MINUTES
CIVIL RULES ADVISORY COMMITTEE
April 23, 2021

1 The Civil Rules Advisory Committee met by Teams teleconference
2 on April 23, 2021. The meeting was open to the public. Participants
3 included Judge Robert Michael Dow, Jr., Committee Chair, and
4 Committee members Judge Jennifer C. Boal; Hon. Brian M. Boynton;
5 David J. Burman, Esq.; Judge Joan N. Ericksen; Judge David C. Godbey;
6 Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge
7 Brian Morris; Judge Robin L. Rosenberg; Joseph M. Sellers, Esq.;
8 Dean A. Benjamin Spencer; Ariana Tadler, Esq.; and Helen E. Witt,
9 Esq. Professor Edward H. Cooper participated as Reporter, and
10 Professor Richard L. Marcus participated as Associate Reporter.
11 Judge John D. Bates, Chair; Catherine T. Struve, Reporter; Professor
12 Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq.,
13 represented the Standing Committee. Judge Catherine P. McEwen
14 participated as liaison from the Bankruptcy Rules Committee.
15 Professor Daniel J. Capra participated as liaison to the CARES Act
16 Subcommittees. Susan Soong, Esq., participated as Clerk
17 Representative. The Department of Justice was further represented
18 by Joshua E. Gardner, Esq. Julie Wilson, Esq. and Kevin Crenny,
19 Esq., represented the Administrative Office. Dr. Emery G. Lee, Dr.
20 Tim Reagan, and Jason Cantone, Esq., represented the Federal
21 Judicial Center.

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

24 Judge Dow opened the meeting with messages of thanks and
25 welcome. He observed that there were around fifty participants and
26 guests, a good attendance, but expressed a hope that the October
27 meeting would be in person.

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

38 The newest Committee members were introduced, repeating the
39 introductions at the October meeting that anticipated their full-
40 fledged arrival. Judge Godbey has already accepted appointment and
41 begun work as chair of the Discovery Subcommittee. David Burman has

42 agreed to serve on both the Discovery and MDL Subcommittees. Brian
43 M. Boynton is serving as acting Assistant Attorney General for the
44 Civil Division. And Judge McEwen is our new liaison from the
45 Bankruptcy Rules Committee.

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

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

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

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

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

79 *Legislative Report*

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

96 *October 2020 Minutes*

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

100 *CARES Act: Rule 87*

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

117 Judge Jordan delivered the subcommittee report. He began by
118 stating that the subcommittee members have done extraordinary work,

119 and thanking them for continuing devotion to the hard work. He also
120 expressed thanks to the reporters for all the advisory committees.
121 A full history of all the work is not needed for today's discussion.
122 It suffices to note that there were many subcommittee meetings, and
123 a lot of work by the reporters, with guiding help and coordination
124 by Professor Capra.

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

147 Strenuous efforts were made to achieve as much uniformity as
148 possible with the other proposed emergency rules. The definition of
149 a rules emergency is uniform across all of them, including Rule
150 87(a), with one departure in Criminal Rule 62(a) that adds a
151 requirement that the Judicial Conference find that "no feasible
152 alternative measures would sufficiently address the impairment [of
153 the court's ability to perform its functions in compliance with
154 these rules] within a reasonable time." The Appellate and Bankruptcy
155 Rules Committees agree that this added provision is not useful in
156 their emergency rules, and the subcommittee agrees for the Civil
157 Rules. The Criminal Rules emergency provisions address many matters
158 made sensitive by tradition, constitutional protections, and the
159 singular weight of criminal conviction. Adding language to ensure
160 exhaustion of all available alternatives by the Judicial Conference
161 is suitable for the Criminal Rules, but unnecessary and possibly
162 confusing in the other rules.

163 Substantial uniformity also has been achieved in the provisions
164 for declaring a rules emergency. Rule 87(b)(1)(B), however, departs
165 from the Bankruptcy and Criminal Rules. The Bankruptcy provision
166 tracks Criminal Rule 62(b)(1)(B): the Judicial Conference
167 declaration "must * * * state any restrictions on the authority
168 granted in (d) and (e)." Rule 87(b)(1)(B) is "must * * * adopt all
169 of the emergency rules in Rule 87(c) unless it excepts one or more
170 of them." Drafting history and, more importantly, the character of
171 the emergency civil rules, underlie the difference. Earlier drafts
172 of Rule 87 provided that the declaration of emergency should specify
173 which of the emergency civil rules were included. This approach
174 reflected the character and limited number of the emergency rules.
175 The provisions for serving process in Emergency Rule 4 are designed
176 to rely on circumstance-specific determinations of what means of
177 service should be approved; there is no reason to "restrict" this
178 authority. Instead, it may make sense to limit which of the Emergency
179 Rule 4 subdivisions might be authorized. Emergency Rule 6(b)(2) is
180 quite different, but includes intricately intertwined provisions
181 for extending the time for post-judgment motions and integrating
182 extensions with the provisions of Appellate Rule 4(a)(4)(A) for
183 resetting appeal time. Any attempt to "restrict" this rule risks
184 untoward consequences; it should be all on or all off. Inviting the
185 Judicial Conference to select from this short menu of emergency
186 rules is attractive. But that approach was abandoned in the interest
187 of uniformity -- the consensus was that the Judicial Conference
188 should not be confronted with an approach that required it to "select
189 out" particular provisions in the Bankruptcy and Criminal rules,
190 but to affirmatively select which emergency civil rules to include.
191 The result was rather awkward language focusing on making
192 exceptions. There may be room to improve the language, but without
193 embracing the inapposite concept of "restrictions." This is a point
194 on which some differences in language are needed to reflect the
195 different settings in which emergency rules would operate as well
196 as differences in the character of the emergency rules themselves.

