The Civil Rules Advisory Committee met by Teams teleconference on April 23, 2021. The meeting was open to the public. Participants included Judge Robert Michael Dow, Jr., Committee Chair, and Committee members Judge Jennifer C. Boal; Hon. Brian M. Boynton; David J. Burman, Esq.; Judge Joan N. Erickson; Judge David C. Godbey; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge Brian Morris; 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. Professor Daniel J. Capra participated as liaison to the CARES Act Subcommittees. Susan Soong, Esq., participated as Clerk Representative. The Department of Justice was further represented by Joshua E. Gardner, Esq. Julie Wilson, Esq. and Kevin Crenny, Esq., represented the Administrative Office. 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 observed that there were around fifty participants and guests, a good attendance, but expressed a hope that the October meeting would be in person.

Judge Dow further noted that the meeting agenda is very full, but expected the Committee to do its best to get through all items. The work of the CARES Act Subcommittee has involved the parallel subcommittees for the Appellate, Bankruptcy, and Criminal Rules Committees, as well as all advisory committee reporters and Professors Capra and Struve as overall coordinating reporters. Their collective work “has been a marvelous thing to watch.” He also thanked Julie Wilson and Brittany Bunting for all of the work that goes into preparing these meetings and that is done so well that we never see it.

The newest Committee members were introduced, repeating the introductions at the October meeting that anticipated their full-fledged arrival. Judge Godbey has already accepted appointment and begun work as chair of the Discovery Subcommittee. David Burman has
agreed to serve on both the Discovery and MDL Subcommittees. Brian
M. Boynton is serving as acting Assistant Attorney General for the
Civil Division. And Judge McEwen is our new liaison from the
Bankruptcy Rules Committee.

Two committee members, Judge Ericksen and Judge Morris, have
served two full terms, adding up to six years each, and are attending
their final meeting today. They have contributed greatly in
subcommittee and committee works, earning our enormous heartfelt
gratitude and friendship.

Professor Capra “deserves a gold medal” for serving as
ambassador plenipotentiary for CARES Act work. Judge Jordan and
Judge Dow agree that watching his exchanges with the several
reporters is like watching an Olympics ping-pong match with words.

Thanks also are due to the Federal Judicial Center,
particularly Emery Lee and Tim Reagan, for tireless and expert work.
Jerome Kalina, AO staff attorney for the Judicial Panel on
Multidistrict Litigation, has facilitated the invaluable help the
Panel has provided to the MDL Subcommittee. Finally, thanks are due
to all those who make time to observe committee meetings.

Judge Dow turned to a report on the January Standing Committee
meeting. The CARES Act drafts from the Appellate, Bankruptcy, Civil,
and Criminal Rules Committees consumed much of the discussion. The
benefits of that discussion, and the further work of the advisory
committees and Professor Capra, are reflected in the Rule 87 draft
on today’s agenda. Rule 7.1 was approved for adoption; because it
missed the regular cycle, it will be presented to the Judicial
Conference next September. Rules 15(a)(1) and 72(b)(1) were approved
for publication when one or more added proposals combine to make a
suitable package for seeking public comment. There also was valuable
feedback on the work of the MDL Subcommittee.

The Rule 30(b)(6) amendments took effect on December 1, 2020.
No new rules are on track to take effect on December 1, 2021.
Rule 7.1 is in the pipeline to take effect on December 1, 2022.
Depending on the outcome of today’s deliberations and action by the
Standing Committee, the Supplemental Rules for Social Security Cases
and an amendment of Rule 12(a)(4) also could be headed toward an
effective date of December 1, 2022.
Legislative Report

Julie Wilson provided the legislative update. The list of bills that would affect civil procedure is short because many bills expired at the end of the last Congress. Bills aiming to exclude “gig economy” claims from Rule 23 class actions and to limit the scope of injunctions to benefit only parties to the litigation repeat bills introduced in the last Congress. There has not yet been any movement on them. Senator Grassley has introduced S 818, a Sunshine in the Courtroom Act that would permit federal judges to allow cameras in the courtroom. This bill would have a particular impact on Criminal Rule 53, which prohibits photographs in the courtroom during proceedings or broadcasting proceedings. Similar bills were introduced in earlier Congresses. The Administrative Office is working to reestablish closer ties on the Hill that will enable it to offer comments during the formative stages of potential legislation, often a more effective process than waiting until bills are pretty much formed.

October 2020 Minutes

The draft minutes for the October 16, 2020 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

CARES Act: Rule 87

Judge Dow introduced the CARES Act Subcommittee Report on draft Rule 87 by noting that the present purpose is to continue to develop a draft to recommend for publication alongside emergency rules proposals by the Appellate, Bankruptcy, and Criminal Rules Committees. Today’s deliberations are framed to keep open the question whether, after public comment, to recommend adoption of a civil rule for rules emergencies, or instead to recommend revision of the civil rules themselves, or to conclude that experience during the pandemic has shown there is no need for new rules texts to meet emergency circumstances. This caution was repeated in the subcommittee report: in the end, the subcommittee may recommend adding more emergency rules, or instead adapting what now are proposed as Emergency Rules 4 and 6(b)(2) by amendments to the regular rule texts, or simply abandoning all of these attempts. Much remains to be learned by further work and in the public comment process.

Judge Jordan delivered the subcommittee report. He began by stating that the subcommittee members have done extraordinary work,
and thanking them for continuing devotion to the hard work. He also expressed thanks to the reporters for all the advisory committees. A full history of all the work is not needed for today’s discussion. It suffices to note that there were many subcommittee meetings, and a lot of work by the reporters, with guiding help and coordination by Professor Capra.

The subcommittee began with independent reviews of all the rules by several people, looking for all those that might be strained by emergency circumstances. Special thanks are due to subcommittee member Sellers for a painstaking review of all of the civil rules in a search for those that might present obstacles to effective procedure during an emergency. Long initial lists of potentially inflexible rule language were pared down, and pared down again. In addition to reviewing rules texts, as much information as possible was sought in actual experience with civil actions during the pandemic. Broad general experience has seemed to show that the rules have held up remarkably well. Their inherent flexibility and general reliance on judicial discretion have enabled courts and parties to function as well as emergency circumstances permit without encountering impractical obstacles in rule language. Careful review of rule texts, rather than difficulties encountered in emergency practice, has provided the basis for proposing emergency rules. For now, the result is to recommend emergency provisions only for the methods of serving process under some subdivisions of Rule 4 and for extensions of the time for post-judgment motions otherwise prohibited by Rule 6(b)(2). It may be that barriers raised by other rules remain to be discovered. Publishing Rule 87 for comment will be a good way to gather additional information.

Strenuous efforts were made to achieve as much uniformity as possible with the other proposed emergency rules. The definition of a rules emergency is uniform across all of them, including Rule 87(a), with one departure in Criminal Rule 62(a) that adds a requirement that the Judicial Conference find that “no feasible alternative measures would sufficiently address the impairment [of the court’s ability to perform its functions in compliance with these rules] within a reasonable time.” The Appellate and Bankruptcy Rules Committees agree that this added provision is not useful in their emergency rules, and the subcommittee agrees for the Civil Rules. The Criminal Rules emergency provisions address many matters made sensitive by tradition, constitutional protections, and the singular weight of criminal conviction. Adding language to ensure exhaustion of all available alternatives by the Judicial Conference is suitable for the Criminal Rules, but unnecessary and possibly confusing in the other rules.
Substantial uniformity also has been achieved in the provisions for declaring a rules emergency. Rule 87(b)(1)(B), however, departs from the Bankruptcy and Criminal Rules. The Bankruptcy provision tracks Criminal Rule 62(b)(1)(B): the Judicial Conference declaration “must * * * state any restrictions on the authority granted in (d) and (e).” Rule 87(b)(1)(B) is “must * * * adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them.” Drafting history and, more importantly, the character of the emergency civil rules, underlie the difference. Earlier drafts of Rule 87 provided that the declaration of emergency should specify which of the emergency civil rules were included. This approach reflected the character and limited number of the emergency rules. The provisions for serving process in Emergency Rule 4 are designed to rely on circumstance-specific determinations of what means of service should be approved; there is no reason to “restrict” this authority. Instead, it may make sense to limit which of the Emergency Rule 4 subdivisions might be authorized. Emergency Rule 6(b)(2) is quite different, but includes intricately intertwined provisions for extending the time for post-judgment motions and integrating extensions with the provisions of Appellate Rule 4(a)(4)(A) for resetting appeal time. Any attempt to “restrict” this rule risks untoward consequences; it should be all on or all off. Inviting the Judicial Conference to select from this short menu of emergency rules is attractive. But that approach was abandoned in the interest of uniformity -- the consensus was that the Judicial Conference should not be confronted with an approach that required it to “select out” particular provisions in the Bankruptcy and Criminal rules, but to affirmatively select which emergency civil rules to include. The result was rather awkward language focusing on making exceptions. There may be room to improve the language, but without embracing the inapposite concept of “restrictions.” This is a point on which some differences in language are needed to reflect the different settings in which emergency rules would operate as well as differences in the character of the emergency rules themselves.

Discussion reiterated the view that there are real differences between the Criminal and Civil Rules settings. Emergency Rule 4 requires a court order for an alternative method of service. “Restricts” fits in the context of Criminal Rule 62, but not Civil Rule 87.

