevails between the time a motion to extend is made and the time a ruling on the motion is made. Until the government knows that an extension will be granted, it must do the work of preparing an answer, and must file a perhaps inadequately developed answer. Once the answer is filed, the government may be required to enter the routine pretrial procedures of scheduling conferences, initial disclosures, perhaps even discovery, while it is still deciding whether to appeal. Those activities are cut off by filing a notice of appeal, but the initial efforts are not undone.

These concerns encountered some skepticism in the April Committee discussion. The 60-day period seemed too long to some members, reflecting the concerns expressed in the two comments that opposed the proposal. Those comments stressed that plaintiffs face formidable obstacles in these actions, and should not be saddled with yet another source of delay in getting into litigation on the merits. These doubts prompted several questions asking for greater detail about Department of Justice experiences that show the need for so long an extension, and that provide more precise information about both the frequency of motions to extend and the rate of success on those motions. The response, framed after mid-meeting consultation with the Torts Branch -- where the proposal originated -- provided anecdotal accounts of real need, "many" requests for extensions, and frequent extensions. No more precise information was available.

The need for time in cases that present an immunity defense and the prospect of an immunity appeal led to similar questions.

What share of these cases actually involve an immunity defense? What is the experience with the need to engage in pretrial litigation after denial of the motion and while a decision is made whether to take an appeal that will cut off further pretrial litigation? These questions were wrapped up with the time questions, and were met with similar answers. Immunity defenses are raised in most cases, appeals are seriously considered in all of them, and appeals are frequently taken.

Similar questions were raised in the Standing Committee. As noted at the outset, much of the discussion there focused on the need for a response period more than four times longer than is afforded in other cases, including actions against the United States, its agency, or its officer sued in an official capacity. As in this Committee, questions also were raised about the reasons for favoring the United States when state governments, which may have similar justice department structures, are treated as all other litigants.

These concerns suggest at least four possible outcomes. One is to adhere to the proposal as published. Another is to abandon it. The third is to reduce the number of extra days. The fourth, which could be combined with a reduced number of days, is to limit the extension to motions that raise an immunity defense.

Framing the questions for discussion began with a reminder that the choice among these alternatives will not affect the incidents of police conduct decried by the public comments, nor will it modify official immunity doctrines. The question is how to tailor this narrow and specific procedure rule to the realities of litigating individual-liability claims against federal officials.

The choice among the alternatives, or perhaps some still different approach, is likely to be influenced by the ability of the Department of Justice to provide additional information about its actual experience.

The Department of Justice representative responded by noting that these cases are handled both in "main Justice" and by U.S. Attorney offices. "There is no mechanical way to track them." But the Torts Branch says that motions to dismiss are made in 90% of these cases, and that an immunity defense is raised in 90% of the motions. When the motion is denied, appeals are considered in every case by a career attorney, and then by an appeal attorney. The recommendation may be not to appeal. But the frequency of "no appeal" recommendations cannot be quantified now. Nor can the Department track "hard numbers" on requests for an extension of time after a motion to dismiss is denied. The Torts Branch, however, proposed the rule amendment because it is "weary of routine motions that are often, but not always, granted."

A question asking how the Department defines "immunity" prompted a response that the Department "could live with an immunity-only rule. That would largely serve our concerns."

A member asked how many extra days are included in a request for an extension? How many days are granted? This information would help in understanding how big the problem is. The Department's response was that "there is a diffuse process." It is hard to canvass all of the US Attorney offices. But it can be noted that the appeal period is 60 days, and an extension to 60 days affords an opportunity to weigh the decision whether to appeal. If an extension is denied, the effort of continuing to litigate before the decision whether to appeal defeats the purpose of immunity.

An alternative approach to the same issue asked whether the Department can find out how many people in the Torts Branch run into these problems? The Department "will try to get more robust information. But we are careful in making rules suggestions. This is not a single, one-off problem." It may be possible to examine the files of individual attorneys to get a better picture.

A new member observed that in coming to this issue for the first time, one apparent element is that all defendants consult with counsel in deciding whether to take an appeal, but only those represented by the Department find their counsel has to get approval. "Immunity is still the law." The defendant should be entitled to get review of the defense before being required to litigate. The Department added that in carrying forward with the defense before knowing whether an extension will be granted, or after an extension is denied, pretrial litigation is shaped by the prospect that an immunity appeal may be taken.

Another member asked whether the purpose of the proposal is to avoid the need to request an extension, or instead is to address the occasions when an extension is denied -- would a rule setting a period less than 60 days meet the need? The Department responded that the primary concern is making the motion and the need to continue pretrial activity until learning whether an extension has been granted. A period shorter than 60 days would be counterproductive. As the recent letter from Acting Assistant Attorney General Boynton points out, "you still have to keep preparing until you know."

A judge framed the issues of delay and uncertainty by observing that a rule allowing 60 days to respond will not much increase delays, and will alleviate uncertainty, if 90% of the motions raise immunity, and if appeal is always considered after an immunity motion is denied, and if a request for an extension is almost always made. Another judge recalled that this observation reflected the discussion in April. A presumption that the period is 60 days, with the opportunity for a plaintiff to request a shorter

period when there are real problems with delay, "may be the Rule 1 answer." This answer, however may be found more comfortable if it is given only for cases with an immunity motion.

Another member asked why, indeed, the rule should not be limited to immunity cases. The Department position was repeated -- "we can live with that." But the proposal as published is clean.

A judge asked what prompted the Torts Branch to suggest this proposal? They have been living with the 14-day period; did something change? The Department's sense is that the issue "has been around for a while."

The question recurred: if the extra time is to be available only in cases with an immunity motion, how is immunity to be defined? Apparently the underlying concept focuses on immunities that confer a "right not to be tried," thus supporting a collateral-order appeal. That may not be appropriate rule language. Discussions that eventually led to the 2010 amendments of Rule 56 considered and abandoned various ways to draft a rule that would require the court to identify disputed material facts when denying summary judgment in a case with an opportunity to appeal. It might be worked out in this way, however, given the lack of any clearly limiting concepts of the "qualified" and "absolute" official immunities that support collateral-order appeals. Or the rule might simply refer to "official immunity," with an explanation in the Committee Note. Or, if it proves possible to identify and define one or two types of immunity that are involved in 90% of the cases, that might suffice.

Another member, who in April voted to recommend adoption of the published proposal for the reasons discussed by some other members today, renewed the question whether this is a problem that has built up over time. Would it be possible to survey US Attorneys to find out more?

Support for the proposal as published was summarized by another member. If 90% of these motions raise an immunity defense, and 100% of the denials are considered for appeal, a clean rule that covers all cases is better. It would clearly address all the cases that present a need for added time -- that is the vast majority of all cases -- and it avoids the risk that an attempt to define the forms of immunity that afford the extra time to respond will miss some cases that should be included.

The discussion at the June Standing Committee meeting was brought back, beginning with the reminder that the published proposal might be modified by limiting it to immunity cases, by reducing the allowance of extra time, or both. The focus in the Standing Committee was on the number of extra days, reflecting concern that there is too much delay in litigation as it is. That

concern needs to be addressed. The prospect that the full 60-day period would not have much effect on delay, given the frequency of successful requests for extensions, should be developed as fully as possible. Another concern was the appearance of favoritism -- affording more than four times the number of days to respond seems too much. The comparison to the 60-day appeal period may weaken this perspective, since that is only double the 30 days allowed other litigants. The 60-day appeal period, however, provides a functional justification that can be offered. And it can be noted that excluding non-immunity cases may generate more work than it's worth.

The Standing Committee's concern with "equity" was noted again. The 60-day appeal period applies to all parties, not only the United States. The proposed extended response time does not. One possibility would be to cut the response time back to 40 days. That is 2/3 of the 60-day appeal period, the same ratio as holds between the 14-day response period for all litigants in Rule 12(a)(4) and the 21-day initial response period afforded by Rule 12(a)(1) to all litigants other than the United States.