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

202 Another suggestion was that Emergency Rule 4 is framed as one
203 rule, but has several parts because it addresses several
204 subdivisions of Rule 4. The Judicial Conference might, for example,
205 decide that alternative methods of service could be ordered on
206 corporations covered by Rule 4(h)(1), but not on individuals covered

207 by Rule 4(e). Should it be "adopt all or part of the emergency
208 rules"?

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

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

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

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

233 Emergency Rule 4 authorizes a court to order that service of
234 summons and complaint be made "by a method that is reasonably
235 calculated to give notice" on defendants addressed by some, but not
236 all, subdivisions of Rule 4. Earlier drafts sought to ease the task
237 of moving between Rule 4 and Emergency Rule 4 by copying the full
238 text of Rule 4 into the corresponding emergency rule provision,
239 adding authority to authorize service "by registered or certified
240 mail or other reliable means that require a signed receipt." The
241 full text approach was abandoned when Rule 4(i) was added to the
242 list, generating an emergency rule of great length. Ongoing
243 experience with postal service, moreover, prompted consideration of
244 the prospect that some emergencies -- and most particularly an
245 emergency with the postal service -- might require different
246 alternative methods of service.

247 The current draft requires a court order to authorize service
248 by an alternative method. The alternative must be "reasonably
249 calculated to give notice." "Notice" means actual notice, but it
250 was thought better to omit "actual" from rule text for fear of
251 inviting inappropriate arguments, most particularly in cases that
252 accomplished actual notice by means challenged as not reasonably
253 calculated to do what in fact was done. Ordinarily the court order
254 must be made in response not only to the circumstances of the
255 particular emergency but also the circumstances of the particular
256 case. As one example, a method of service reasonably calculated to
257 give notice to a large and sophisticated corporation under Emergency
258 Rule 4(h)(1) might not be reasonably calculated to give notice to a
259 small and unsophisticated incorporated family business. The
260 committee note, however, also reflects the prospect that some
261 emergencies might justify a standing order that authorizes a
262 particular method of service. When Rule 4 authorizes service by
263 mail, for example, a breakdown of the postal service -- perhaps a
264 strike -- might justify a general order under Emergency Rule 4 for
265 service by designated commercial carriers with confirmation of
266 delivery.

267 Emergency Rule 4 authorizes alternative methods of service only
268 for Rules 4(e), (h)(1), (i), or (j)(2), or on a minor or incompetent
269 person in a judicial district of the United States. The omissions
270 all tie to Rule 4(f). Rule 4(f) governs service at a place not
271 within any judicial district of the United States. It is
272 incorporated in Rule 4(h)(2). Rule 4(j)(1) provides for service on
273 a foreign state or its agency under the Foreign Sovereign Immunities
274 Act. It seems better not to attempt to expand the extensive and at
275 times flexible provisions for service abroad, in part because
276 service of process is commonly viewed as a sovereign act that
277 impinges on the sovereignty of the country where service is made.
278 Similar concerns arise from Rule (4)(g), which lacks paragraph
279 designations to support simple cross-reference. Instead, Rule
280 87(c)(1) refers to service "on a minor or incompetent person in a
281 judicial district of the United States," omitting the part of
282 subdivision (g) that addresses service outside a judicial district
283 of the United States.

284 The final sentence of Emergency Rule 4 provides a specific
285 focus on what had been a general provision in earlier drafts of
286 Rule 87(d). The question is what to do when a declaration of a rules
287 emergency ends before completion of an act authorized by an order
288 made under an emergency rule. The earlier provision borrowed the
289 language of Rule 86(a)(2)(B) that governs the retroactive effect of
290 a rule amendment by asking whether applying the new rule "would be

291 infeasible or work an injustice." The analogy may help, but it is
292 indefinite. And it seemed to apply without distinction between
293 Emergency Rule 4 and Emergency Rule 6(b)(2). Reflection, however,
294 showed that different tests should apply. For Emergency Rule 4, any
295 of three alternatives may be desirable when an order authorizes
296 service by a method not within Rule 4 and service is not completed
297 when the declaration ends. It may be useful to allow service to be
298 completed as authorized by the order, and perhaps important if the
299 claim is governed by a limitations statute that requires actual
300 service by a stated time. Or it may be useful to strike one of the
301 alternative methods authorized by the order while leaving another
302 to be completed. Or it may seem better to terminate the order,
303 falling back on the ordinary methods authorized by Rule 4.