Another suggestion was that Emergency Rule 4 is framed as one rule, but has several parts because it addresses several subdivisions of Rule 4. The Judicial Conference might, for example, decide that alternative methods of service could be ordered on corporations covered by Rule 4(h)(1), but not on individuals covered
by Rule 4(e). Should it be “adopt all or part of the emergency rules”?

A judge brought the discussion back to Rule 87(b)(1)(A).

Can a declaration cover a division rather than an entire district? It is easy to imagine a local emergency -- or to remember a courthouse bombing -- that affects only one division within a district. The intent has been to authorize a declaration for a division, recognizing, in line with Criminal Rule 62(a)(2), that the Judicial Conference would have to consider the possibility of operating under the regular rules by moving activities to another division within the district, obviating any need for emergency rules. This question has played a role in drafting the Bankruptcy emergency rules. It will be studied further, considering the possibility of added rule text or adding to the committee note.

A related question asked whether the rule text should provide an explicit procedure for informing the Judicial Conference of an emergency. A local emergency may not otherwise come to the Conference’s attention. The response was that early drafts included a provision for informing the Conference, but the provision was thought unnecessary. Conference members are likely to be attuned to conditions within their circuits, even the district judges. And any judge who believes that emergency circumstances warrant a Conference declaration will be able to inform the Conference immediately, either by direct communication or through a local Conference member.

Rule 87(c) establishes two Emergency Civil Rules, although Emergency Rule 4 has several parts.

Emergency Rule 4 authorizes a court to order that service of summons and complaint be made “by a method that is reasonably calculated to give notice” on defendants addressed by some, but not all, subdivisions of Rule 4. Earlier drafts sought to ease the task of moving between Rule 4 and Emergency Rule 4 by copying the full text of Rule 4 into the corresponding emergency rule provision, adding authority to authorize service “by registered or certified mail or other reliable means that require a signed receipt.” The full text approach was abandoned when Rule 4(i) was added to the list, generating an emergency rule of great length. Ongoing experience with postal service, moreover, prompted consideration of the prospect that some emergencies -- and most particularly an emergency with the postal service -- might require different alternative methods of service.
The current draft requires a court order to authorize service by an alternative method. The alternative must be “reasonably calculated to give notice.” “Notice” means actual notice, but it was thought better to omit “actual” from rule text for fear of inviting inappropriate arguments, most particularly in cases that accomplished actual notice by means challenged as not reasonably calculated to do what in fact was done. Ordinarily the court order must be made in response not only to the circumstances of the particular emergency but also the circumstances of the particular case. As one example, a method of service reasonably calculated to give notice to a large and sophisticated corporation under Emergency Rule 4(h)(1) might not be reasonably calculated to give notice to a small and unsophisticated incorporated family business. The committee note, however, also reflects the prospect that some emergencies might justify a standing order that authorizes a particular method of service. When Rule 4 authorizes service by mail, for example, a breakdown of the postal service — perhaps a strike — might justify a general order under Emergency Rule 4 for service by designated commercial carriers with confirmation of delivery.

Emergency Rule 4 authorizes alternative methods of service only for Rules 4(e), (h)(1), (i), or (j)(2), or on a minor or incompetent person in a judicial district of the United States. The omissions all tie to Rule 4(f). Rule 4(f) governs service at a place not within any judicial district of the United States. It is incorporated in Rule 4(h)(2). Rule 4(j)(1) provides for service on a foreign state or its agency under the Foreign Sovereign Immunities Act. It seems better not to attempt to expand the extensive and at times flexible provisions for service abroad, in part because service of process is commonly viewed as a sovereign act that impinges on the sovereignty of the country where service is made. Similar concerns arise from Rule (4)(g), which lacks paragraph designations to support simple cross-reference. Instead, Rule 87(c)(1) refers to service “on a minor or incompetent person in a judicial district of the United States,” omitting the part of subdivision (g) that addresses service outside a judicial district of the United States.

The final sentence of Emergency Rule 4 provides a specific focus on what had been a general provision in earlier drafts of Rule 87(d). The question is what to do when a declaration of a rules emergency ends before completion of an act authorized by an order made under an emergency rule. The earlier provision borrowed the language of Rule 86(a)(2)(B) that governs the retroactive effect of a rule amendment by asking whether applying the new rule “would be
infeasible or work an injustice.” The analogy may help, but it is indefinite. And it seemed to apply without distinction between Emergency Rule 4 and Emergency Rule 6(b)(2). Reflection, however, showed that different tests should apply. For Emergency Rule 4, any of three alternatives may be desirable when an order authorizes service by a method not within Rule 4 and service is not completed when the declaration ends. It may be useful to allow service to be completed as authorized by the order, and perhaps important if the claim is governed by a limitations statute that requires actual service by a stated time. Or it may be useful to strike one of the alternative methods authorized by the order while leaving another to be completed. Or it may seem better to terminate the order, falling back on the ordinary methods authorized by Rule 4.

Emergency Rule 6(b)(2) is a quite different matter. The first part of it is simple enough. Rule 6(b)(2) raises an impermeable barrier: “A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).” Emergency Rule 6(b)(2) changes “must not” to “may.” But it is carefully hedged about. The court can grant an extension only by acting under Rule 6(b)(1)(A), which requires good cause and that the court act, or a request be made, before the original time expires. For Rules 50, 52, and 59, the original time is 28 days from entry of judgment. Rule 60(b) is governed by a more complex time provision, which creates complications for integration with Appellate Rule 4(a)(4)(A)(vi), yet to be discussed. The extension is limited to “a period of not more than 30 days after entry of the order” granting an extension. Setting the limit to run from entry of the order, rather than from the motion, enables the court to consider the matter carefully, but it is expected that ordinarily the needs for prompt disposition of post-judgment motions will encourage prompt decisions.

What remains is not so simple. Timely post-judgment motions reset appeal time under Appellate Rule 4(a)(4)(A). Emergency Rule 6(b)(2) would not work if it did not reset appeal time, requiring a party either to surrender any opportunity to appeal or to make the post-judgment motion within the ordinary time unaltered by any extension. Earlier drafts, framed in the spirit of flexibility and purpose-oriented interpretation that characterize the Civil Rules, relied on a simple provision that a motion filed within the period authorized by an extension has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under Rule 50(b), 52(b), 59, and 60. That approach was accepted for a while on all sides. But then the appellate rules experts began to have doubts. The appeal times in Rule 4 that reflect statutory provisions are
treated as mandatory and jurisdictional. There is no room for harmless error, no matter how innocent or how obscure the time calculations may be. Greater precision was sought. A series of detailed exchanges among Standing, Appellate, and Civil Rules reporters produced several revised drafts, exploring -- and at times backtracking from -- many variations. The draft in the original agenda materials was replaced by a more detailed version that breaks out three distinct sequences of events. Here too the task is relatively straightforward for motions under Rules 50, 52, or 59.

The first step in Emergency Rule 6(b)(2)(B) is to ensure that if a longer appeal time is available under the ordinary rules, that governs. An example would be a motion made by one party within the ordinary 28 days from entry of judgment, followed by a motion for an extension by another party. The court might deny an extension, or grant an extension and dispose of a timely motion filed within the extended period without yet disposing of the original motion. Appeal time would be reset to run for all parties from the later order disposing of the original motion.

Three variations are addressed by items (i), (ii), and (iii). Under (i), appeal time is reset to run from an order denying a motion for an extension. Under (ii), a motion authorized by the court and filed within the extended period is filed “within the time allowed by” the Federal Rules of Civil Procedure for purposes of Appellate Rule 4(a)(4)(A). Appeal time is reset to run from the last such remaining motion. Under (iii), a failure to file any authorized motion within the extended period resets appeal time to run from the expiration of the extended period. All of these variations fit neatly within the purposes of the emergency rule and Appellate Rule 4(a)(4)(A).

The complication that caused real difficulty arises from the time limits set by Rule 60(c)(1) for motions under Rule 60(b). Rule 60(c)(1) sets the basic limit for a Rule 60(b) motion at a reasonable time, but also imposes a cap of one year for motions under Rule 60(b)(1) (mistake, etc.), (2)(newly discovered evidence), and (3)(fraud or misrepresentation). These three subdivisions account for most Rule 60(b) motions. And they closely resemble grounds for relief that may be sought under Rules 52 and 59.

The first step is clear enough. What is a reasonable time for a Rule 60(b) motion should be calculated in light of emergency circumstances that impede filing within what otherwise would be a reasonable time. The one-year cap, however, presents a problem. It is possible that an emergency could thwart filing a motion in a time
that is reasonable in light of the emergency but runs beyond the one-year cap. Allowing an extension under Emergency Rule 6(b)(2) fits within the purpose of the emergency rule.

The next step is not quite so clear. Experience shows that motions for relief that could be sought under Rule 52 or 59 are at times captioned as Rule 60(b) motions. If the motion is filed within 28 days after entry of judgment and seeks relief available under those rules, it should have the same effect in resetting appeal time. That result has been accomplished by Appellate Rule 4(a)(4)(A)(vi), which resets appeal time on a motion “for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.” The same resetting effect should follow under the circumstances described in Emergency Rule 6(b)(2)(B)(i), (ii), and (iii).

Interpreting Appellate Rule 4(a)(4)(A)(vi) together with Emergency Rule 6(b)(2), however, has not seemed as easy as the evident purpose suggests. A close technical reading would insist that a motion filed more than 28 days after judgment, although timely because of an emergency extension, is not “filed no later than 28 days after the judgment is entered.” Simply saying that a motion made within the time authorized by an emergency extension has the same effect as a timely motion does not do the job.