The importance of addressing the Standing Committee's concern was echoed. The Department responded that it understands the questions and will get as much information as can be gathered for consideration at the March meeting.

Discussion concluded with the observation that the consensus is to give the Department the opportunity to respond to the concerns expressed today and in the Standing Committee. The Department's work is much appreciated. This will be an action item on the March agenda.

Rule 12(a)(2), (3)

Judge Dow opened discussion by noting that a proposal to recommend publication of an amendment that would conform Rule 12(a)(2) and (3) to statutory requirements has been considered twice, first at the October 2020 meeting and then again at the April 2021 meeting. The Committee divided by a rare tie vote at the October meeting and did not have time for full consideration at the April meeting. The time has come to decide whether to recommend publication.

The reasons supporting amendment are simple. As it stands, the rule is inconsistent with statutes that set a shorter time to respond than the 60 days allowed by paragraphs (2) and (3). There has never been any intention to supersede such statutes, but the failure to provide for them may be aggravated by the prospect that a close reading might even support an inference from the exception for other statutory periods in (a)(1) that (2) and (3) were intended to supersede inconsistent statutes. The problem with the

present rule text can be readily amended to subject all three paragraphs to inconsistent statutes, as shown by the present rule text and the proposed amendment.

Rule 12(a) begins like this:

(a) TIME TO SERVE A RESPONSIVE PLEADING.
(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:
(A) A defendant must serve an answer:
(i) within 21 days after being served with the summons and complaint; or * * *
(2) *United States and its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.
(3) *United States Officers or Employees Sued in an Individual Capacity.* 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 must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later. * * *

The amendment would recast the beginning of Rule 12(a) to read like this:

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

There are in fact statutes that set a shorter time than 60 days to respond in actions within Rule 12(a)(2). The submission that prompted consideration of this topic was made by a lawyer who had to argue vigorously to persuade a clerk to issue a summons with the 30-day response period set by the Freedom of Information Act. It is not the only such statute. The potential for confusion is more than abstract speculation. Independent research on PACER by a journalist and research law librarian shows that mean and median response times in Freedom of Information Act actions exceed 30 days. Breaking it down further, in the cases with responses within 30 days -- one-third of the total -- the mean was 22.4 days and the median was 24 days. In the remaining two-thirds, the mean was 62.1 days and the median was 48 days. The District for the District of

Columbia accounts for approximately 2/3 of all these cases, and has a "practical mechanism" for obtaining 30-day summonses. In other districts, 60-day summonses are commonly issued.

The proposed amendment is supported by the desire to have rule text that accurately reflects the intended purpose. That may suffice in itself to overcome the general reluctance to avoid burdening bench and bar with what may seem a steady profusion of minor adjustments. There is a more important concern as well. As it stands, Rule 12(a)(1) expressly defers to inconsistent statutes. (2) and (3) do not. The apparent distinction may imply an intent to supersede inconsistent statutes. That has never been intended, and should be clearly rejected now. The very implementation of supersession, moreover, can impose significant burdens. An Enabling Act rule supersedes inconsistent statutes in effect at the time the rule is adopted, but is in turn superseded by later enactment of an inconsistent statute. What counts as the relevant time of adoption or enactment may be further confused by changes in rule text or statutory provisions that are associated with the inconsistent texts but do not directly change the relevant texts. Research has not yet uncovered a statute inconsistent with the 60-day period in Rule 12(a)(3), but such statutes may exist now, and might be enacted in the future.

The only contrary concern has been suggested by the Department of Justice. The Department reports it knows and honors the 30-day statutory periods. But some cases combine claims subject to a 30-day statute and other claims that are not. Often they move for an extension of the 30-day period so they have adequate time to prepare a response to all claims. They are concerned that adding express deference to statutes to rule text might make it more difficult to persuade some judges to grant extensions in the mixed-claim cases.

The view that supersession concerns provide a strong reason to go forward with the proposal was expressed forcefully. Although the problem does not seem to have yet emerged in the cases, treatises have noted it as a concern.

Further discussion suggested that it is a good idea to clean up this problem. "The rules maven in me wants to fix it." There is no reason to expect any interference with practice in the District Court for the District of Columbia, where the majority of FOIA actions are brought.

Another member supported the amendment. The rule "is inaccurate now." It is important that the rule reflect the statutes. Discussion with some judges who are not committee members suggests that if the amendment affects practice in granting extensions, the effect will not be adverse to the Department of Justice.

The committee voted without dissent to recommend publication of this proposal.

MDL Subcommittee

Judge Rosenberg began the report of the MDL Subcommittee with thanks to the Subcommittee for much hard work, including several meetings and the Emory conference. She also thanked Professor Marcus for drafting illustrations of ways in which Rule 16 could be revised to embody some of the approaches to managing MDL proceedings that the Subcommittee has been discussing.

The Subcommittee retains the question of interlocutory appeal opportunities on its agenda, but holds it in reserve without plans for further consideration now. Third party litigation funding remains an important topic to be discussed later in this meeting, but it does not seem to be peculiarly involved in MDL proceedings and has been relinquished by the Subcommittee to a watching agenda of the full committee.

Attention now focuses on early "vetting" of claims and judicial involvement in the settlement process. Most Subcommittee members attended the Emory conference arranged by Professor Dodge. The conference focused on management of MDL proceedings and settlement. Academics frequently invoke an analogy to Rule 23 provisions for appointing counsel in class actions and for reviewing proposed settlements. The conference showed that MDL settlements often are not "global." Rather than settling all the claims swept into the proceeding, settlements commonly involve a greater or smaller subset. One common event is an "inventory" settlement that resolves all claims represented by a single lawyer. And it often happens that different inventories settle for different values. Participants accounted for the differences by suggesting that higher prices are paid for claims represented by a lawyer who has carefully developed each case in the inventory, making it clear that the claims are strong. As compared to class actions, further, there is no authority for an MDL court to reject a proposed settlement reached between a plaintiff and a defendant. The Subcommittee is not looking toward a rule that would require court approval, but instead is considering the possibility of providing for judicial monitoring or perhaps supervision of the settlement process.

The Subcommittee also is considering the questions raised by common benefit fund practices. Common benefit funds are regularly established as the vehicle for compensating court-appointed lead counsel for pretrial work undertaken on behalf of all claimants in the proceeding. Judge Chhabria's thoughtful opinion in the Roundup MDL proceeding says that courts and attorneys need clear guidance. The practice seems to have got out of control, at least in some of the largest MDL proceedings. The opinion invites consideration of

new rules.

The Subcommittee met in August. It considered the choice between looking for a "high impact" rule or looking for a "low impact" rule. A high impact rule would be something of the sort illustrated by the sketch Rule 23.3 that has been in agenda materials for some time but has never been much discussed. A low impact rule would offer less guidance, at least in rule text. Professor Marcus was asked to draft an illustrative rule, and quickly produced the sketch of a new Rule 16(b)(5) included in the agenda materials. This is what many MDL courts are doing now. The Subcommittee plans to develop this low impact approach, without looking for present discussion of the "Rule 23.3" high impact alternative.

The familiar proposition that MDL proceedings now include nearly half of all civil actions on the dockets of federal courts may of itself provide good reason to continue looking for possible new rules. Additional reasons may be found in the reports that the Judicial Panel on Multidistrict Litigation is expanding the number of judges selected to entertain MDL proceedings, and that MDL judges are seeking to expand and diversify the pool of lead counsel. Explicit MDL rules could help guide judges and lawyers new to these proceedings. The Manual for Complex Litigation remains relevant, but parts of it are outdated. The parts for early vetting of claims and early exchange of information are increasingly behind evolving practice.