304 Emergency Rule 6(b)(2) is a quite different matter. The first
305 part of it is simple enough. Rule 6(b)(2) raises an impermeable
306 barrier: "A court must not extend the time to act under Rules 50(b)
307 and (d), 52(b), 59(b), (d), and (e), and 60(b)." Emergency
308 Rule 6(b)(2) changes "must not" to "may." But it is carefully hedged
309 about. The court can grant an extension only by acting under
310 Rule 6(b)(1)(A), which requires good cause and that the court act,
311 or a request be made, before the original time expires. For Rules 50,
312 52, and 59, the original time is 28 days from entry of judgment.
313 Rule 60(b) is governed by a more complex time provision, which
314 creates complications for integration with Appellate Rule
315 4(a)(4)(A)(vi), yet to be discussed. The extension is limited to "a
316 period of not more than 30 days after entry of the order" granting
317 an extension. Setting the limit to run from entry of the order,
318 rather than from the motion, enables the court to consider the
319 matter carefully, but it is expected that ordinarily the needs for
320 prompt disposition of post-judgment motions will encourage prompt
321 decisions.

322 What remains is not so simple. Timely post-judgment motions
323 reset appeal time under Appellate Rule 4(a)(4)(A). Emergency
324 Rule 6(b)(2) would not work if it did not reset appeal time,
325 requiring a party either to surrender any opportunity to appeal or
326 to make the post-judgment motion within the ordinary time unaltered
327 by any extension. Earlier drafts, framed in the spirit of
328 flexibility and purpose-oriented interpretation that characterize
329 the Civil Rules, relied on a simple provision that a motion filed
330 within the period authorized by an extension has the same effect
331 under Appellate Rule 4(a)(4)(A) as a timely motion under Rule 50(b),
332 52(b), 59, and 60. That approach was accepted for a while on all
333 sides. But then the appellate rules experts began to have doubts.
334 The appeal times in Rule 4 that reflect statutory provisions are

335 treated as mandatory and jurisdictional. There is no room for
336 harmless error, no matter how innocent or how obscure the time
337 calculations may be. Greater precision was sought. A series of
338 detailed exchanges among Standing, Appellate, and Civil Rules
339 reporters produced several revised drafts, exploring -- and at times
340 backtracking from -- many variations. The draft in the original
341 agenda materials was replaced by a more detailed version that breaks
342 out three distinct sequences of events. Here too the task is
343 relatively straightforward for motions under Rules 50, 52, or 59.

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

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

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

372 The first step is clear enough. What is a reasonable time for
373 a Rule 60(b) motion should be calculated in light of emergency
374 circumstances that impede filing within what otherwise would be a
375 reasonable time. The one-year cap, however, presents a problem. It
376 is possible that an emergency could thwart filing a motion in a time

377 that is reasonable in light of the emergency but runs beyond the
378 one-year cap. Allowing an extension under Emergency Rule 6(b)(2)
379 fits within the purpose of the emergency rule.

380 The next step is not quite so clear. Experience shows that
381 motions for relief that could be sought under Rule 52 or 59 are at
382 times captioned as Rule 60(b) motions. If the motion is filed within
383 28 days after entry of judgment and seeks relief available under
384 those rules, it should have the same effect in resetting appeal
385 time. That result has been accomplished by Appellate
386 Rule 4(a)(4)(A)(vi), which resets appeal time on a motion "for
387 relief under Rule 60 if the motion is filed no later than 28 days
388 after the judgment is entered." The same resetting effect should
389 follow under the circumstances described in Emergency
390 Rule 6(b)(2)(B)(i), (ii), and (iii).

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

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

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

414 Finally, the last sentence of Emergency Rule 6(b)(2) provides
415 a different answer from Emergency Rule 4 for the effect of a
416 declaration's end on an act authorized by an order under Rule 6(b)(2)
417 but not completed when the declaration ends. The act, which may be

418 either a motion or an appeal, may be completed under the order. If
419 the order denies a timely motion for an extension, the time to
420 appeal runs from the order. If an extension is granted, a motion
421 may be filed within the extended period. Appeal time starts to run
422 from the order that disposes of the last remaining authorized
423 motion. If no authorized motion is filed within the extended period,
424 appeal time starts to run on expiration of the extended period. Any
425 other approach would sacrifice opportunities for post-judgment
426 relief or appeal that could have been preserved if no emergency rule
427 motion had been made.

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

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

443 *Supplemental Rules for Social Security Review Actions Under*
444 *42 U.S.C. § 405(g)*

445 Judge Lioi delivered the Report of the Social Security Review
446 Subcommittee.

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

452 The more important improvement is deletion of the provisions
453 that required that the complaint include the last four digits of
454 relevant social security numbers. That requirement had met continued
455 and vigorous opposition based on the fear of identity theft. But it
456 was retained because the Social Security Administration maintained
457 that this information was essential to enable it to accurately

458 identify the proceeding and produce the record for review. So many
459 claims are processed through to final administrative disposition
460 that relying on the claimant's name alone does not enable prompt
461 identification of all cases. The comments and testimony, however,
462 revealed that, responding to the Social Security Number (SSN) Fraud
463 Prevention Act of 2017, SSA has launched a system that attaches a
464 13-character alphanumeric designation, currently called a
465 Beneficiary Notice Control Number, to each notice it sends to a
466 claimant. This unique number readily identifies the proceeding and
467 record. SSA anticipates that this practice will be expanded to
468 include all final dispositions before the proposed supplemental
469 rules can become effective. Elimination of the last-four-digits
470 requirement is accomplished by instead requiring that the complaint
471 include "any identifying designation provided by the Commissioner
472 with the final decision."