The Appellate Rules Committee has considered this difficulty, and has drafted a cure by a proposed amendment of Appellate Rule 4(a)(4)(A)(vi) to read: “for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59.” The draft committee note for new (vi) states that “if a district court grants an extension of time to file a Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion.”

With the help of the proposed appellate rule amendment, Emergency Rule 6(b)(2) is effectively integrated with the rules for resetting appeal time. This process has impressed participants with the conviction that Rule 4 is a delicate topic, even a mystery, but the work has succeeded with particular help from those with deep knowledge of the Appellate Rules.

Finally, the last sentence of Emergency Rule 6(b)(2) provides a different answer from Emergency Rule 4 for the effect of a declaration’s end on an act authorized by an order under Rule 6(b)(2) but not completed when the declaration ends. The act, which may be
either a motion or an appeal, may be completed under the order. If the order denies a timely motion for an extension, the time to appeal runs from the order. If an extension is granted, a motion may be filed within the extended period. Appeal time starts to run from the order that disposes of the last remaining authorized motion. If no authorized motion is filed within the extended period, appeal time starts to run on expiration of the extended period. Any other approach would sacrifice opportunities for post-judgment relief or appeal that could have been preserved if no emergency rule motion had been made.

Discussion returned to Emergency Rule 4. It says “the court may order.” Does that clearly require a court order, or does it leave room for a party to devise and use a novel method of service, preparing to argue that it was reasonably calculated to give notice of a challenge should be made? The committee note says that the rule authorizes the court to order service. The rule text itself focuses only on a court order, an approach used throughout the rules to describe acts that can be done only under a court order. It would be a brave or foolish lawyer who decided to act without an order. Still, thought will be given either to an explicit statement in the committee note or even to added rule text that authorizes an alternative method of service “only if authorized by court order” or some such words.

A motion to recommend Rule 87 for publication was adopted without dissent.

Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)


The proposed Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) were published last August. They drew a comparatively modest number of comments. Two witnesses appeared for the public hearing. The comments and testimony led to useful improvements in the rules draft.

The more important improvement is deletion of the provisions that required that the complaint include the last four digits of relevant social security numbers. That requirement had met continued and vigorous opposition based on the fear of identity theft. But it was retained because the Social Security Administration maintained that this information was essential to enable it to accurately
identify the proceeding and produce the record for review. So many
claims are processed through to final administrative disposition
that relying on the claimant’s name alone does not enable prompt
identification of all cases. The comments and testimony, however,
revealed that, responding to the Social Security Number (SSN) Fraud
Prevention Act of 2017, SSA has launched a system that attaches a
13-character alphanumeric designation, currently called a
Beneficiary Notice Control Number, to each notice it sends to a
claimant. This unique number readily identifies the proceeding and
record. SSA anticipates that this practice will be expanded to
include all final dispositions before the proposed supplemental
rules can become effective. Elimination of the last-four-digits
requirement is accomplished by instead requiring that the complaint
include “any identifying designation provided by the Commissioner
with the final decision.”

Rule 6 was improved to state more clearly that the time to file
the plaintiff’s brief is reset by the order disposing of the last
remaining motion filed under Rule 4(c). Some changes were made in
the committee note, including one that responds to a comment that
it should say clearly that Rule 1 brings into the Supplemental Rules
an action that presents a single claim based on the wage record of
one person for an award to be shared by more than one person.

The subcommittee agrees unanimously that this is a good set of
rules. No further work is needed. The remaining question is whether
to recommend adoption or to abandon the project because of doubts
about the wisdom of adopting substance-specific rules.

These rules are neutral as between claimant and the
Commissioner. A quick sketch may be useful for new committee
members. Supplemental Rule 1 defines the scope of the rules to
include actions under 42 U.S.C. § 405(g) for review on the record
of a final decision of the Commissioner of Social Security that
presents only an individual claim. The Civil Rules also apply,
except to the extent that they are inconsistent with the
Supplemental Rules.

Supplemental Rule 2 authorizes a simple complaint that need
state only that the action is brought against the Commissioner under
§ 405(g), identify the claimant and person on whose wage record
benefits are sought, and identify the type of benefits claimed. The
plaintiff is free, but not required, to add a short and plain
statement of the grounds for relief.
Supplemental Rule 3 requires the court to notify the Commissioner of the action by transmitting a Notice of Electronic Filing to the Commissioner and to the United States Attorney for the district. This provision reflects a practice established in some districts now. The plaintiff need not serve a summons and complaint under Rule 4. This rule is vigorously supported by claimants as well as SSA.

Supplemental Rule 4 describes the answer and motions. The answer may be limited to the administrative record and any affirmative defenses. It states explicitly that Rule 8(b) does not apply — the Commissioner is free to answer the allegations in the complaint, but need not.

Supplemental Rule 5 is in many ways the core of the rules. It provides that the action is presented for decision on the parties’ briefs. Supplemental Rules 2, 3, 4, and 5 taken together reflect the character of § 405(g) actions within the scope of Supplemental Rule 1. They are statutory actions for review on an administrative record, not suited for the civil rules that govern proceedings headed for trial.

Supplemental Rules 6, 7, and 8 set the times for submitting briefs. Thirty days are set for filing the plaintiff’s brief, then for the Commissioner’s brief. Fourteen days are set for a reply brief. The public comments and testimony almost universally urged that the times be set at 60 days, 60 days, and 21 days. Similar comments were made throughout the years the subcommittee worked with claimants’ groups and SSA. They urge that all sides need more time. Plaintiffs’ attorneys may come to the case for the first time after the final administrative decision. Often they practice in small firms with heavy caseloads. The administrative records may run to thousands of pages. SSA attorneys may be similarly overworked. When local rules set similarly short briefing schedules, extensions are routinely requested and routinely granted. These are good arguments. But these cases typically spend years in the administrative process. Claimants often are in urgent need. The subcommittee concluded that it is better to set an expeditious briefing schedule that can be met in many cases, but still permits extensions when truly needed.

Despite unanimous agreement that these rules have been polished into a very good procedure for § 405(g) administrative review actions, the subcommittee divided on the question whether to recommend adoption. Four of those who participated in the discussion, including all three judges, recommended adoption. Three
others, however, remained uncertain, “on the fence,” or even negative.

Doubts about recommending adoption spring from concern about the principle of transubstantiation that pervades the Rules Enabling Act. Section 2072(a) authorizes “general rules of practice and procedure.” Do rules confined to § 405(g) review actions count as “general”? If these rules are adopted, will it be more difficult in the future to resist proposals for other special rules, motivated not by the general public interest but by narrow private interest, whether to the rules committees or in Congress? Some doubters also suggest that there is nothing distinctive about § 405(g) actions that merits special rules that generate these risks. To them, the general civil rules, together with local rules or standing orders, suffice. And claimants’ representatives, even though they recognize that the rules have been refined into a good procedure, prefer to stick with the variety of disparate procedures that are familiar to judges.

These doubts are met, first, by the basic fact that these actions are appeals on a closed record. There is no occasion for discovery -- adding any claims that might support discovery takes an action outside the scope of the Supplemental Rules.

The rules also are neutral between the parties, claimants and Commissioner. They are good rules that will help claimants, the Commissioner, and courts. SSA strongly supports the rules, based on their deep experience with proceedings under the civil rules and divergent local practices. The Department of Justice is promoting a model local rule that is largely drawn from earlier drafts of the Supplemental Rules. The judges who commented support the proposed rules, including the chief judges of two of the three districts that have the greatest number of § 405(g) actions and have local rules closely similar to the proposed rules.

The proliferation of local rules shows that courts recognize the need to supplement the general rules.

Comments on the proposal entrench the prediction that these simple rules will provide important help to pro se plaintiffs.

The value of supplemental rules is further shown by the great number of these cases. The annual count has run between 17,000 and 18,000; the most recent annual figure is 19,454. The benefit of improved procedure in so many cases is important.
It also is significant that this project began with a proposal by the Administrative Conference of the United States, bolstered by a thorough study by two leading procedure scholars of procedures used in § 405(g) actions throughout the country.

Finally, it should be remembered that there are other substance-specific rules. Rule 71.1 for condemnation actions is prominent. The Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions enjoy a strong history, but include the much more recent addition of Rule G, strongly urged by the Department of Justice, governing forfeiture actions in rem. The separate sets of rules for § 2254 and § 2255 proceedings are other prominent examples. Others can be found as well.

Discussion began with the observation that the public comments and testimony “were a real help.”

A second observation was to point to the Appellate Rules. There is a general Rule 15 for petitions to review administrative action, but also a specific Rule 15.1 that applies only to the order of briefing and oral argument in enforcement or review proceedings with the National Labor Relations Board. Rules focused on specific substantive areas are not limited to the Civil Rules.

A subcommittee member began by praising the supplemental rules as “extremely well-written,” reflecting intense and engaging work. But “I’m on the fence,” uncertain both whether we need special rules and whether they will much improve things.

Dean Coquillette, who served three decades as Standing Committee Reporter, described himself as “an apostle of transubstantivity.” But this “is the best possible job. I can see doing it. It will address real problems.”