Professor Marcus added that the agenda includes the first sketch of a new Rule 16(b)(5), and a companion addition to Rule 26(f)(3) that would add a new subparagraph (F) calling for party discussion about an early exchange of information about claims and defenses. The sketch includes many footnotes that call attention to issues that need to be addressed. Discussion today will help the Subcommittee as it advances its work. Judge Dow agreed that feedback will be welcome and helpful.

A Subcommittee member found the Rule 16(b)(5) sketch helpful, but expressed concerns. It is true that MDL proceedings occupy a large share of the federal court case inventory. The draft provisions are "hefty." It is regrettable that the Manual has not been updated. But these provisions "do not reflect how MDLs actually work." They might give leadership counsel still greater leverage than they now have over cases not in the MDL. And it must be remembered that mass-tort cases are not the only kind that find their way into MDL proceedings. "We may be further muddying waters that are already muddy," and "add to present conflicts."

A judge agreed with these concerns "to some extent," asking how much have these issues been discussed with the bar? The focus seems to have whittled down to settlement. How much discussion has

there been with members of the MDL bar about rules for appointing lead counsel, the responsibilities of lead counsel, reports of lead counsel to the court?

Judge Rosenberg explained that the draft was prepared at the Subcommittee's request. The Subcommittee saw it for the first time at its August 23 meeting. Early vetting has been discussed in conferences with lawyers -- plaintiff and defense lawyers agree that it is important, but have not discussed how it should be done. Rule 16(b)(5)(A) addresses this. The Subcommittee has discussed that topic repeatedly, but has not addressed this draft.

The question was reframed to ask whether the Subcommittee will go back to the bar to discuss the issues raised by provisions regarding leadership counsel.

A partial response was made by recalling discussions early in the MDL Subcommittee's work with former committee member Parker Folse, who focused on widespread use of TPLF in patent litigation. The Subcommittee has "intensely focused on ideas that have fallen by the way. Ideas have come from various sources. They have not been fully explored. There is a good deal of work yet to be done." There are academic papers that focus on the importance of including detailed provisions in the orders that appoint leadership counsel. These orders limit what other lawyers can do. The order needs to look four or five years ahead. The subcommittee needs to raise these issues in conferences with the bar, giving them the attention that has been lavished on ideas that have fallen by the way.

The work to continue to develop possible rules is justified in part because there is a lot that new MDL judges do not know. Guidance in formal court rules might help. But in the end, the Committee may decide not to attempt to frame a formal rule of procedure.

A Subcommittee member noted that the Subcommittee has wrestled with these issues. Many questions remain open. The "low impact" approach represents the Subcommittee's best thinking for right now, but without consensus on the issues flagged in the footnotes.

Professor Marcus added that indeed this draft has not been reviewed with the bar. Resistance is likely, but it may be different from what a high impact approach would encounter. It is useful to pursue these issues with the bar to see whether a low impact approach can win support.

A new committee member noted that while a member of the Judicial Panel on Multidistrict Litigation he had engaged in many conferences with the Subcommittee and had been impressed with its work. Some of the issues may prove to be suitable for addressing in the annual conference for MDL judges, but determining what may be

better addressed by court rules is the question to be addressed now. That is the work going forward.

Judge Dow noted that there has been a lot of resistance to the idea that judges might be called on to approve settlements. Many lawyers emphasize the right to settle, and lawyers and judges agree that there is nothing an MDL judge can do when parties file a stipulated dismissal. The low impact approach focuses on the process of settlement, and on the disconnect between leadership and other counsel. There is reason to be nervous about the prospect that a judge might upset a settlement reached between two parties, but perhaps a procedure can be devised to improve the flow of information in ways that will advance the fairness of individual inventory settlements, or other forms of settlement.

A judge asked whether it would be wise to test a new rule through a pilot project. "I'm not sure this feels right for a rule right now." The response observed that many of these ideas are being tried in practice now. Early vetting of claims is an example of practices that have evolved dramatically during the time the Subcommittee and Committee have been studying MDL practice. The concept is not controversial. Plaintiffs and defendants agree that it is desirable. The means of implementation depend in part on the particular characteristics of each mass tort. Settlement review practices vary, but the Subcommittee can find orders that illustrate a variety of approaches, and may be able to learn about implementation. The Subcommittee continues to gather information about many aspects of ongoing MDL practice. Its work remains in mid-stream.

Professor Marcus noted that the mandatory initial discovery pilot project fixed on two districts, and asked how would a pilot project for MDL procedures be structured. The Judicial Panel selects the transferee judge for each MDL. Would that element of itself interfere with the ability to compare pilot courts to other courts in a neutral, random way?

A judge said that it is worth pursuing the low impact model now to see how lawyers and judges react to it. "The concepts seem attractive. It's worth pursuing."

Director Cooke said that the Federal Judicial Center is in the early stages of developing a new edition of the Manual for Complex Litigation. A steering committee is being formed. But the new edition is not likely to be ready soon. Professor Marcus added that the Fourth Edition was drafted shortly after Rule 23 amendments. The prospect of a Fifth Edition is not a reason to defer work on a possible MDL rule.

Judge Rosenberg noted again that the Subcommittee has not reached uniform views on the concepts in the Rule 16(b)(5) sketch.

"We will work more to crystallize thinking about general concepts." The Subcommittee will meet as often as needed to work out a draft that is ready for review at another conference, either arranged by Professor Dodge at Emory or in some other forum. A conference is being held later this week at George Washington Law School to discuss all these issues as part of a project to develop best practices. Others as well are working for best practices guidelines. The concepts in the Rule 16(b)(5) sketch subparagraphs (A), (B), and (D) are being done now -- early exchanges of information about claims and defenses, detailed orders appointing leadership lawyers, and regular reporting by leadership to the court. The footnotes to subparagraph (C) on identifying methods for compensating leadership counsel for efforts that produce common benefits reflect the uncertainties that surround current practice. Subparagraphs (E) and (F) address settlement issues that remain "hot button" subjects of controversy. And there is one optimistic note. The pandemic has led to many Zoom conferences in MDL proceedings, engaging attendance by hundreds of lawyers. As compared to travel from distant places to attend a hearing in person, this practice should be encouraged as a regular feature of MDL management.

Discovery Subcommittee

Judge Dow prefaced the Discovery Subcommittee report by noting that Discovery Subcommittee members participated in remote conferences on privilege logs on September 20, and 22 to 23.

Judge Godbey began the report by thanking Subcommittee members for their hard work. Special thanks are due to the lawyers from private practice, who have devoted much valuable time to this Subcommittee and all of whom have also devoted much valuable time to the MDL Subcommittee. Two main subjects have occupied the discovery work -- sealing court records and privilege logs.

The sealing topic began with a proposal for a new Rule 5.3 submitted by Professor Volokh, the Reporters' Committee for Freedom of the Press, and the Electronic Frontier Foundation. The proposed rule draft is complex, but is designed to make it harder to seal and easier for the press to oppose sealing. The Subcommittee has not voted on this specific proposal, but it seems to have little support.

Sealing "is complicated." A sample of local rules, without yet undertaking a comprehensive survey, shows clearly that practices are different in different districts. The circuits seem to have pretty similar standards for sealing, although it might be useful to confirm in rule text that the standard for sealing court records is different from the standard for discovery confidentiality orders.

The Administrative Office has launched a sealing project. Julie Wilson noted that the effort aims to address the management of sealed documents through operational tools such as model rules, best practices, and the like. The newly formed Court Administration and Operations Advisory Council will be asked for advice on operational issues with unsealing, and will be asked for advice on the need for a civil rule on sealing. "It's very early in the process. They will be gathering information on what the operational issues are." That may extend to offering views on the desirability or framing of a new civil rule.

The agenda materials include a sketch of a new Rule 5(d)(5) to govern sealing, along with a companion cross-reference provision to be added as Rule 26(c)(4). Professor Marcus observed that it would be premature to decide now to do nothing, or to adopt some version of this draft, or even to look at the procedures for sealing. These issues affect other advisory committees, particularly the Criminal Rules Committee. It may make sense to pause work for now.