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

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

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

492 Supplemental Rule 2 authorizes a simple complaint that need
493 state only that the action is brought against the Commissioner under
494 § 405(g), identify the claimant and person on whose wage record
495 benefits are sought, and identify the type of benefits claimed. The
496 plaintiff is free, but not required, to add a short and plain
497 statement of the grounds for relief.

498 Supplemental Rule 3 requires the court to notify the
499 Commissioner of the action by transmitting a Notice of Electronic
500 Filing to the Commissioner and to the United States Attorney for
501 the district. This provision reflects a practice established in some
502 districts now. The plaintiff need not serve a summons and complaint
503 under Rule 4. This rule is vigorously supported by claimants as well
504 as SSA.

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

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

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

534 Despite unanimous agreement that these rules have been polished
535 into a very good procedure for § 405(g) administrative review
536 actions, the subcommittee divided on the question whether to
537 recommend adoption. Four of those who participated in the
538 discussion, including all three judges, recommended adoption. Three

539 others, however, remained uncertain, "on the fence," or even
540 negative.

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

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

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

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

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

574 The value of supplemental rules is further shown by the great
575 number of these cases. The annual count has run between 17,000 and
576 18,000; the most recent annual figure is 19,454. The benefit of
577 improved procedure in so many cases is important.

578 It also is significant that this project began with a proposal
579 by the Administrative Conference of the United States, bolstered by
580 a thorough study by two leading procedure scholars of procedures
581 used in § 405(g) actions throughout the country.

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

590 Discussion began with the observation that the public comments
591 and testimony "were a real help."

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

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

602 Dean Coquillette, who served three decades as Standing
603 Committee Reporter, described himself as "an apostle of
604 transsubstantivity." But this "is the best possible job. I can see
605 doing it. It will address real problems."

606 The subcommittee representative from the Department of Justice
607 agreed that the rules are about as good as can be. But the Department
608 remains concerned. The rules might be seen as designed to assist
609 SSA attorneys, who often appear in these review actions as Assistant
610 United States Attorneys. The plaintiffs' bar is at best divided.
611 Should we favor, or appear to favor, one side? Yes, these are
612 appeals. But they are not much different from the mine-run of APA
613 cases; there is a risk of mission creep. And the hoped-for efficiency
614 will be threatened by local rules that will persist in face of the
615 new national practice.

616 A judge member of the subcommittee said that the supplemental
617 rules promote efficiency for all parties. They will be especially
618 helpful for pro se plaintiffs. The briefing times will generate
619 requests for extensions.

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

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

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

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

655 Judge Lioi concluded the discussion, saying that these are
656 rules of procedure. Judges have not resisted them. Once they engage

657 in discussion, they support them. And the benefits to pro se
658 claimants are important.

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

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

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

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

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

690 There were only three comments on the proposal. The New York
691 City Bar supports it. The American Association for Justice and the
692 NAACP Legal Defense Fund oppose it. The reasons for opposition
693 reflect concern that plaintiffs in these actions often are involved
694 in situations that call for significant police reforms, parallel
695 concerns about established qualified immunity doctrine, the general
696 issues arising from delay in resolving these actions, and the

697 breadth of the proposal in applying to actions in which there is no
698 immunity defense.

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

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

714 Another member agreed, and added that "60 days is far too long
715 in any event."

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

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

734 A judge member observed that immunity defenses are often raised
735 in § 1983 actions against state or local officials: don't they have
736 similar arguments for more time? They may face local problems

737 similar to the need arising from the need for Solicitor General
738 approval of appeals, and from the more general need for time. It
739 was noted that similar concerns about the needs of state and local
740 governments have been raised in considering other rules provisions
741 that give distinctive treatment to federal actors, but that so far
742 the needs of the federal government have been found to justify
743 distinctive treatment not accorded to other governments.

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

755 A judge member asked whether, if the 60-day period is adopted,
756 the government will routinely ask for extensions? Judges are likely
757 to be amenable to a first motion to extend, whether the period is
758 initially set at 14 days or 60 days. They are less likely to be
759 amenable to a second request. The choice of the initial period to
760 answer makes a real difference. The Department answered that the
761 process can, and often does, happen within 60 days. But not within
762 14.

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

771 The Department of Justice responded with a reminder that the
772 need for 60 days to respond is felt even when there is no prospect
773 of a collateral-order appeal. The reasons are the same reasons as
774 have been accepted in providing 60-day periods by earlier amendments
775 of Rule 12(a)(3) and Appellate Rule 4(a). Local attorneys still need
776 to consult with the Department in Washington. And the reasons that
777 explain denial of the motion to dismiss may affect the next steps,
778 including the answer.

779 A judge agreed that the need for time to prepare an answer in
780 all cases, including affirmative defenses, may justify a blanket
781 60-day provision.