The subcommittee representative from the Department of Justice agreed that the rules are about as good as can be. But the Department remains concerned. The rules might be seen as designed to assist SSA attorneys, who often appear in these review actions as Assistant United States Attorneys. The plaintiffs’ bar is at best divided. Should we favor, or appear to favor, one side? Yes, these are appeals. But they are not much different from the mine-run of APA cases; there is a risk of mission creep. And the hoped-for efficiency will be threatened by local rules that will persist in face of the new national practice.
A judge member of the subcommittee said that the supplemental rules promote efficiency for all parties. They will be especially helpful for pro se plaintiffs. The briefing times will generate requests for extensions.

Another subcommittee member judge reiterated the point that the Department of Justice is promoting a model local rule for adoption in all districts. It is similar to the supplemental rules. But it, like other local rules, has not gone through the lengthy and painstaking process that generated the supplemental rules. The Department model, for example, requires social security numbers. “These rules treat all parties equally and fairly.”

Another judge agreed that the subcommittee should be thanked for its great work. “The rules are top-notch.” But it is important to consider at least two concerns. First, although these rules benefit all parties, will there be a perception that, in the face of opposition by claimants’ organizations, they are proposed for the benefit of SSA? Second, although many judges seem to favor these rules, there are others who will remain inclined to do things their own way. Will uniformity in fact happen? Certainly there will be more uniformity, but how much more? How often will local rules and individual judges depart to satisfy their own desires? That is a risk for all national rules, but can we be confident of uniformity?

Yet another judge admitted to an initial reluctance about adopting substance-specific rules, “but I’m coming around. These are different from the mine-run of cases.” “We struggle with the same issues” in my court. The proposed rules are better than many local rules. The Federal Magistrate Judges Association supports the proposal, and their views carry weight. Concern for pro se litigants also provides support. “Yes, judges will do what they want to do.” There is not much that rules can do about that. But “On balance, I like this. A lot of districts will embrace them.”

A lawyer summarized the views that the plaintiffs’ bar and the Department of Justice oppose the proposals, while SSA supports them. These positions should be taken seriously. “We want neutral rules.” But the subcommittee has taken these concerns seriously. It is right in finding that the rules are neutral and address the proper concerns that have been expressed. “The asymmetry of support is almost an optics problem” that should not get in the way of adopting good rules.

Judge Lioi concluded the discussion, saying that these are rules of procedure. Judges have not resisted them. Once they engage
in discussion, they support them. And the benefits to pro se claimants are important.

The Committee voted to recommend the Supplemental Rules for adoption. A Committee member who arrived at the meeting just as the vote was being taken abstained. The Department of Justice dissented from the recommendation, at the same time agreeing that “these are strong rules.”

Rule 12(a)(4)(A): Time to Respond

A proposal to amend Rule 12(a)(4)(A) was published last August. It is time to decide whether to recommend it for adoption.

The proposal was brought to the committee by the Department of Justice. It rests on experience with the difficulties the Department has encountered in one class of cases with the provision in Rule 12(a)(4)(A) that, unless the court sets a different time, directs that a responsive pleading must be served within 14 days after the court denies a motion under Rule 12 or postpones its disposition until trial. These are cases brought against “a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf.” The Department often provides representation in such cases.

The difficulty of responding within 14 days rests in part on the need for more time than most litigants need, at times in deciding whether to provide representation, and more generally in providing representation. But the need is aggravated by an additional factor. The individual defendant often raises an official immunity defense. Denial of a motion to dismiss based on an official immunity defense can be appealed as a collateral order in many circumstances. Time is needed both to decide whether appeal is available and wise, and then to secure approval by the Solicitor General. Allowing 60 days is consistent with the recognition of similar needs in Rule 12(a)(3), which provides a 60-day time to answer, and in Appellate Rule 4(a)(1)(B)(iv), which sets appeal time at 60 days.

There were only three comments on the proposal. The New York City Bar supports it. The American Association for Justice and the NAACP Legal Defense Fund oppose it. The reasons for opposition reflect concern that plaintiffs in these actions often are involved in situations that call for significant police reforms, parallel concerns about established qualified immunity doctrine, the general issues arising from delay in resolving these actions, and the
breadth of the proposal in applying to actions in which there is no immunity defense.

Discussion began with a statement for the Department of Justice. The proposal is important, in part because of the frequent need to seek approval of an appeal by the Solicitor General. Opposition that rests on the need for police reform, and on distress with official immunity doctrines, addresses collateral concerns. The Department appreciates these concerns, but continues to believe that the amendment is important.

A committee member suggested that the proposed amendment is overbroad, reaching cases in which there is no occasion to consider an appeal, most obviously in those that do not include an immunity defense in a motion to dismiss. As it stands, Rule 12(a)(4) allows the court to set a time different than 14 days. It will work better to require the Department to request an extension when needed to support its deliberation of a possible appeal, avoiding the opportunity for delayed answers in all of these cases.

Another member agreed, and added that “60 days is far too long in any event.”

A judge member suggested that it is a question of what the presumption should be. Should it be presumed that the defendant gets more than 14 days? Or that the plaintiff is entitled to an answer within less than 60 days? The difference “is not likely to change the litigation very much.” How many cases will provide likely occasions for appeal? How much difference will the choice of time to answer make in the progress of what often are very complicated cases?

An initial response for the Department of Justice noted that the Rule 12(a)(3) provision allowing 60 days to answer in these cases is important, whether or not grounds for an immunity appeal are anticipated. But data on the empirical question of how many cases involve potential immunity appeals are uncertain. This proposal originated in the Torts branch, prompted by experience when an answer is filed within the present 14-day period. In some actions they are required to proceed to Rule 16(b) scheduling conferences, and even into discovery, while a decision whether to appeal is being made.

A judge member observed that immunity defenses are often raised in § 1983 actions against state or local officials: don’t they have similar arguments for more time? They may face local problems
similar to the need arising from the need for Solicitor General approval of appeals, and from the more general need for time. It was noted that similar concerns about the needs of state and local governments have been raised in considering other rules provisions that give distinctive treatment to federal actors, but that so far the needs of the federal government have been found to justify distinctive treatment not accorded to other governments.

A veteran of Department of Justice service observed that the Department must manage a great number of cases, and that it is important to have one person -- the Solicitor General -- responsible for making and enforcing a nationally uniform practice on taking appeals. It is unlikely that any state or local government faces like concerns. Fourteen days is a short period, and the pressure is not alleviated simply by seeking an extension. Until an extension is actually granted, the Department must proceed on the assumption that it will not be granted. Given the brevity of time, moreover, the request is likely to be pretty much boilerplate that does not adequately explain case-specific needs for an extension.

A judge member asked whether, if the 60-day period is adopted, the government will routinely ask for extensions? Judges are likely to be amenable to a first motion to extend, whether the period is initially set at 14 days or 60 days. They are less likely to be amenable to a second request. The choice of the initial period to answer makes a real difference. The Department answered that the process can, and often does, happen within 60 days. But not within 14.

A judge returned discussion to the argument that the proposed rule is overbroad by renewing the question whether it is possible to come up with an empirical estimate of how many cases will be affected? “I get the need for time when an appeal is in prospect. I rarely get requests to extend in § 1983 cases.” This is a pragmatic question of where the burden should lie -- on the government to seek more time, or on the plaintiff to seek a reduced time if the rule sets the general time at 60 days.

The Department of Justice responded with a reminder that the need for 60 days to respond is felt even when there is no prospect of a collateral-order appeal. The reasons are the same reasons as have been accepted in providing 60-day periods by earlier amendments of Rule 12(a)(3) and Appellate Rule 4(a). Local attorneys still need to consult with the Department in Washington. And the reasons that explain denial of the motion to dismiss may affect the next steps, including the answer.
A judge agreed that the need for time to prepare an answer in all cases, including affirmative defenses, may justify a blanket 60-day provision.

Another judge agreed that the problem "is bigger than immunity appeals." It is not surprising that the Department needs more time to answer in these cases, parallel to the needs that led to amending Rule 12(a)(3).

A committee member asked how often is the Department unable to complete its consulting process in 14 days? We have only the Department’s statement that this is a problem. Is more time needed in all cases? Compare Rule 15(a)(3), which allows only 14 days to respond to an amended pleading if the original time to answer expires before then.

Another participant noted that the parallel to Rule 12(a)(3) is not complete. Rule 12(a)(2) gives the Department 60 days to answer in actions against the United States or its agencies or officers sued in an official capacity, but it has not been proposed that Rule 12(a)(4)(A) should be expanded to provide 60 days in those cases. And if the 14-day response period leads to a risk of discovery before the time to appeal runs out, the Department can always seek a stay of discovery. The Department responded that this is part of the problem. "Discretion is exercised differently."

A lawyer member asked about empirical evidence of actual problems. Perhaps this item should be tabled for further discussion in October. How often do courts deny an extension of the time to respond? How often does that force a rushed response, or lead to other problems?

A judge asked whether it is useful to put judges to the work of ruling on motions to extend the time to respond? Is it useful even if the motions are routinely granted? Experience in a United States Attorney office and as a district judge showed that "this is a gigantic system. The default mode should be enough time to make the system work." In the relatively rare cases where there is a real need for a response in less than 60 days, let the plaintiff make the motion to shorten the time.

A different member asked what is the reason for picking the particular figure of 60 days? It has no obvious anchor in the arguments that more time is needed in cases that do not present the possibility of a collateral-order appeal. A response was offered — the 60-day period does have a clear anchor in the 60-day appeal
period set by Appellate Rule 4 for cases with the possibility of an appeal.