The Committee agreed that present work on sealing court files should be deferred to avoid competition with the parallel work in the Administrative Office.

Judge Godbey described the Subcommittee's work on privilege logs. Suggestions for rule amendments have relied on the view that privilege logs can be vastly expensive and at the same time provide little or no benefit. The Subcommittee responded by issuing an invitation for public comments that produced more than 100 responses and a considerably revised and elaborated version of the suggestion that prompted the inquiry. Professor Marcus summarized the comments as shown in the agenda materials. The Subcommittee met with representatives of the National Employment Lawyers Association and of Lawyers for Civil Justice, a proponent of a new rule. They also attended a day and a half long symposium produced by Jonathan Redgrave and retired Magistrate Judge Facciola with participation by dozens of practicing lawyers. The American Association for Justice will be asked whether it is interested in arranging a discussion group for the Subcommittee.

These events have demonstrated a drastic divide between plaintiffs and defendants. Defendants think that the predominant practice that requires a document-by-document log is expensive, often prohibitively expensive, and leads to nearly useless logs that no one uses. Plaintiffs think that defendants over-designate documents that are not privileged. Their theory is in part that the actual designations are made by junior associates or contract lawyers that are terrified that failure to designate a privileged document will be a career disaster. And plaintiffs also believe that switching the proposed rule to allow designation by "categories" will lead to less informative logs that make it difficult or even impossible to ferret out which designations to

challenge. Defendants, of course, will be equally unhappy if we do nothing. It is likely to be impossible to find a mid-point that is acceptable on all sides.

There may, however, be agreement on one issue. Most observers agree that many of the problems with current log practice arise from producing logs late in the discovery period. Making challenges and getting them resolved before the close of discovery, and then getting discovery of documents successfully challenged, is a regular problem. Some means to encourage early attention to the log process, including "rolling" logs to keep pace with rolling discovery responses, may be acceptable on all sides.

Professor Marcus pointed to pages 187-190 of the agenda materials to illustrate possible ways to call attention to these issues early in the litigation through Rules 26(f) and 16(b). "It is an open question whether this would be useful. Good lawyers tell us they do this now." But some plaintiffs say they try to do it and meet a blank wall of refusal even to discuss the issues.

Professor Marcus further observed that the proposal to enshrine in rule text recognition of logs that describe only categories of withheld documents would appear to "tilt the playing field" away from the current presumption in most courts that document-by-document designations are required. And trying to define the contours of appropriate categories in rule text will be tricky, perhaps even in approaching such suggestions as one that would specifically describe in rule text a category of documents involving communication with outside counsel after the first complaint is filed. The Subcommittee has not had an opportunity to meet and discuss the many surrounding issues that were described in the recent conferences.

A Committee member noted that "people feel very strongly on both sides of the v." We have heard complaints from people involved in very big cases. The rule seems to be working in ordinary cases. But the time at which logs are produced does seem to be a problem in cases both large and small.

Another judge member observed that "not all cases are created equal." A run-of-the-mill employment case may have few documents in the privilege log. It might be useful to add discussion of log issues to the matters for discussion in the Rule 26(f) conference, and include the possibility of a categorical approach and timing in the report.

Judge Dow concluded the discussion by repeating thanks to the lawyer members for all the time they contribute to the Subcommittee. "It makes a tremendous difference in the quality of our work."

Appeal Finality After Consolidation Subcommittee

Judge Rosenberg delivered the report of the joint Subcommittee, informally dubbed the "Hall v. Hall" Subcommittee. The Subcommittee is studying the Supreme Court's suggestion that new rules may be appropriate if problems arise from the ruling that a case initially filed as an independent action retains its identity for purposes of appeal finality after consolidation with another action. Final disposition of all claims among all parties to what began as a separate action is appealable, and appeal time starts to run.

The Subcommittee has reported on an exhaustive Federal Judicial Center study of appeals in all consolidations in the district courts over a period of three years. These years were evenly divided between cases filed before, and cases filed after, Hall v. Hall. The study revealed no problems. Replicating the study for a later year or two would be a great effort that does not seem worthwhile. The Subcommittee had come close to deciding that it had little left to do apart from considering the question whether a new rule might be justified as a way to enhance trial court control of the consolidation from start to finish. But Dr. Lee has devised a different study method that begins with cases on appeal rather than beginning with all original filings in the district courts. That study is continuing. The Subcommittee will study the results when the study is completed, and decide then whether further consideration of Hall v. Hall is appropriate.

End of Day for e-Filing

Judge Dow reported that the Federal Judicial Center continues to gather information that will inform the work of the joint subcommittee formed to study the question whether the several sets of rules should continue to define the end of the last day for electronic filing as midnight in the court's time zone. The pandemic has slowed progress. A new Civil Rules member will be appointed to this Subcommittee.

Rule 9(b)

Dean Spencer, a Committee member, has submitted a proposal to revise Rule 9(b) to allow malice, intent, knowledge, and other conditions of a person's mind to be pleaded as a fact without requiring pleading of facts that support inference of the fact. The proposal has been on the agenda for two meetings, but the press of other work has prevented full consideration. The proposal is important enough to justify appointment of a subcommittee. Judge Lioi has agreed to chair the subcommittee. Other members will be appointed soon. A report is expected for the March meeting, and will generate robust discussion.

In Forma Pauperis Standards and Procedures

The Committee, prompted by submissions by a frequent litigant and by Professors Clopton and Hammond, has considered forma pauperis questions at three earlier meetings. The topic was carried forward to await the outcome of work by the Appellate Rules Committee on the i.f.p. Form 4 appended to the Appellate Rules. That work is nearing completion, but not in time for consideration at this meeting.

The Committee has concluded that there are serious problems with administration of forma pauperis practice. There are no uniform standards to govern determinations whether a litigant qualifies under 28 U.S.C. § 1915(a) as unable to pay fees. In practice, standards vary widely from one court to another, and often among different judges on the same court. Nor are there uniform practices in gathering information to consider in applying whatever standard is adopted. Many courts use forms created by the Administrative Office, but many others do not. The forms, moreover, are criticized as ambiguous or opaque, leaving the party uncertain what is being asked. As a simple example, should "income" be defined as for the Internal Revenue Code, or by some more natural test? The breadth and depth of the information requested by many forms is also challenged as an unwarranted invasion of nonparty privacy, perhaps even unconstitutional. Appellate Form 4 is offered as an example by pointing to the required wealth of information about resources available to the party's spouse.

These issues call out for a better approach. But it remains unclear whether the appropriate response is an Enabling Act rule. As a simple illustration, Appellate Form 4 assumes that a spouse's resources are relevant to the § 1915(a) determination, but that is a substantive interpretation of the statute that at best tests the limits of Enabling Act authority. Many of the questions that may be appropriate to determining pauper status also may be better addressed by setting different standards for different areas of the country. The resources required to support minimal standards of living in a major and congested metropolitan area, for example, may be considerably greater than what is required in a rural area. And even if not appropriately substantive, individual circumstances vary across countless important variations in other obligations. What account should be taken of health expenditures? Health expenditures for dependents? Education expenses incurred to qualify for better compensated employment? Enabling Act processes are not designed to address such questions. And even if appropriate answers could be worked out for the moment, the standards will surely require regular adjustments.

Judge Dow invited comments on this presentation. He observed that experience in the Northern District of Illinois reflects many of the problems. They have repeatedly revised their forms. Even

with that, prisoners often fail to understand what they are being asked.

Judge McEwen said that if a joint subcommittee is formed to study forma pauperis issues, the Bankruptcy Rules Committee should be involved. They frequently encounter these problems. Judge Dow agreed that the advisory committees should think together about these issues.