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

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

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

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

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

814 A different member asked what is the reason for picking the
815 particular figure of 60 days? It has no obvious anchor in the
816 arguments that more time is needed in cases that do not present the
817 possibility of a collateral-order appeal. A response was offered -
818 - the 60-day period does have a clear anchor in the 60-day appeal

819 period set by Appellate Rule 4 for cases with the possibility of an
820 appeal.

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

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

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

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

850 The Department of Justice representative added that as compared
851 to having no amendment of Rule 12(a)(4) for all of these actions,
852 it would be better to have a rule extending the time to answer to
853 60 days in cases where an immunity defense is raised.

854 The possibility of narrowing the rule in this fashion led to
855 the question whether the narrower rule should be republished to
856 support a new period for comment. This is always an uncertain
857 calculation. For this situation, a participant suggested that
858 republication is probably not necessary. The narrower version gives

859 the opponents something of what they wanted, and does not take away
860 anything. But republication would be warranted if the task of
861 drafting the amended rule shows a risk that the new language may
862 not get it right.

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

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

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

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

896 Another judge agreed that as long as there is an immunity
897 defense and a possibility of a collateral-order appeal, it is not
898 likely that the case will go to discovery before the end of the 60-
899 day period, no matter whether there is a defendant that has not

900 pleaded immunity. "There are complexities." But both judges agreed
901 that their own experience and practices cannot be taken, without
902 more, to describe practices universal to all judges. Yet another
903 judge agreed, being moderately comfortable with the proposal without
904 attempting to distinguish how many defendants have immunity
905 defenses.

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

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

912 *MDL Subcommittee Report*

913 Judge Rosenberg delivered the Report of the MDL Subcommittee.
914 Three topics are addressed.

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

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

937 A third topic is as much as anything a combination of topics.
938 The broad general questions focus on the MDL court's role in

939 appointing lead counsel and in setting a framework for settlement
940 negotiations and possibly for settlement review. These broad
941 questions lead to others that the subcommittee has not yet discussed
942 in any detail, including how to establish and administer common-
943 benefit funds and the possibility of imposing limits on the attorney
944 fees provided by contracts between individual plaintiffs and their
945 counsel.

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

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

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

973 A general question has persisted throughout subcommittee
974 deliberations. Many of the issues that have been explored arise in
975 "mega" MDL proceedings that bring together thousands or tens of
976 thousands of cases. Despite efforts to engage lawyers and judges
977 with experience in less sprawling proceedings, it remains unclear
978 whether any new rules should be available in all MDL proceedings or
979 should be limited only to more limited categories, however they
980 might be defined.

981 More specific questions address particular topics. What
982 standards might be defined for appointing lead counsel? Can they be
983 drawn from the Manual for Complex Litigation? How should the court
984 articulate the duties of lead counsel or a leadership team? Should
985 a rule address common benefit funds? Caps on fees set by individual
986 client contracts? How might a rule relate to Rule 23, recognizing
987 that MDL proceedings often include class actions and may be resolved
988 by certifying a class?

989 Professor Marcus added that "this is the toughest set of
990 problems we had addressed in MDLs." One pervasive question is how
991 to describe the court's duty -- sometimes characterized as a
992 fiduciary duty -- to all claimants, especially those whose
993 individually retained attorneys do not participate in or with the
994 leadership team? There are tensions within the plaintiffs' side,
995 and also on the defense side. We have heard of settlements of various
996 sizes: global, continental, inventory, and individual. Can courts
997 prefer global settlements? When inventory settlements are reached,
998 we have heard that there are good reasons for settling on different
999 terms with different inventories. One inventory may consist of cases
1000 that have all been thoroughly worked up, high-value cases that
1001 deserve high settlement values. Another inventory may consist of a
1002 large number that have not been carefully worked up, some of them
1003 with strong claims and others with weak or no claims. It may be
1004 difficult for a judge to evaluate the differences.

1005 A judge observed that there is an important relationship
1006 between what happens early in a proceeding and what happens as the
1007 proceeding progresses. The structure at the beginning has a profound
1008 effect on how it ends. The leadership order may hamper the ability
1009 of non-lead individually retained plaintiffs' attorneys to represent
1010 their clients. That cannot be avoided. "You cannot have 5,000
1011 lawyers participating in a status conference."

1012 Professor Marcus added that, as compared to class actions,
1013 almost every plaintiff brought into an MDL proceeding has a personal
1014 lawyer. There are likely to be few pro se plaintiffs. "Judges should
1015 be concerned with process more than outcome." The initial order
1016 appointing lead counsel structures the proceeding, setting the
1017 process in motion. Judges should be aware of this, and perhaps
1018 offered guidance in a rule.

1019 A judge observed that at the annual conference for MDL judges,
1020 they are advised that all nonleadership lawyers "should be included
1021 in conference calls." This practice prompts lead counsel to

1022 communicate with nonlead counsel to forestall comments based on a
1023 lack of information about the work being done.

1024 *Discovery Subcommittee*

1025 Judge Godbey delivered the report of the Discovery
1026 Subcommittee, beginning with thanks to all subcommittee members for
1027 participating in the February 26 meeting, noting that the
1028 contributions of the four lawyer members were invaluable. The
1029 thorough and thoughtful research by Kevin Crenny, the Rules Law
1030 Clerk, also was helpful.