These competing concerns were summarized. One argument is that this general provision is too broad; 60 days are not needed in cases without the prospect of a collateral-order appeal. But the Department responds that it needs this time for other purposes, not only to decide whether to seek the Solicitor General’s approval for an appeal. It is important to remember that these competing concerns meet on a field of presumptions: should the presumption be that the period is 60 days, subject to shortening by court order? Or should it be that the period is 14 days, subject to extension by court order?

A lawyer suggested that the problem arising from the time needed to win approval to appeal could be met by limiting the 60-day period to cases “where a defense of immunity was denied.” Another member supported this suggestion.

A Department of Justice representative reported talking with the Torts branch during today’s meeting. They do not track how often requests to extend the present 14-day period are made and denied. But the burdens on courts and the Department are those that have been described in today’s discussion. And it is clear that the Department assumes that it must go forward even after moving for an extension unless the court acts quickly on the motion. Beyond that, the Torts branch reports that most motions to dismiss do raise immunity defenses. Any issue of overbreadth in reaching cases that do not include an immunity defense is not a real-world concern.

A judge noted that either way, the rule does not address stays of discovery. In most cases, discovery will be stayed because immunity is at issue. A Department representative responded that some judges do not grant stays. But it was noted that discovery stops once an appeal is taken.

The Department of Justice representative added that as compared to having no amendment of Rule 12(a)(4) for all of these actions, it would be better to have a rule extending the time to answer to 60 days in cases where an immunity defense is raised.

The possibility of narrowing the rule in this fashion led to the question whether the narrower rule should be republished to support a new period for comment. This is always an uncertain calculation. For this situation, a participant suggested that republication is probably not necessary. The narrower version gives
the opponents something of what they wanted, and does not take away anything. But republication would be warranted if the task of drafting the amended rule shows a risk that the new language may not get it right.

A judge asked whether there is any real advantage in limiting the 60-day period to cases with an immunity defense, when the choice of time does no more than establish a presumption. Another judge noted that whichever is the presumed time to respond, a motion to stay discovery may remain necessary. A third judge responded that shifting the presumption to 60 days is likely to reduce the need for motions to extend, and it is likely that discovery will be suspended “on its own.”

Another judge suggested that whether or not the Department is right that only a few cases do not include immunity defenses, limiting the 60-day period to immunity cases would create a gap with the time to appeal, which remains set at 60 days both for cases with an immunity defense and for cases without.

Limiting the rule to cases with an immunity defense was defended again as a measure designed to address the cases where the Solicitor General has to be consulted. If indeed that covers most individual-capacity cases, there will be few occasions to move to extend the time to answer. But if there are a good number of cases without immunity defenses -- and we do not have hard data on that -- it can be useful to confine the 60-day period to cases with an immunity defense. Another member agreed. “Lunch-time conversations” within the Department of Justice do not take the place of firm data.

It was pointed out that there may be cases with two or more individual-capacity defendants, one of whom raises an immunity defense while the other does not. Should a rule that focuses on a defendant that raises an immunity defense be designed to set different times to answer for one defendant and the other? It was quickly agreed that if immunity-defense cases are to be distinguished, it would better to have a single time for all defendants. A judge observed that if the rule did set different times to answer, it is likely that the court would extend the shorter period to match the longer period. And it also is likely that if discovery is stayed as to one defendant, it will be stayed generally.

Another judge agreed that as long as there is an immunity defense and a possibility of a collateral-order appeal, it is not likely that the case will go to discovery before the end of the 60-day period, no matter whether there is a defendant that has not
pleaded immunity. “There are complexities.” But both judges agreed
that their own experience and practices cannot be taken, without
more, to describe practices universal to all judges. Yet another
judge agreed, being moderately comfortable with the proposal without
attempting to distinguish how many defendants have immunity
defenses.

A motion was made to amend the rule to allow 60 days to respond
only when “a defense of immunity has been postponed to trial or
denied.” The motion was defeated, six votes for and nine votes
against.

A motion to recommend approval for adoption of the amendment
as published passed, ten votes for and five votes against.

MDL Subcommittee Report

Judge Rosenberg delivered the Report of the MDL Subcommittee.

Three topics are addressed.

One topic that remains under discussion is “early vetting.”
This is a broad term used to describe various methods of attempting
to get behind the pleadings to sort out individual plaintiffs who
clearly do not have claims, who do not have a chance of success.
Lawyers representing plaintiffs and defendants agree that some such
process is desirable in at least some MDLs, particularly the “mass
tort” proceedings that account for a great share of the total federal
civil docket. A practice described as “plaintiff fact sheets” has
grown up in the last few years, and has become widespread in the
largest MDL proceedings. But more recently, plaintiffs have
developed, and some MDL courts have adopted, a somewhat simpler
process described as an “initial census.” Under this practice, both
plaintiffs and defendants send data to a “provider” that merges it
and provides the results to all parties. One result may be to ensure
that the plaintiff sues the right defendant. The subcommittee
continues to study evolving practice closely.

The opportunity for interlocutory appeals has been a second
topic that commanded close study for a good time, including
conferences aimed at this topic alone. Last October the subcommittee
recommended that this topic be dropped from present work. The
Committee agreed, and the Standing Committee accepted this
disposition. Appeal opportunities are not being studied further.

A third topic is as much as anything a combination of topics.
The broad general questions focus on the MDL court’s role in
appointing lead counsel and in setting a framework for settlement negotiations and possibly for settlement review. These broad questions lead to others that the subcommittee has not yet discussed in any detail, including how to establish and administer common-benefit funds and the possibility of imposing limits on the attorney fees provided by contracts between individual plaintiffs and their counsel.

Counsel on all sides, and most MDL judges, agree that there is no need for a rule for supervising settlements. A March 24 conference sponsored by Emory Law School showed reasons to oppose judicial supervision of efforts to achieve “global” settlements. Defendants want to be free to settle segments of the proceeding without having to settle all parts. And they are concerned that it may be difficult for judges to understand the legitimate reasons that lead to different structures for different settlements.

Despite these concerns, the subcommittee is continuing its investigation of practices in appointing lead counsel, and looking toward the MDL judge’s role in settlement. MDL proceedings account for nearly half of the civil actions on the federal docket; it is important to be confident there is no need for rules addressing them. There also is concern that some individual plaintiffs whose attorneys do not have a role with lead counsel have only minimal representation.

As compared to the “Rule 23.3” draft in the agenda materials, the subcommittee has turned to exploring the possibility of providing general guidance in Rule 16(b), and perhaps in Rule 26. New Rule 16 provisions could offer guidance on orders appointing leadership, compensation, and early vetting. A lot has happened since the Manual for Complex Litigation was revised in 2004. Or it may be enough to simply help prepare a set of “best practices.” Whatever the means, there is a broad interest in expanding the ranks of MDL judges to bring more federal judges into these proceedings. It may be helpful to find a means to guide them toward the special tasks required to manage MDL proceedings.

A general question has persisted throughout subcommittee deliberations. Many of the issues that have been explored arise in “mega” MDL proceedings that bring together thousands or tens of thousands of cases. Despite efforts to engage lawyers and judges with experience in less sprawling proceedings, it remains unclear whether any new rules should be available in all MDL proceedings or should be limited only to more limited categories, however they might be defined.
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More specific questions address particular topics. What standards might be defined for appointing lead counsel? Can they be drawn from the Manual for Complex Litigation? How should the court articulate the duties of lead counsel or a leadership team? Should a rule address common benefit funds? Caps on fees set by individual client contracts? How might a rule relate to Rule 23, recognizing that MDL proceedings often include class actions and may be resolved by certifying a class?

Professor Marcus added that “this is the toughest set of problems we had addressed in MDLs.” One pervasive question is how to describe the court’s duty -- sometimes characterized as a fiduciary duty -- to all claimants, especially those whose individually retained attorneys do not participate in or with the leadership team? There are tensions within the plaintiffs’ side, and also on the defense side. We have heard of settlements of various sizes: global, continental, inventory, and individual. Can courts prefer global settlements? When inventory settlements are reached, we have heard that there are good reasons for settling on different terms with different inventories. One inventory may consist of cases that have all been thoroughly worked up, high-value cases that deserve high settlement values. Another inventory may consist of a large number that have not been carefully worked up, some of them with strong claims and others with weak or no claims. It may be difficult for a judge to evaluate the differences.

A judge observed that there is an important relationship between what happens early in a proceeding and what happens as the proceeding progresses. The structure at the beginning has a profound effect on how it ends. The leadership order may hamper the ability of non-lead individually retained plaintiffs’ attorneys to represent their clients. That cannot be avoided. “You cannot have 5,000 lawyers participating in a status conference.”

Professor Marcus added that, as compared to class actions, almost every plaintiff brought into an MDL proceeding has a personal lawyer. There are likely to be few pro se plaintiffs. “Judges should be concerned with process more than outcome.” The initial order appointing lead counsel structures the proceeding, setting the process in motion. Judges should be aware of this, and perhaps offered guidance in a rule.

A judge observed that at the annual conference for MDL judges, they are advised that all nonleadership lawyers “should be included in conference calls.” This practice prompts lead counsel to
communicate with nonlead counsel to forestall comments based on a lack of information about the work being done.

Discovery Subcommittee

Judge Godbey delivered the report of the Discovery Subcommittee, beginning with thanks to all subcommittee members for participating in the February 26 meeting, noting that the contributions of the four lawyer members were invaluable. The thorough and thoughtful research by Kevin Crenny, the Rules Law Clerk, also was helpful.