Despite the obvious difficulties, the topic will remain on the agenda. Judge Dow will reach out to Professors Clopton and Hammond.

Rule 41(a)

Judge Furman, a member of the Standing Committee, submitted a suggestion that it might be useful to study a well-settled division of interpretations of Rule 41(a)(1)(A). The rule says that "the plaintiff may dismiss an action without a court order by filing a notice of dismissal or a stipulation signed by all parties who have been served. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. Dismissal without prejudice is not a judgment on the merits and does not establish res judicata.

The initial question is whether power to dismiss "the action" requires dismissal of the entire action as to all claims. Most courts, commonly relying on the plain meaning of "the action," conclude that the rule does not authorize a unilateral dismissal without prejudice as to some claims but not others. Other courts, however, allow dismissal of some claims while the action proceeds as to others. The suggestion is that it may be desirable to establish a uniform meaning. That leaves the question which meaning is better.

The reasons that move a plaintiff to wish to dismiss only part of an action are likely to be similar to the reasons that counsel dismissal of an entire action, but with the complication that part remains to be litigated here and now. Further preparation may show that one claim is simply not ready for litigation, while another is ready and may present a compelling need for prompt relief. Or joinder of the claims may come to be poor litigation tactics. Or the decisions of which plaintiffs to join together, which defendants to join, and what court to seek, may be rethought.

The impact on the defendant is more obviously different when only some claims are dismissed. The defendant is faced with the need to continue litigating the claims that remain, often incurring most of the costs that would be incurred to litigate them all. At the same time, the defendant is left at risk of future litigation, with continuing uncertainty as to total liability. Evidence must be preserved both for defense and to avoid spoliation, and further investigation may seem necessary.

Partial dismissal, in short, is markedly different from dismissal of an entire action. If the proposal is taken up, practical wisdom about the likely consequences of either choice may be the most important guide. The inquiry may prove reasonably manageable, or more difficult.

If the proposal is taken up, it will be appropriate to consider the possibility that related issues should be considered.

One potential set of issues relates both to the value of amending Rule 41(a)(1)(A) and to consistency with other rules. Claims may be dropped by amending the complaint, subject to the rather permissive provisions of Rule 15. Parties may be dropped under Rule 21. How far do those rules afford an opportunity to dismiss without prejudice? If Rule 41 is amended, should there be some explicit provisions that address the role of each rule?

Judge Furman's submission notes that most courts seem to agree that Rule 41(a)(1)(A) authorizes dismissal without prejudice as to one defendant. That may be seen as dismissal of "the action," treating a single suit as including as many actions as there are defendants. As compared to dismissing a claim against a defendant who must continue to litigate other claims, this result may be appropriate because the dismissed defendant is in a position closer to the position of a defendant who was the only one joined to begin with. But this is not the only way the rule might be read.

Nothing in the submission asks whether "plaintiff" should be interpreted to reach any claimant by way of counterclaim, crossclaim, third-party claim, or conceivably interpleader. That question might, if considered, prove truly complicated.

Apart from those questions, a distinct question is presented by Rule 41(a)(1)(A)(i), which cuts off the right to dismiss without court order and without prejudice when the opposing party files an answer or a motion for summary judgment. There are good reasons to wonder whether, if Rule 41(a)(1)(A) is taken up for consideration, the work should also consider adding a motion to dismiss to this list. Rule 15(a)(1)(B) was amended not long ago to add motions under Rule 12(b), (e), and (f) to the events that trigger the time limit on amendment once as a matter of course. The reason was that a motion to dismiss often involves more work than an answer, and often does a better job of educating the plaintiff about the things that need be pleaded and proved. The same reasons may well apply here, perhaps adding a Rule 12(c) motion for judgment on the pleadings to the list.

Discussion began with the suggestion that there are enough questions to deserve additional attention. What is the intent of the rule? Should it be broadened?

Another observation was that a recent Fifth Circuit en banc decision has made dismissal without prejudice a trap for finality. This is a question distinct from frequent, and commonly unsuccessful, efforts to establish appeal finality after an adverse ruling on part of an action by dismissing what remains without prejudice.

The next observation was that "action" and "claim" are used to express different concepts in different settings. So Rule 41(d) refers to the consequences when a plaintiff has previously dismissed "an action, based on or including the same claim * * *." These words may have a different meaning than "action" has in Rule 41(a), or than "claim" would mean if it comes to be included there.

A judge agreed that these issues are worthy of attention. Judge Furman's opinion exploring partial dismissal is useful.

The discussion concluded with the observation that judges are not uniform in applying the present rule. "On its face, we may be able to do better." Work will proceed to see what projects may be carved out.

Rule 55

The role of the provisions directing that the clerk "must" enter a default, and "must" enter a default judgment in narrowly defined circumstances, was brought to the Committee by the curiosity of judges on courts that regularly have a judge enter both the initial default and any eventual default judgment. How many courts, they wondered, engage in similar departures from the apparent mandate of the rule text? And why was the rule written as it is?

The role of "must" begins with the Style Project that amended all of the rules in 2007. Rule 55(a) and (b) had provided that the clerk "shall" enter the default, and, in the circumstances defined by the rule, the default judgment. Having banished "shall" from rules style conventions, the choice among "may," "should," and "must" was made for must and explained in the Committee Note as "intended to be stylistic only." That choice may have been unwise. At any event, it is confused by the parallel style revisions of Rule 77(c)(2), which now provides that "subject to the court's power to suspend, alter, or rescind the clerk's actions for good cause, the clerk may: * * * (B) enter a default; (C) enter a default judgment under Rule 55(b)(1)." "May" here seems inconsistent with "must" in Rule 55 itself. The court's role may be further confused by the apparent direction that the court may set aside the clerk's action only for good cause.

Whatever might be divined from these rule texts, the important question is what role clerks should play in the distinct processes

of entering a default and entering a default judgment.

Entering a default is a less ominous step. Although it sets the stage for a default judgment, courts are willing to set aside a default on rather modest showings so that a case can be resolved on the merits. But it is not a purely ministerial act. It must be shown, "by affidavit or otherwise," that a party "has failed to plead or otherwise defend." A failure to plead is apparent from the court's records, but a proof of service may not be fully satisfactory. The problem of "sewer service" has not entirely disappeared. However that may be, "otherwise defend" may involve events that do not come to the court's attention. Nonetheless, the potential complications may be rare in comparison to straightforward defaults. Authorizing the clerk to enter the default is different from mandating, but a clerk that finds reasons for concern can submit the question to the court despite the mandate.

Entering a default judgment is intended to be just that, a judgment. Under Rule 54(b) it can be revised at any time before all claims are resolved as to all parties, but after that it becomes final and can be set aside only by vacating it under Rule 60(b). The determination that the claim is "for a sum certain or a sum that can be made certain by computation" may not be easy, and consideration by a judge may show reasons to doubt whether anything is due at all. The clerk's authority and duty are limited to cases in which the defendant has been defaulted for not appearing and is not a minor nor an incompetent person. "[N]ot appearing" may not be free from all ambiguity. And the complaint may not show whether the defendant is a minor or an incompetent person, adding to the clerk's responsibilities to inquire.

These observations concluded with the suggestion that the first step in any inquiry into these parts of Rule 55 might begin with a quest for more information about actual practices. If the questions that prompted the inquiry bear out, much can be learned about the wisdom of the present rule by considering actual practices.

Judge Dow asked how many committee members have clerks enter a default. Some initial responses that this happens were followed by a more detailed accounting. The clerk representative reported that in the last two years, her office had 600 requests for a default and the clerk entered defaults in 480 cases; the reasons for not entering defaults in the other 120 cases are not yet clear. Her office does not enter default judgments. Six judges then reported that in their courts, the same practices prevail: the clerk enters defaults, but only a judge enters a default judgment. A practicing lawyer reported the same practices in another court.