1031 The subcommittee considered four topics: privilege logs;
1032 sealing orders; the availability of attorney fees under Rule 37(e)
1033 as a remedy for spoliating electronically discoverable information;
1034 and a proposal to add a new Rule 27(c) to authorize an independent
1035 action for an order to preserve information or an order that
1036 information need not be preserved. The first two deserve further
1037 study.

1038 Privilege Logs Several general questions surround the privilege log
1039 practice mandated by Rule 26(b)(5)(A). It is common to observe that
1040 they are expensive, and not uncommon to suggest that often they are
1041 not helpful. Laments are made that lawyers commonly assume that a
1042 log has to be detailed on a document-by-document basis, even though
1043 the 1993 committee note said this: "Details concerning time,
1044 persons, general subject matter, etc., may be appropriate if only a
1045 few items are withheld, but may be unduly burdensome when voluminous
1046 documents are claimed to be privileged or protected, particularly
1047 if the items can be described by categories." It has been suggested
1048 that complaints about expense are overblown -- that most of the
1049 expense is necessary to identify relevant and responsive documents,
1050 to screen them for privilege, and to decide which to withhold. It
1051 also is suggested that the opportunity to invoke Rule 26(b)(5)(B)
1052 or Evidence Rule 502 to establish clear provisions that protect
1053 against inadvertent waiver may reduce the burden of drafting a
1054 privilege log.

1055 A common observation has been that most of the problems arise
1056 because privilege logs are commonly produced toward the close of
1057 the discovery period.

1058 The central question is whether it will be possible to write
1059 new rule text that reduces the challenges of privilege log practice.
1060 The subcommittee will reach out to the bar for further information
1061 that may help in addressing the problem.

1062 Professor Marcus noted the proposal from Lawyers for Civil
1063 Justice included in the agenda materials. That proposal is
1064 essentially contingent on party agreement, without addressing any
1065 rule provision prompting such agreement or even discussion of
1066 possible agreement. The initial discussion in the subcommittee has
1067 not been along the lines suggested by their actual proposal.
1068 Instead, the focus has been on getting lawyers to address these
1069 issues early in the litigation. "How do we provide a prod in a rule?
1070 Is improvement possible? If so, where would new provisions fit in
1071 the body of the Civil Rules"?

1072 The invitation for discussion was met by brief silence. Then
1073 a lawyer member suggested that we need more information on
1074 technological implications for practice. Is metadata an appropriate
1075 means of compiling a log? Some lawyers find this an acceptable
1076 practice, but "judges are not yet there." And in fact creating a
1077 log can be as much of a problem as identifying protected documents
1078 when there are thousands of them.

1079 Another lawyer member observed that the four lawyers on the
1080 Committee and the subcommittee practice in large cases, with e-
1081 discovery and responses. "We should not lose sight of more regular
1082 cases."

1083 Another lawyer said that this is a problem worth thinking
1084 about, although it is difficult to imagine a rule that will improve
1085 the process.

1086 The fourth lawyer member agreed that "one rule for all sizes
1087 of cases is not likely to work. Metadata logs aren't likely to apply
1088 to most cases." Even with the most sophisticated lawyers in the most
1089 sophisticated litigation, there is much to learn about how to form
1090 a log by searching metadata.

1091 A judge said that privilege logs are a not infrequent problem
1092 in practice. Adding provisions to Rule 16 to prompt the parties and
1093 court to address it early on may be useful.

1094 A lawyer member agreed. "Timing is critical." Participants may
1095 often push these problems toward the discovery cutoff. Encouragement
1096 in Rule 16 to address them early in the litigation would be very
1097 helpful.

1098 A judge suggested that silence among judges asked about their
1099 experience with these problems is not a sign that the problems
1100 encountered in compiling logs are unimportant. "A lot of money is

1101 spent that judges don't know about." A lot of further work by the
1102 subcommittee will be valuable. Another judge agreed that the log
1103 and the process for logging are issues that deserve further work.

1104 The subcommittee indeed will continue its work.

1105 Sealing Orders Judge Godbey began the report on sealing orders by
1106 noting the proposal submitted by press interests to adopt an
1107 elaborate rule with many specific provisions to regulate orders that
1108 seal anything in court files. The proponents see a problem that
1109 media and First Amendment interests "are not at the table when these
1110 issues are discussed." The proposal can be seen as an attempt to
1111 give a "virtual seat" at the table to these interests.

1112 The subcommittee has not generated much enthusiasm for the
1113 specific proposal. But these issues "have been floating around for
1114 decades." A decade ago the Committee on Court Administration and
1115 Case Management produced a best practices guide for sealing. The
1116 Criminal Rules do address sealing.

1117 The Rules Law clerk reviewed a sample of local court rules on
1118 sealing, drawing from districts represented on the committee. the
1119 survey shows the local rules are not uniform. Further information
1120 was provided by a letter from Lawyers for Civil Justice.

1121 As work goes forward, it may be useful to do more to distinguish
1122 inter partes protective orders from sealing court files. The
1123 appropriate standards may be different.