The subcommittee considered four topics: privilege logs; sealing orders; the availability of attorney fees under Rule 37(e) as a remedy for spoliating electronically discoverable information; and a proposal to add a new Rule 27(c) to authorize an independent action for an order to preserve information or an order that information need not be preserved. The first two deserve further study.

Privilege Logs Several general questions surround the privilege log practice mandated by Rule 26(b)(5)(A). It is common to observe that they are expensive, and not uncommon to suggest that often they are not helpful. Laments are made that lawyers commonly assume that a log has to be detailed on a document-by-document basis, even though the 1993 committee note said this: “Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.” It has been suggested that complaints about expense are overblown -- that most of the expense is necessary to identify relevant and responsive documents, to screen them for privilege, and to decide which to withhold. It also is suggested that the opportunity to invoke Rule 26(b)(5)(B) or Evidence Rule 502 to establish clear provisions that protect against inadvertent waiver may reduce the burden of drafting a privilege log.

A common observation has been that most of the problems arise because privilege logs are commonly produced toward the close of the discovery period.

The central question is whether it will be possible to write new rule text that reduces the challenges of privilege log practice. The subcommittee will reach out to the bar for further information that may help in addressing the problem.
Professor Marcus noted the proposal from Lawyers for Civil Justice included in the agenda materials. That proposal is essentially contingent on party agreement, without addressing any rule provision prompting such agreement or even discussion of possible agreement. The initial discussion in the subcommittee has not been along the lines suggested by their actual proposal. Instead, the focus has been on getting lawyers to address these issues early in the litigation. “How do we provide a prod in a rule? Is improvement possible? If so, where would new provisions fit in the body of the Civil Rules”?

The invitation for discussion was met by brief silence. Then a lawyer member suggested that we need more information on technological implications for practice. Is metadata an appropriate means of compiling a log? Some lawyers find this an acceptable practice, but “judges are not yet there.” And in fact creating a log can be as much of a problem as identifying protected documents when there are thousands of them.

Another lawyer member observed that the four lawyers on the Committee and the subcommittee practice in large cases, with e-discovery and responses. “We should not lose sight of more regular cases.”

Another lawyer said that this is a problem worth thinking about, although it is difficult to imagine a rule that will improve the process.

The fourth lawyer member agreed that “one rule for all sizes of cases is not likely to work. Metadata logs aren’t likely to apply to most cases.” Even with the most sophisticated lawyers in the most sophisticated litigation, there is much to learn about how to form a log by searching metadata.

A judge said that privilege logs are a not infrequent problem in practice. Adding provisions to Rule 16 to prompt the parties and court to address it early on may be useful.

A lawyer member agreed. “Timing is critical.” Participants may often push these problems toward the discovery cutoff. Encouragement in Rule 16 to address them early in the litigation would be very helpful.

A judge suggested that silence among judges asked about their experience with these problems is not a sign that the problems encountered in compiling logs are unimportant. “A lot of money is
spent that judges don’t know about.” A lot of further work by the
subcommittee will be valuable. Another judge agreed that the log
and the process for logging are issues that deserve further work.

The subcommittee indeed will continue its work.

Sealing Orders Judge Godbey began the report on sealing orders by
noting the proposal submitted by press interests to adopt an
elaborate rule with many specific provisions to regulate orders that
seal anything in court files. The proponents see a problem that
media and First Amendment interests “are not at the table when these
issues are discussed.” The proposal can be seen as an attempt to
give a “virtual seat” at the table to these interests.

The subcommittee has not generated much enthusiasm for the
specific proposal. But these issues “have been floating around for
decades.” A decade ago the Committee on Court Administration and
Case Management produced a best practices guide for sealing. The
Criminal Rules do address sealing.

The Rules Law clerk reviewed a sample of local court rules on
sealing, drawing from districts represented on the committee. the
survey shows the local rules are not uniform. Further information
was provided by a letter from Lawyers for Civil Justice.

As work goes forward, it may be useful to do more to distinguish
inter partes protective orders from sealing court files. The
appropriate standards may be different.

Professor Marcus elaborated the introduction, suggesting that
the “bells and whistles” in the submitted proposal are not
productive. But it is important to remember that transparency in
the courts has important constitutional and common-law aspects that
are different from discovery protective orders. A basic question
will be identifying a standard for sealing if it should be more
demanding than “good cause.” Further study will be important. Having
many local methods of sealing “may be just fine, not in need of a
national rule.”

A lawyer member reported that the Sedona Conference is working
on these issues.

Sealing orders will remain on the subcommittee agenda.

Rule 37(e) Attorney Fee Awards A question has been raised whether
attorney fees can be awarded to reimburse costs incurred by a party
requesting discovery to restore or replace electronically stored information that should have been preserved in the anticipation or conduct of litigation. Rule 37(e) addresses spoliation of electronically stored information, but does not include an express provision for attorney fees. Rule 37(e)(1) authorizes “measures no greater than necessary to cure the prejudice,” but it might be read to be limited to circumstances where the information cannot be restored or replaced through additional discovery.

Research by the Rules Law Clerk shows that there is a potential problem in reading the rule text, but not a practical problem. Almost all courts that address the question find authority to award attorney fees. Compensation for the costs of successful efforts to retrieve information that should have been preserved in a more easily accessible form seems an obviously appropriate remedy.

Professor Marcus added that past work by Tom Allman, and a recent letter from him, bolster the conclusion that there is no practical problem. Reopening Rule 37(e), further, might lead to work comparable to the difficult process that led to adopting its current form.

This subject will be removed from the agenda.

Presuit Preservation Orders Professor Jeffrey Parness submitted a proposal to add a new element to Rule 27(c):

(c) PERPETUATION BY AN ACTION. This rule does not limit a court’s power to entertain an action to perpetuate testimony and an action involving pre-suit information preservation when necessary to secure the just, speedy, and inexpensive resolution of a possible later federal civil action.

Judge Godbey illustrated some of the questions raised by this proposal. The duty to preserve information in anticipation of litigation was left to the common law when Rule 37(e) was developed and revised, in part because of questions whether a rule that imposes a duty to preserve before any federal action is filed would be authorized by the Rules Enabling Act. Referring to a “possible later federal civil action” raises questions of subject-matter jurisdiction different from the provision in Rule 27(a)(1) for perpetuating testimony “about any matter cognizable in a United States court,” showing that the petitioner expects to be a party to such an action but cannot presently bring it or cause it to be brought. The supporting memorandum suggests that “an action
invoking presuit information preservation” can include an action for a declaration that information need not be preserved. What if two actions, one to preserve and one to permit destruction, lead to conflicting orders?

Professor Marcus added that the proposal is not limited to electronically stored information, a limitation deliberately incorporated in Rule 37(e). In developing Rule 37(e), the Committee “did not want to encourage preservation orders in litigation.” Beyond that, pre-litigation discovery generally has not been popular. People do preserve information. Demand letters are sent. The committee should not take up this subject.

The committee agreed to remove this proposal from the agenda.

Rule 9(b): Pleading State of Mind

Judge Dow introduced the Rule 9(b) proposal by reminding the committee that this subject was taken up at the October meeting only for a brief introduction. A more thorough introduction will be provided today, but without any thought of moving toward a recommendation. Further consideration over the summer will be important.

Dean Spencer provided a summary of his article on this topic, which he has submitted as a proposal for action. The purpose today is not to advocate for adoption. The purpose, rather, is to show that the proposal is worthy of serious study. “There are concerns that need to be addressed.”

The focus is on revising the second sentence of Rule 9(b) to modify the interpretation adopted by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 686-687 (2009). As revised, Rule 9(b) would read:

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally without setting forth the facts or circumstances from which the condition may be inferred.

The Supreme Court ruled that “generally” means pleading that satisfies the “plausibility” standard recently adopted for interpreting Rule 8(a)(2). Lower courts adhere to the Court’s
ruling, requiring that a pleading include facts that make plausible
an allegation of state of mind.

One reason to question the Court’s interpretation can be found
in the meaning intended when the present language was adopted in
1938. The 1937 committee note refers to the English Rule that
permitted conditions of mind to be alleged as a fact, without
alleging facts from which the condition of mind might be inferred.
The Court’s interpretation is inconsistent with the intended
meaning.

Added reasons can be found in the structure of the pleading
rules. Rule 8(a)(2) addresses what is required to plead a claim.
Rule 9(b) is a rule for pleading allegations, not claims. Rule
8(d)(1) is a rule for pleading allegations, and requires that the
allegation be “simple, concise, and direct.” In Rule 9(b) itself,
further, “generally” is used to establish a contrast with the “with
particularity” standard required for allegations of fraud or
mistake, but the Court’s interpretation requires that conditions of
mind be pleaded with particularity.

Policy issues further undermine the Court’s interpretation.
Plaintiffs cannot be expected to have detailed information of the
facts that will support an inference of intent at the time an action
is filed. Discovery is needed.