Judge Dow noted that in his court a judge enters the default

as well as a default judgment. "We may be in the minority." In any event, this topic merits a place on the agenda. "The rule should reflect the state of the world."

The Federal Judicial Center will be asked to help with this research. In addition to the general questions described in the earlier discussion, an added question was suggested -- to find out whether there are courts in which the clerk actively audits the files for cases that seem to be in default, as compared to waiting for a request from a party.

Rule "9(i)"

A letter dated June 7, 2021, from Senators Tillis, Grassley, and Cornyn to Chief Justice Roberts suggests that the Chief Justice "should coordinate with the Judicial Conference to create a pleading standard for Title III ADA cases that employs the 'particularity' requirement currently contained in Rule 9(b) of the Federal Rules of Civil Procedure." Enhanced pleading would enable property owners to more easily remove barriers to access, prompt removal would benefit disabled plaintiffs, and courts could more readily determine whether Title III has been violated.

Professor Marcus introduced this topic by noting that ADA litigation has drawn a lot of attention in recent years. There has been a great increase in the number of actions, as detailed in the agenda materials. Much of the attention seems to focus on California, perhaps because a parallel state statute provides for damages, a remedy not available under Title III; Florida, perhaps because there are a number of active "tester" plaintiffs there; and New York, perhaps because there are many outdated business structures that have not been brought into compliance with accessibility requirements.

Although there may be many reasons to worry about the blossoming of Title III litigation, "particularity in pleading may not be the answer." The Committee has always been reluctant to recommend substance-specific rules. The recent Supplemental Rules for Social Security cases were recommended only after searching and repeated demands for compelling reasons to justify substance-specific rules. The Social Security Rules are intended to establish a procedure for actions that involve appellate review on a closed administrative record, while Title III cases fall into the mainstream of civil litigation. Adoption of a particularized pleading standard, further, might simply lead California lawyers to file their actions only under state law in state courts. On balance, the initial conclusion may be that a particularized pleading standard is not the answer for whatever problems exist.

A committee member suggested that such problems of vague pleading as may exist can be addressed by a motion for a more

definite statement. In addition, current general pleading standards may well be up to the task. It was pointed out that recent Ninth Circuit decisions uphold district court demands for specific pleading of barriers to accessibility.

A judge member observed that a wide variety of barriers exist. Such things as curb cuts, the height of towel rods, the placement of shower controls, floor plans themselves, are commonplace. And a lot is happening with claims based on access barriers to websites facing visually or hearing impaired persons. A better solution to the problems of litigation should be sought in legislation that requires pre-suit notification of barriers, affording an opportunity for correction, spending needed funds on improving access rather than wasting them on litigation.

Another participant agreed, and underscored the proposition that principles of transsubstantivity preclude making a rule for a specific problem in a particular area of the law.

A judge observed that the same problems arise in state courts, which may likewise resist pressures for substance-specific rules.

The discussion concluded by removing this topic from the agenda. Courts can implement appropriate pleading standards under the current rules. Congress can consider solutions outside the pleading rules. It is better not to infringe the transsubstantivity presumption in this setting.

Rule 23 Opt-In

Professor Marcus introduced this submission by a nonlawyer who, after his wife got a notice of an opt-out class action, believes that class actions should be limited to members who affirmatively choose to opt in. "The rest of the world doesn't believe in our opt-out class." But the opt-out feature was baked into Rule 23 in the 1966 amendments. It is an interesting argument, but it would be a dramatic change in class-action practice as it has matured in our system. An opt-in structure likely would defeat the utility of class actions for small claims.

This item was removed from the agenda without dissent.

Rule 25(a)(1)

This proposal by a federal judge's law clerk is to amend Rule 25(a)(1) to authorize the judge to enter a statement of death on the record. The purpose is to avoid the risk that a "zombie" action may continue indefinitely after a party has died but no party makes a suggestion of death. A statement made by the judge, just as a statement entered by a party, would trigger the 90-day limit for a motion to substitute.

Professor Marcus noted that an amendment framed as entry of a statement noting the death would have to resolve a complication framed by Rule 25(a)(3), which directs that a statement noting death must be served on the parties as provided in Rule 5 -- no problem there -- and served on nonparties as provided in Rule 4. It might become important to clarify the practice for Rule 4 service by the court, including the means of identifying the nonparties that must be served.

The proposal identifies four cases that appear to involve the "zombie" problem. One of them, from the Northern District of Illinois, appears to treat a judge's identification of a party's death as like a suggestion of death that must be served on a nonparty. The nonparty that must be served has an obvious interest in learning of the litigation and deciding whether to seek to substitute in.

This proposal does not seem a promising occasion for amending Rule 25. The first sentence of Rule 25(a)(1) confers authority to order substitution of the proper party when a party dies and the claim is not extinguished. The court, on learning of the death, can order substitution on terms that are suitable to the circumstances, just as if there had been a formal statement of the death. Indeed once the court learns of the death it is required to dismiss the action as moot as to the deceased party unless a new party with authority to pursue or defend against the claim is brought in.

Judge Dow described the circumstances surrounding the Northern District of Illinois action described in the proposal. The deceased defendant was the medical director at a large prison. He had been sued more than 400 times. In most of the related actions the state attorney general's office filed a statement noting the death. For some reason that did not happen in this action, but the judge was well aware from other cases that this defendant had died. It was a strange case with special circumstances, the sort of circumstances and judicial response that prove the worth of the current rule.

This item was removed from the agenda by consent.

Rule 37(c)(1)

Professor Marcus introduced this topic. Rule 37(c)(1) was added in 1993 to implement the disclosure requirements of new Rule 26(a) and the Rule 26(e) duty to supplement Rule 26(a) disclosures. The first sentence directs that a party who fails to disclose information or the identity of a witness as required by Rule 26(a) and (e) is not allowed to use the information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless. The second sentence then begins: "In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard" may

order other sanctions. The first in the list, (A), is an award of reasonable expenses, including attorney fees.

The rule text is unambiguous. Even though a failure to make a required disclosure is not substantially justified and is not harmless, the court may order an alternative sanction "instead of this [exclusion] sanction."

This question was raised by a submission that pointed to a pair of dissenting opinions in the Eleventh Circuit that argue that a court may not choose to award attorney fees and permit a party to use as evidence information or a witness that was not disclosed when the failure to disclose was not substantially justified and is not harmless. The argument rests on the 1993 Committee Note. The Note characterizes exclusion as a "self-executing sanction," and as an "automatic sanction," because it can be implemented without a motion. The Note then observes that exclusion is not an effective sanction when a party fails to disclose information that it does not want to have admitted in evidence. The alternative sanctions address that circumstance. The argument juxtaposes these Note observations to conclude that the alternative sanctions cannot be imposed as a substitute for excluding evidence offered by the party who failed to disclose it.

Research by the Rules Law Clerk discloses that other courts have been bemused by this argument from the Committee Note, as if the Note could somehow impair the explicit and unambiguous language of the rule text. The research further reveals, however, that the district judge's hands are not tied. The rule has functioned as intended for almost thirty years.

This topic was removed from the agenda by consensus, without further discussion.

Rule 63

Rule 63 addresses situations in which a judge conducting a hearing or trial is unable to proceed. The first sentence authorizes another judge to proceed on "determining that the case may be completed without prejudice to the parties." The second sentence applies only to a hearing or a nonjury trial, and provides:

> [T]he successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden.

The suggestion that brought this topic to the agenda responded to a nonprecedential Federal Circuit decision by asking whether the direction to recall a witness should be relaxed when the witness's original testimony was recorded by video.