1124 Professor Marcus elaborated the introduction, suggesting that
1125 the "bells and whistles" in the submitted proposal are not
1126 productive. But it is important to remember that transparency in
1127 the courts has important constitutional and common-law aspects that
1128 are different from discovery protective orders. A basic question
1129 will be identifying a standard for sealing if it should be more
1130 demanding than "good cause." Further study will be important. Having
1131 many local methods of sealing "may be just fine, not in need of a
1132 national rule."

1133 A lawyer member reported that the Sedona Conference is working
1134 on these issues.

1135 Sealing orders will remain on the subcommittee agenda.

1136 Rule 37(e) Attorney Fee Awards A question has been raised whether
1137 attorney fees can be awarded to reimburse costs incurred by a party

1138 requesting discovery to restore or replace electronically stored
1139 information that should have been preserved in the anticipation or
1140 conduct of litigation. Rule 37(e) addresses spoliation of
1141 electronically stored information, but does not include an express
1142 provision for attorney fees. Rule 37(e)(1) authorizes "measures no
1143 greater than necessary to cure the prejudice," but it might be read
1144 to be limited to circumstances where the information cannot be
1145 restored or replaced through additional discovery.

1146 Research by the Rules Law Clerk shows that there is a potential
1147 problem in reading the rule text, but not a practical problem.
1148 Almost all courts that address the question find authority to award
1149 attorney fees. Compensation for the costs of successful efforts to
1150 retrieve information that should have been preserved in a more
1151 easily accessible form seems an obviously appropriate remedy.

1152 Professor Marcus added that past work by Tom Allman, and a
1153 recent letter from him, bolster the conclusion that there is no
1154 practical problem. Reopening Rule 37(e), further, might lead to work
1155 comparable to the difficult process that led to adopting its current
1156 form.

1157 This subject will be removed from the agenda.

1158 Presuit Preservation Orders Professor Jeffrey Parness submitted a
1159 proposal to add a new element to Rule 27(c):

1160 (c) PERPETUATION BY AN ACTION. This rule does not limit a
1161 court's power to entertain an action to perpetuate
1162 testimony and an action involving presuit
1163 information preservation when necessary to secure
1164 the just, speedy, and inexpensive resolution of a
1165 possible later federal civil action.

1166 Judge Godbey illustrated some of the questions raised by this
1167 proposal. The duty to preserve information in anticipation of
1168 litigation was left to the common law when Rule 37(e) was developed
1169 and revised, in part because of questions whether a rule that imposes
1170 a duty to preserve before any federal action is filed would be
1171 authorized by the Rules Enabling Act. Referring to a "possible later
1172 federal civil action" raises questions of subject-matter
1173 jurisdiction different from the provision in Rule 27(a)(1) for
1174 perpetuating testimony "about any matter cognizable in a United
1175 States court," showing that the petitioner expects to be a party to
1176 such an action but cannot presently bring it or cause it to be
1177 brought. The supporting memorandum suggests that "an action

1178 involving presuit information preservation" can include an action
1179 for a declaration that information need not be preserved. What if
1180 two actions, one to preserve and one to permit destruction, lead to
1181 conflicting orders?

1182 Professor Marcus added that the proposal is not limited to
1183 electronically stored information, a limitation deliberately
1184 incorporated in Rule 37(e). In developing Rule 37(e), the Committee
1185 "did not want to encourage preservation orders in litigation."
1186 Beyond that, pre-litigation discovery generally has not been
1187 popular. People do preserve information. Demand letters are sent.
1188 The committee should not take up this subject.

1189 The committee agreed to remove this proposal from the agenda.

1190 *Rule 9(b): Pleading State of Mind*

1191 Judge Dow introduced the Rule 9(b) proposal by reminding the
1192 committee that this subject was taken up at the October meeting only
1193 for a brief introduction. A more thorough introduction will be
1194 provided today, but without any thought of moving toward a
1195 recommendation. Further consideration over the summer will be
1196 important.

1197 Dean Spencer provided a summary of his article on this topic,
1198 which he has submitted as a proposal for action. The purpose today
1199 is not to advocate for adoption. The purpose, rather, is to show
1200 that the proposal is worthy of serious study. "There are concerns
1201 that need to be addressed."

1202 The focus is on revising the second sentence of Rule 9(b) to
1203 modify the interpretation adopted by the Supreme Court in *Ashcroft*
1204 *v. Iqbal*, 556 U.S. 662, 686-687 (2009). As revised, Rule 9(b) would
1205 read:

1206 (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or
1207 mistake, a party must state with particularity the
1208 circumstances constituting fraud or mistake. Malice,
1209 intent, knowledge, and other conditions of a
1210 person's mind may be alleged ~~generally~~ <u>without</u>
1211 <u>setting forth the facts or circumstances from which</u>
1212 <u>the condition may be inferred</u>.

1213 The Supreme Court ruled that "generally" means pleading that
1214 satisfies the "plausibility" standard recently adopted for
1215 interpreting Rule 8(a)(2). Lower courts adhere to the Court's

1216 ruling, requiring that a pleading include facts that make plausible
1217 an allegation of state of mind.

1218 One reason to question the Court's interpretation can be found
1219 in the meaning intended when the present language was adopted in
1220 1938. The 1937 committee note refers to the English Rule that
1221 permitted conditions of mind to be alleged as a fact, without
1222 alleging facts from which the condition of mind might be inferred.
1223 The Court's interpretation is inconsistent with the intended
1224 meaning.