Discussion began with comments that recounted other themes in
the article, offered from the perspective of one who was both
surprised and nonplussed by the Supreme Court’s interpretation of
Rule 9(b). “Generally” had always seemed to recognize that
knowledge, intent, malice, and other conditions of mind often are
proved, not by confession but by inference from a mass of facts.
Even if all the facts were available to the pleader at the time of
framing the pleading, little purpose would be served by dumping them
all into the pleading, much less to put a judge to the task of
determining whether the “well pleaded” facts would permit a rational
trier of fact to draw the asserted inference. It is more effective
to permit a pleading to allege a state of mind as a simple fact --
the defendant intended to discriminate, and so on. There is a more
particular danger that evaluation of plausible inferences is
hampered by perspective: inferences that seem plausible to one mind
may seem impossible to another, depending on experience and the
influences of stereotypes. And of course the pleader is not likely
to have access to all the supporting facts at the time of pleading.
Discovery is necessary.
This comment went on, however, to suggest that the first rush of enthusiasm for this proposal should be tempered by further reflection. Practices that worked in the context of Nineteenth Century substantive law may not be as suitable to the enormous spread of substantive law, often through ambitious statutes, in the Twenty-First Century. Is it useful to apply a single rule for pleading intent in an individual employment discrimination action, an action under RLUIPA for denial of a zoning permit sought by a religious institution, or a “class of one” equal protection claim?

Professor Marcus added another perspective. It would be useful to know more about how Rule 9(b) was actually applied over the years before the Supreme Court adopted what has come to be described as the “plausibility” pleading standard. Practice under Rule 8(a)(2) varied widely, both in lower courts and at times in the Supreme Court. The same may have been true for Rule 9(b), reflecting concerns that will inform our consideration today. One example is provided by a mid-1970s Second Circuit decision that required pleading in a securities case of facts giving rise to a strong inference of scienter, a standard that was later adopted by statute.

Professor Marcus also recalled Committee experience after the 1993 decision in the Leatherman case. The Court’s opinion seemed to invite consideration of rules for “heightened pleading” of some matters, but repeated efforts failed to generate any proposal. The road ahead with the Rule 9(b) proposal may be long and arid. “It’s an uphill push.” Many judges seem to believe that the developing plausibility standard of pleading is desirable. So it may be for Rule 9(b).

A third observation was that this topic is “incredibly important, and deserves close attention.”

A judge reported denial of a motion to dismiss in a Title VII case, relying on Dean Spencer’s arguments. The Supreme Court standard is tough to meet in these cases.

Another judge observed that the plausibility pleading approach “gives me a tool to encourage the parties to come up with better pleadings.” It is a way to encourage them to try harder. But different issues may be presented when pleading a defendant’s state of mind. This proposal will be retained for further study.

It may prove desirable to appoint a subcommittee to study Rule 9(b). That could stimulate the kind of discussion we need. Dean
Spencer agreed that a subcommittee with judges and practitioners could be useful.

Appeal Finality After Consolidation Subcommittee

Judge Rosenberg delivered the report of the joint Appellate-Civil Rules Subcommittee that is studying the impact of the decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). The Court ruled that even if initially separate cases are consolidated for all purposes, a judgment that completely disposes of all claims among all parties to what began as a separate action is final for purposes of appeal.

Last October the subcommittee reported on the results of an in-depth FJC study that found no identifiable difficulties stemming from lost opportunities to appeal.

Since October, informal inquiries have been made to the Second, Third, Seventh, Ninth, and Eleventh Circuits. All routinely screen appeals for timeliness. Two have appeals handbooks that point to the rule in *Hall v. Hall*. Only one case in the Second Circuit was found to illustrate lost opportunities to appeal.

There is no sense of imminent need to consider rules that might establish a different rule of finality for appeal.

Discussion began with a judge’s observation that the Supreme Court chose one of the various possible rules. That may be reason to let the question rest.

The choice now seems to be whether to leave this topic to rest for a while without further work, or instead to disband the subcommittee. There is no present plan to expand the informal survey. Expanding the FJC study would be costly, and there is little reason to suppose that it would produce markedly different results. “We’re really doing nothing.” But retaining the topic in a state of suspension may be useful, looking both for developing experience in practice and for possible reasons to believe that, even without evidence of lost appeal opportunities, integrating consolidation practice with the partial final judgment provisions of Rule 54(b) might better serve the needs of the parties, the trial court, and appeals courts.

Because the subcommittee was appointed by the Standing Committee as a joint subcommittee, action by the Standing Committee will be required to dissolve it. The question will be taken to the Appellate Rules Committee for further consideration.
Rules 12(a)(2), (3): Statutory Appeal Times

Rule 12(a)(1) sets general times to respond to a pleading, subject to a qualification: "Unless another time is specified by * * a federal statute." No similar qualification appears in either paragraph (2) or (3), which set 60-day response times for actions against the United States and for actions against a United States officer or employees sued in an individual capacity. The problem is that at least a few statutes -- most prominently the Freedom of Information Act -- set shorter periods. On its face, the rule supersedes any statute enacted before the rule was adopted, and is superseded by any statute enacted after the rule was adopted. There is no reason to believe that this result was intended. The problem also is easily fixed by revising the structure of Rule 12(a):

(a) TIME TO SERVE A RESPONSIVE PLEADING. Unless another time is specified by a federal statute, the time for serving a responsive pleading is as follows:

Paragraphs (1), (2), and (3) would all be subject to a statute that sets a different time.

Two arguments have been advanced for deciding not to fix this textual misadventure. One is that it has not given rise to any practical problems. The Department of Justice reports that it is fully aware of the 30-day response times set in the Freedom of Information Act and the Sunshine in Government Act, and generally complies with them or, in appropriate cases, seeks an extension. Extensions are often requested in cases that combine claims, one subject to a 30-day response period and the other subject to the general 60-day response period. But it fears that if the statutes are explicitly recognized in Rule 12(a) text, courts may be less willing to grant extensions in the combined-claim cases.

At the October meeting, these competing concerns led the Committee to an equally divided vote on recommending publication of the proposed amendment, six votes for publication and six votes against.

Since the October meeting, an extensive PACER survey of actual response times in FOIA action was made by John A. Hawkinson, a freelance news reporter, and Rebecca Fordon of the UCLA Law School. The survey covers FOIA actions in 87 districts from 2018 up to 2021. It shows nationwide mean times of 42 days, with 66% of responses received outside of 30 days. A spreadsheet shows the experience in each district. 1,391 of the 2,115 case total were filed in the
District Court for the District of Columbia, a court that has a “mechanism” for issuing summonses that set a 30-day response time. The median there is 31 days, and the mean 40 days. The four other districts with more than 30 cases during this period show comparable or shorter times. The method used for preliminary analysis did not show whether the Department of Justice had moved for an extension of time during the 30-day period. Nor does it seem to show whether the FOIA claim was joined with a claim not subject to the 30-day response period.

This survey is remarkably helpful. It seems to confirm the description of Department of Justice practice.

The Department of Justice representative repeated the earlier descriptions of Department practice, adding that there has been no reason to think that plaintiffs are concerned about its practices.

Discussion concluded with the reminder that this topic was not listed for action at this meeting. The division of votes at the October meeting suggests that it deserves further consideration. It will be brought back for disposition at the next October meeting.

**Rule 4(f)(2)**

This suggestion raises a question about the interplay between paragraphs (1) and (2) of Rule 4(f).

Rule 4(f)(1) authorizes service “at a place not within any judicial district of the United States: (1) by any internationally agreed means of service * * * such as those authorized by the Hague Convention * * *.” (f)(2) authorizes service “if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice.”

The suggestion points out that the Hague Convention establishes a system for service through the central authorities in states that are parties to the convention. At the same time, it permits service by other means, all of which are specified. Thus these other means do not fall within (f)(2) -- the Convention authorizes them, but also does specify them.

Although this limit in (f)(2) is said to present a problem, the suggestion does not deal with the more apparent reading of (f)(1). Service by means that are both authorized and specified by the Hague Convention fits squarely within (f)(1). There is no
apparent reason to undertake some revision of (f)(2) to include these circumstances.

The committee voted to remove this item from the agenda.

Rule 65(a)(2): Interlocutory Statutory Interpleader Injunctions

This suggestion points out that Rule 65(e)(2) seems curiously incomplete:

(e) These rules do not modify the following:

(2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader;

The suggestion points out that § 2361 includes two paragraphs. The first provides that the court may issue its process for all claimants “and enter its order restraining them from instituting or prosecuting any proceeding” affecting the subject of the interpleader “until further order of the court.” Without using the exact words, this provision seems to relate to interlocutory or preliminary injunctions. The second paragraph provides that the court may “make the injunction permanent.”

The question asked, without further elaboration, is why does the rule address only preliminary injunctions?

The question in part may reflect a change made when Rule 65(e) was restyled in 2007. From 1938 to 2007, it referred to the provisions of the interpleader statute “relating to” preliminary injunctions. That language did not imply that § 2361 relates only to preliminary injunctions. As restyled, “which relates to” seems to say that § 2361 relates only to preliminary injunctions, apparently excluding permanent injunctions.

This potential explanation still leaves the question: Why should the statutory provisions for preliminary injunctions in interpleader actions be protected against modification by Rule 65, while the provisions for permanent injunctions are not?

Preliminary research, stretching back into the Equity Rules that preceded the Civil Rules, has revealed no indication of the purposes that underlie the distinction. One plausible speculation may be that the original advisory committee thought that the statute
might imply power to issue preliminary injunctions by a process, and perhaps on terms, not consistent with Rule 65. Rule 65(e)(2) then reflects an intent to avoid modifying the statutory powers.