Many features of Rule 63 suggest that it provides ample authority to account for the availability of a video transcript in determining whether a witness must be recalled. The question might be considered initially in determining whether the case can be completed without prejudice to the parties if the witness is not available to be recalled. If the witness can be recalled, the three factors listed in the rule come to bear. The testimony must be "material." Materiality is a concept that appears in many settings, often with uncertain meaning. At a minimum, it means that the testimony could make a difference in the outcome. It may also allow some room to determine, with the aid of a video transcript if there is one, that possible changes in the testimony are unlikely, in the context of the whole record, to affect the outcome. The testimony must be disputed. It may be fair to ask whether the dispute needs to be further illuminated, and credibility measured, by recalling the witness, a determination that again may be advanced by consulting a video transcript. The witness, finally, must be available for recall "without undue burden." Whether the rule means to consider only burdens on the witness, or also allows consideration of burdens on the parties and the court, whether a burden is "undue" can be measured in light of the confidence engendered by reviewing a video transcript.

A further consideration is that Rule 63 applies to hearings as well as trials. Hearings address a great many things. Witness testimony may be adduced for many different purposes, implicating quite different fact-finding responsibilities and issues. Recalling a witness on an issue of personal or subject-matter jurisdiction, for example, may be less sensitive than recalling a trial witness.

One perspective on the rule text is that although "must" is used in the rules drafting convention to express a clear command, it is frequently accompanied, as in Rule 63, by provisions that qualify the command. The witness "must" be recalled only if available without "undue" burden, and so on. Any command is clearly qualified by some measure of discretion.

These considerations suggest that there is little reason to take up Rule 63 for the specific purpose of asking whether the rule text should be revised to refer to the availability of a video transcript.

Discussion began with a suggestion that it might be interesting to take a deeper look at Rule 63. "I'm not convinced there is as much flexibility as should be." The cases seem to close it down. To be sure, video trials today are far better than the video depositions that were known in 1991, when the Committee Note to the revised Rule 63 suggested that the availability of a video recording might be considered. But "must" seems to be specific, to be controlled by the parties more than the court. How often is the rule used? To what effect?

Another member suggested that, without greater familiarity with the cases, the plain rule language "seems fairly mandatory." It may not have as much "wiggle room" as the initial presentation suggests. That is not to say that the Department of Justice has encountered problems with Rule 63, only to suggest that it may deserve further inquiry.

A specific question looked to the sketch provided in the agenda materials to illustrate a possible amendment to incorporate reference to the forms of available transcripts. This version would add this at the end of the second sentence: "considering whether the testimony is preserved in written, audio, or video transcript." The question asked whether "considering" is consistent with "must."

The Committee concluded that Rule 63 should be carried on the agenda to determine how frequently it is used in practice, and whether it is sufficiently flexible to enable proceedings before a successor judge in ways that are both fair to all parties and efficient.

Briefs Amicus Curiae

This proposal was advanced by three lawyers who have an extensive practice of submitting briefs amicus curiae in district courts around the country. They suggest it would be desirable to establish uniform national standards and procedures to govern amicus briefs.

The proposal is accompanied by a draft rule adapted from a local rule in the District Court for the District of Columbia, and informed by Appellate Rule 29 and the Supreme Court Rules. If the subject is to be taken up, it will provide a good starting point.

The reasons for adopting a new rule on amicus briefs begin, in a perhaps surprising way, with the estimate that an amicus brief is filed in only one case out of every thousand filed in the district courts, some 300 cases a year. The relative rarity of amicus filings may in part account for the observed reasons for a rule. Many district courts do not really know what to make of amicus brief practice. They have no standards, or only vague standards, governing permission to file. And the procedures for seeking permission may be equally indistinct or ad hoc. Amicus briefs can improve the quality of decisions. As the submission puts it:

> At a high level, amicus parties should bring a unique perspective that leverages the expertise of the party submitting the brief and adds value by drawing on materials or focusing on issues not addressed in detail in the parties' submissions * * *.

The analogy to amicus practice in appellate courts is

interesting, but may be complicated. The central task of appellate courts is to develop the law. Trial courts also are responsible for resolving what may be new, important, complex, and vigorously disputed questions of law. In addition, however, trial courts also are responsible for generating a trial record that provides as strong a foundation as possible for resolving the facts. The facts are critical in deciding the case, and also may be an indispensable part of the framework for identifying and deciding the relevant questions of law. The parties may welcome participation by an amicus. But a party also may prefer to maintain control of the information, issues, and arguments presented to the trial court to protect its own interests in shaping the record. On appeal, the trial court record is taken as given, significantly limiting the range of arguments open to an amicus brief.

The question, then, is whether a rule should be adopted to establish good and nationally uniform standards and procedures for authorizing amicus briefs.

Discussion began with an expression of uncertainty. "I'm not a strong advocate for doing anything." But the local rule in the District of Columbia is a fine rule. The District may be atypical, because it encounters a number of cases that raise issues of law. "I've had a number of cases that involve issues of law." A minimalist rule like the D.D.C. rule may be worth considering.

A judge noted that in 14 years on the bench he has had fewer than half a dozen amicus briefs. "I've never denied a motion. I'm not sure we need a rule." One concern is that the Civil Rules do not have a rule on briefs. Format, length, timing, and like issues are left to local practice. The District of Columbia may be uniquely situated to draw amicus briefs. But it might be useful to survey local rules. And the proposal is well executed. It would be a helpful starting point if a rule is to be drafted.

The Committee concluded that these questions should be carried forward. The first task will be to determine how frequently amicus briefs are tendered in courts outside the District of Columbia.

Rule 4

The service of summons and complaint provisions of Rule 4 have drawn a number of suggestions over the last few years. Suggestions continue to arrive. The broader recent suggestions are to reduce the burden of multiple service in many of the actions involving the United States and governed by Rule 4(i); to authorize service on the United states by electronic means, greatly expanding the limited provision in Rule 3 of the pending Supplemental Rules for Social Security cases; and to dispense with service on a party who has actual knowledge of the suit.

Rule 4 was considered carefully by the CARES Act Subcommittee. The proposed new Rule 87 published last August includes several Emergency Rule 4 provisions for service by a means reasonably calculated to give notice when a court order authorizes a specific proposal. In recommending publication, the Committee explicitly reserved Rule 87 for further consideration in light of the public comments. One of the reserved alternatives would be to amend Rule 4 for general purposes, not only for a civil rules emergency, discarding the Rule 4 part of Rule 87. The Subcommittee also recognized that however that question is resolved, it may be wise to consider Rule 4 in depth. The obvious question is whether it is time to contemplate the use of electronic service in at least some cases. One limited possibility would be to authorize electronic service on any defendant that consents and establishes an address for electronic service. Firms that are frequently sued might find that electronic service works to their advantage by enabling a structure that promptly brings new litigation to the attention of the relevant people within the firm. That and other possibilities, however, remain in the realm of speculation.

Rule 4 questions will be considered by the CARES Act Subcommittee while it studies comments on Rule 87.

Rule 5(d)(3)(B)

Rule 5(d)(3)(B) directs that a person not represented by an attorney may file electronically only if allowed by court order or by local rule. It was drafted as a joint project by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. Alternatives that would allow readier access to electronic filing were discussed extensively during the drafting process. Proponents of a general right to file electronically noted that many pro se litigants are adept with computer systems, and that their numbers grow every day. They emphasized the advantages of electronic filing for a pro se party, producing savings in time and expense that increase with the distance to the courthouse. These advantages were recognized, but the more limited approach was adopted from fear that inept litigants would impose undue burdens on the court and other parties.

The question has been renewed in light of experience during the pandemic. Several courts expanded the opportunities for pro se parties to use electronic filing. Susan Soong conducted an informal survey of clerks offices in the districts within the Ninth Circuit. Several of them allowed general access to e-filing by unrepresented parties. Many of those courts reported that it worked. It "worked fine" in the Northern District of California. For the most part, electronic filing was accomplished by e-mail messages to the clerk, who then entered the filings in the court's system. Other courts, however, were not enthusiastic about this process.