There has been no indication that the uncertain purpose of Rule 65(e)(2) has caused any difficulties in practice. The few courts that have confronted this question have suggested that departures from regular Rule 65 procedure may be required by the imperative for immediate action to forestall competing judicial proceedings that might effectively defeat the interpleader action by disposing of the contested property. Permanent injunctions at the conclusion of the interpleader action do not present like problems.

It would be possible to reexamine the question whether changed circumstances, perhaps most plausibly the development of widespread means of instantaneous communication, justify the cautious approach reflected in Rule 65(e)(2). That would be a substantial undertaking, perhaps difficult to justify absent any sign of problems in practice. It would be much easier to undo the style revision, but that work too might fall before the general practice that avoids amendments framed only to revisit earlier styling decisions.

The Committee voted to remove this item from the agenda.

Rules 6, 60

This suggestion, addressing some effects of the Civil Rules on the Appellate Rules, raises separate questions for Rules 6 and 60.

Rule 6(d) Rule 6(d) provides that “3 days are added” when a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C), (D), or (F). The proposal is that 3 days should be added when a party must act within a specified time “after entry of judgment” and service is made by any of the same three means.

The underlying concern is that notice of judgment may be served by mail, delaying receipt of notice and thus shortening, as a practical matter, the time to make motions under Rules 50, 52, 59, or 60 after judgment is entered. The running of appeal time can be affected as well. (Service by leaving with the district court clerk or “other means consented to” does not seem likely to be at issue.)

This proposal enters a web of related rules that run time to act from the entry of judgment, not from being served. Rules 50, 52, 59, and 60 set the time for various post-judgment motions to
run from the entry of judgment. Appellate Rule 4(a) sets the time
to appeal to run from the entry of judgment. Rule 77(d)(1) directs
the clerk to immediately serve every party with notice of the entry
of judgment “as provided in Rule 5(b).” Rule 77(d)(2) provides that
lack of notice of entry does not affect the time for appeal or
authorize the court to relieve a party for failing to appeal within
the time allowed “except as allowed by Federal Rule of Appellate
Procedure 4(a).” Rule 4(a)(5) provides a general authority to extend
appeal time. Rule 4(a)(6) specifically allows the district court to
extend appeal time for a party who did not receive the Rule 77(d)
notice within 21 days after entry of judgment, subject to several
limits.

The integrated framework of these rules shows that the
Appellate and Civil Rules Committees have worked to coordinate the
provisions for notice of judgment, post-judgment motions, and appeal
times. Amending to allow “3 added days” would revise this system,
and should be approached with care, if at all.

A potential complication was pointed out. It can be expected
that ordinarily notice of judgment will be provided through the
court’s CM/ECF system. Mail is likely to be used primarily for pro
se parties. A revised rule should resolve the question whether
different parties should have different times for post-judgment
motions and appeal, or whether all parties should get an additional
3 days because one party received notice by mail.

It also was suggested that automatically allowing an additional
3 days would seldom be the best way to address such legitimate needs
as may arise in a few cases.

The Committee voted to remove this item from the agenda.

Rule 60(c)(1): Rule 60(c)(1) sets the time for making motions for
relief from judgment under Rule 60(b). As reflected in the
discussion of draft Rule 87 and Emergency Rule 6(b)(2), integration
of Rule 60(b) motions with Appellate Rule 4(a)(4)(A) has been more
complicated than integration of post-judgment motions under
Rules 50, 52, or 59. Rule 4(a)(4)(A)(vi) gives a Rule 60(b) motion
the same effect as timely Rule 50, 52, or 59 motions “if the motion
is filed no later than 28 days after the judgment is entered.”

The proposal is to add a cross-reference to Appellate Rule 4
as a new subparagraph Rule 60(c)(1)(B): “A motion under Rule 60(b)
must be made * * * (B) within 28 days to toll the time for filing
an appeal.” The idea of adding a cross-reference is clear, although
the wording might need some work, particularly if Appellate Rule 4(a)(4)(A)(vi) is amended to refer to the time for a Rule 59 motion rather than 28 days.

The question is whether to add another cross-reference to the Appellate Rules in the Civil Rules. The cross-reference to Appellate Rule 4 in Rule 77(d) was noted above. Another example appears in Rule 58(e). Both of these provisions were worked out in careful coordination with the Appellate Rules Committee. Similar work integrated the general entry of judgment provisions of Rule 58 with Appellate Rule 4, leaving the task of cross-reference to Appellate Rule 4.

The purpose of adding a cross-reference to Rule 60(c)(1) would be a simpler purpose to provide notice to litigants who are not familiar with the interplay of appeal time provisions with Rule 60. Similar opportunities for cross-references have not been seized. The Rule 54(b) provisions for partial final judgment do not warn that appeal time starts to run on entry of the judgment. Nor has any attempt been made to provide notice, perhaps in Civil Rule 42, of the effects of the decision in *Hall v. Hall*, noted above, on the time to appeal. Cross-references may be difficult to draft -- just what sorts of consolidations might fall into a potential cross-reference, for example, might be challenging to identify. And a proliferation of cross-references might generate misleading implications that there is no need to worry about Appellate Rule 4 when there is no cross-reference in a Civil Rule, for example when a preliminary injunction is entered.

The Appellate Rules Committee has removed this proposal from its agenda.

The Committee voted to remove this proposal from the agenda.

In *Forma Pauperis Standards and Procedures*

Judge Dow introduced this subject. Professors Clopton and Hammond have submitted a proposal that the Committee should renew its consideration of standards and procedures for granting petitions to proceed in forma pauperis. Similar issues were considered at the three most recent committee meetings. The submission underscores the evidence that standards for granting i.f.p. status vary widely across the country and even within a single district. And the forms used to collect information are confusing and often invade privacy, including privacy interests of nonparties, and may imply that it is appropriate to consider information that is not properly considered.
This is a succinct suggestion. The Committee has recognized at its earlier meetings that “these are big problems.” Both the Court Administration and Case Management Committee and the Appellate Rules Committee have considered proposals that relate to these topics.

The Northern District of Illinois has taken a close look at its practices, prompted by the work of Professors Clopton and Hammond. The local rules committee studied the issues for many months, and the Chicago Council of Lawyers collected a lot of data. The local i.f.p. form has been revised a number of times -- revisiting the form is a constant battle. The District has 12 staff attorneys for prisoner litigation; they do the preliminary screening of i.f.p. requests and apply uniform standards. Uniformity has been further promoted by the departure from the bench of judges who had adopted “outlier” practices.

These are important issues, but it is not clear whether answers are best sought by adopting new Civil Rules to address a topic that has not been addressed by the rules. Would other means be more flexible, more readily adapted to different circumstances -- most notably the cost of living -- in different parts of the country, and perhaps better informed by procedures different from Rules Enabling Act procedures? Model standards, or model local rules, might be developed and offer better help than formal national rules.

One beginning might be to collect information from the districts represented on the Committee. Further study may lead to a decision whether to proceed further.

A judge noted that her district’s pro se clerks show the judges of the district “are all over the map in standards,” and even on whether they take up the i.f.p. question before or after screening. The Administrative Office has a working group for pro se issues. Perhaps they can help us gather information.

Judge Dow noted that the very process of gathering information may show the districts that they need to get their practices in order. “Highlighting the issue can be helpful.”

Another judge suggested that this topic might benefit from joint work with the Appellate Rules Committee. They have an i.f.p. subcommittee at work now, investigating suggestions for revising the Appellate Form 4 affidavit to accompany a motion for permission to appeal in forma pauperis. It seems likely that the Bankruptcy Rules Committee also frequently encounters these problems.
Judge Dow brought the discussion to a point by suggesting several steps that may be taken to gather more information. He will consult with the Federal Judicial Center. Judge Rosenberg can help with the Administrative Office pro se working group. The Appellate and Bankruptcy Rules Committees chairs and reporters will be consulted; it may make sense to establish a means for coordinating work, whether through a joint subcommittee or more informal coordination among the reporters. Emery Lee volunteered to cooperate with the work and with coordinating the reporters.

Initial Mandatory Discovery Pilot Projects

Judge Dow provided an interim summary of the mandatory initial discovery pilot projects in the Northern District of Illinois and the District of Arizona. It was a good thing to have done in Illinois. “What we learned is all in the eyes of the beholder.” The FJC is mining the data to see what conclusions can be drawn beyond the impressions of each judge, both those who participated in the project and those who did not.

Emery Lee offered a brief summary. Each pilot project ran for three years, concluding on April 30, 2020, in the District of Arizona, and on May 31, 2020, in the Northern District of Illinois. There will be no new pilot cases.

More than 5,000 cases came into the project in Arizona; 90% of them had terminated by this April 1. Some 12,000 cases came into the project in Illinois; some 83% of them had terminated by April 1.

The FJC is tracking the longer-pending cases. The pandemic disrupted the study; about two-thirds of the cases had terminated when the pandemic began, about the same proportion in both districts. It seems probable that the effect of the pandemic was the same in both districts, so comparisons will not be distorted. The same is true for the comparison districts. If problems do arise on that score, there are statistical techniques that can help adjust, but it is too early to know whether they should be used.

The FJC is on the eighth round of closed-case attorney surveys. Response rates have held up across the pandemic.
Judge Dow closed the meeting with thanks for the good work and attention of everyone involved. Let us hope that the next meeting, scheduled for October 5 in Washington, D.C., will indeed be held in person.

Respectfully submitted,

Edward H. Cooper
Reporter
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