Judge Bates noted that there may be a risk that each of the advisory committees may hang back from this topic, waiting to see whether some other committee will take the lead. The Appellate Rules Committee, for example, has tabled the question pending consideration by the Civil Rules Committee. Deferring consideration by all committees may be the right course. Perhaps the reporters should take the question up among themselves, to make sure that it does not fall through the cracks. Professor Struve agreed that the reporters will confer.

Judge Dow noted that in addition to coordination among the advisory committees, it will be important to coordinate with the Court Administration and Case Management Committee to integrate with the next generation CM/ECF project. He also noted that some courts are experimenting with e-filing by supporting facilities in prisons.

Judge McEwen noted that there has been little progress on this subject in the Bankruptcy Rules Committee. "We're heading into the next generation CM/ECF. We need to find out how it works." In bankruptcy there often are hundreds of docket events in a single case, in a system that cannot work for untrained persons. Claims can be filed electronically, and frequent filers must do so. But any system for e-filing by unrepresented debtors or other parties would need "a lot of safeguards."

Another comment suggested that a distinction might be drawn between the events that initiate a case and later filings. Electronic filing of initiating papers could be troublesome. This concern was seconded by another participant who suggested that clerks' offices may well resist electronic filing of case-initiating filings by pro se litigants.

A practical note was sounded by asking how electronic filing would relate to getting permission to file without paying fees under 28 U.S.C. § 1915. This question was expanded by an observation that § 1915 provides a screen for dismissing frivolous filings without service of process. But if a fee is paid, not all judges do the initial screening.

This question will be retained. The next step may be collaboration of the reporters.

Third Party Litigation Funding

Professor Marcus introduced the report on Third Party Litigation Funding as a timely reminder that this growing and changing phenomenon continues to hold a place on the agenda. The report is further made timely by an inquiry last May from Senator Grassley and Representative Issa.

This topic first came to the agenda in 2014 with a proposal to add a rule requiring initial disclosures about TPLF arrangements. That proposal was studied carefully and put aside to await further developments and better knowledge of TPLF practices. It came back in 2019, and was then confided to the Multidistrict Litigation Subcommittee. The Subcommittee concluded that TPLF is not distinctively allied to MDL proceedings, and remitted the subject to the Committee's general agenda.

TPLF presents an important set of issues. The Committee will continue to monitor them. The Rules Law Clerks continue to gather a catalogue of relevant materials that has grown to impressive length.

Legislation has been introduced in Congress, S. 840, that would adopt disclosure requirements for TPLF in class actions and MDL proceedings.

TPLF continues to present many "uncertainties, unknowns, and difficulties."

Last week the Committee received a proposal that TPLF disclosure be tested by a pilot project. There are some local rules that might be seen as informal pilot projects. A Northern District of California local order providing for disclosure in class actions has been invoked once in four years. The District of New Jersey has recently adopted a local rule; there is no information yet on how it works. Wisconsin has adopted a disclosure requirement for TPLF arrangements in civil cases in its state courts, but informal inquiries have failed to garner much information about how it is working.

The agenda materials describe several of the many problems that must be confronted by any attempt to create a rule for TPLF arrangements. What should be its scope -- what sorts of financing, and perhaps what sorts of litigation should be included? What about work-product protections? Many of the concerns, such as professional responsibility and usury, "are not the normal stuff of the Civil Rules."

Judge Dow said that the topic has been presented to take stock. What experiences have Committee members had? Some judges do ask about TPLF. A party can ask the judge to inquire.

A judge reported requiring disclosure of any TPLF arrangements by those applying for leadership positions in an MDL. The disclosures were to be made to the judge ex parte. No arrangements were reported.

This MDL experience was consistent with findings by the Judicial Panel on Multidistrict Litigation, which found that TPLF

seems not to be used in big MDLs, likely because lawyers self-finance. Another judge, however, reported being aware of massive TPLF positions in some MDLs. The court has to keep in touch with this. Possibilities could include adding the subject to Rule 16(b) and Rule 26, or encouraging courts to discuss TPLF with the parties. The court might decide that there is nothing to do about the arrangements. And there is no need to make the arrangements public. He did have one case in which he admonished the lender that it could not affect settlement decisions.

A judge agreed that courts have authority to require disclosure. "A Rule 16 prompt could be useful." Not all judges are aware of the authority they have.

A judge who reported no personal experience with TPLF suggested that it would be good to learn more about the California, New Jersey, and Wisconsin arrangements. We heard years ago that TPLF is common in patent litigation, but the California order does not seem to touch that. A related issue is before the Appellate Rules Committee, concerning disclosure of who is actually funding an amicus brief. These are big issues. Holding them open may be the right course to pursue.

Another judge agreed that it would be useful to learn more about such local rules and practices as may be identified. And the reports about patent litigation indicated that TPLF is used by defendants as well as plaintiffs. It would be good to learn more about defendant financing practices.

A magistrate judge noted that magistrate judges frequently engage in mediations. They have discussed among themselves the effect that ex parte disclosures of TPLF might have in mediating a resolution.

Another participant noted that "there is a whole state regulatory mechanism." "This is a huge research burden," perhaps too heavy to impose on the rules law clerks. A judge agreed that state courts confront TPLF practices, and volunteered to approach the Conference of Chief Justices and the National Center for State courts if that seems likely to be helpful.

A lawyer member provided a reminder that it is critical to be clear about defining terms in approaching TPLF. It can mean many different things. What of a traditional bank line of credit? All agree that's not "TPLF." TPLF goes on around the world, though it is more common in some places than others.

This observation included a reminder that it is important to encourage diversity, equity, and inclusion in the ranks of class action lawyers and MDL leadership. There are lawyers who need to borrow to represent clients they are perfectly able to represent.

They should not be left at a disadvantage.

Another participant observed that lawyers frequently have financing in bankruptcy proceedings. In state courts, financing may provide living expenses for plaintiffs. "There are lots of things we're not talking about." Champerty is one of the things others are talking about.

Two participants agreed there is a distinction between "consumer" and "commercial" TPLF. There are so many permutations that it would be difficult to define what sorts of arrangements should be brought into a "TPLF" rule. "This is a challenge. There is much to be learned. But filling in the blanks will not make the rules choices go away."

The Committee agreed that TPLF is a big topic. It cannot be allowed to get away. Continued study will be important. But the time has not come to start drafting. The game for now is to stay the course.

Mandatory Initial Discovery Pilot Projects

Dr. Lee provided an interim report on the mandatory initial discovery projects in the District of Arizona and the Northern District of Illinois. The projects ran for three years in each court, beginning and concluding a month apart. All judges participated in the Arizona project. Most judges participated in the Northern District of Illinois.

The "pilot order" was docketed in more than 5,000 cases in Arizona. Discovery was filed in about half of them. Ninety-three percent of these cases have closed. In both Arizona and Illinois there is a backlog of cases awaiting trial because of the pandemic. Jury trials are on the lists. The pilot order was entered in more than 12,000 cases in Illinois. Ninety percent of these cases have closed, leaving some 1,200 open.

There are positive things to report about the study. The pandemic affected both districts, so it remains possible to compare their experiences. Case events have been loaded into the study program with the cooperation of the clerks' offices. The FJC has interviewed judges and court staff. In-depth docket data is being collected.

Surveys are sent to the lawyers in closed cases at six-month intervals. More than 10,000 surveys have been sent. There are more than 3,000 responses. That is a great response rate.

The FJC has been working on the study for five years. "It's become part of my mental furniture." It will yield "lots and lots of information."

Judge Dow noted that circumstances in Arizona are different from circumstances in Illinois. Arizona lawyers have worked with expanded disclosures in Arizona state courts for more than twenty years. Greater resistance was faced in Illinois.

The meeting concluded with the hope that the next meeting, scheduled for March 29, 2022, will be in person.

Respectfully submitted,

Edward H. Cooper
Reporter