1225 Added reasons can be found in the structure of the pleading
1226 rules. Rule 8(a)(2) addresses what is required to plead a claim.
1227 Rule 9(b) is a rule for pleading allegations, not claims. Rule
1228 8(d)(1) is a rule for pleading allegations, and requires that the
1229 allegation be "simple, concise, and direct." In Rule 9(b) itself,
1230 further, "generally" is used to establish a contrast with the "with
1231 particularity" standard required for allegations of fraud or
1232 mistake, but the Court's interpretation requires that conditions of
1233 mind be pleaded with particularity.

1234 Policy issues further undermine the Court's interpretation.
1235 Plaintiffs cannot be expected to have detailed information of the
1236 facts that will support an inference of intent at the time an action
1237 is filed. Discovery is needed.

1238 Discussion began with comments that recounted other themes in
1239 the article, offered from the perspective of one who was both
1240 surprised and nonplussed by the Supreme Court's interpretation of
1241 Rule 9(b). "Generally" had always seemed to recognize that
1242 knowledge, intent, malice, and other conditions of mind often are
1243 proved, not by confession but by inference from a mass of facts.
1244 Even if all the facts were available to the pleader at the time of
1245 framing the pleading, little purpose would be served by dumping them
1246 all into the pleading, much less to put a judge to the task of
1247 determining whether the "well pleaded" facts would permit a rational
1248 trier of fact to draw the asserted inference. It is more effective
1249 to permit a pleading to allege a state of mind as a simple fact --
1250 the defendant intended to discriminate, and so on. There is a more
1251 particular danger that evaluation of plausible inferences is
1252 hampered by perspective: inferences that seem plausible to one mind
1253 may seem impossible to another, depending on experience and the
1254 influences of stereotypes. And of course the pleader is not likely
1255 to have access to all the supporting facts at the time of pleading.
1256 Discovery is necessary.

1257 This comment went on, however, to suggest that the first rush
1258 of enthusiasm for this proposal should be tempered by further
1259 reflection. Practices that worked in the context of Nineteenth
1260 Century substantive law may not be as suitable to the enormous
1261 spread of substantive law, often through ambitious statutes, in the
1262 Twenty-First Century. Is it useful to apply a single rule for
1263 pleading intent in an individual employment discrimination action,
1264 an action under RLUIPA for denial of a zoning permit sought by a
1265 religious institution, or a "class of one" equal protection claim?

1266 Professor Marcus added another perspective. It would be useful
1267 to know more about how Rule 9(b) was actually applied over the years
1268 before the Supreme Court adopted what has come to be described as
1269 the "plausibility" pleading standard. Practice under Rule 8(a)(2)
1270 varied widely, both in lower courts and at times in the Supreme
1271 Court. The same may have been true for Rule 9(b), reflecting concerns
1272 that will inform our consideration today. One example is provided
1273 by a mid-1970s Second Circuit decision that required pleading in a
1274 securities case of facts giving rise to a strong inference of
1275 scienter, a standard that was later adopted by statute.

1276 Professor Marcus also recalled Committee experience after the
1277 1993 decision in the Leatherman case. The Court's opinion seemed to
1278 invite consideration of rules for "heightened pleading" of some
1279 matters, but repeated efforts failed to generate any proposal. The
1280 road ahead with the Rule 9(b) proposal may be long and arid. "It's
1281 an uphill push." Many judges seem to believe that the developing
1282 plausibility standard of pleading is desirable. So it may be for
1283 Rule 9(b).

1284 A third observation was that this topic is "incredibly
1285 important, and deserves close attention."

1286 A judge reported denial of a motion to dismiss in a Title VII
1287 case, relying on Dean Spencer's arguments. The Supreme Court
1288 standard is tough to meet in these cases.

1289 Another judge observed that the plausibility pleading approach
1290 "gives me a tool to encourage the parties to come up with better
1291 pleadings." It is a way to encourage them to try harder. But
1292 different issues may be presented when pleading a defendant's state
1293 of mind. This proposal will be retained for further study.

1294 It may prove desirable to appoint a subcommittee to study
1295 Rule 9(b). That could stimulate the kind of discussion we need. Dean

1296 Spencer agreed that a subcommittee with judges and practitioners
1297 could be useful.

1298 *Appeal Finality After Consolidation Subcommittee*

1299 Judge Rosenberg delivered the report of the joint Appellate-
1300 Civil Rules Subcommittee that is studying the impact of the decision
1301 in *Hall v. Hall*, 138 S. Ct. 1118 (2018). The Court ruled that even
1302 if initially separate cases are consolidated for all purposes, a
1303 judgment that completely disposes of all claims among all parties
1304 to what began as a separate action is final for purposes of appeal.

1305 Last October the subcommittee reported on the results of an
1306 in-depth FJC study that found no identifiable difficulties stemming
1307 from lost opportunities to appeal.

1308 Since October, informal inquiries have been made to the Second,
1309 Third, Seventh, Ninth, and Eleventh Circuits. All routinely screen
1310 appeals for timeliness. Two have appeals handbooks that point to
1311 the rule in *Hall v. Hall*. Only one case in the Second Circuit was
1312 found to illustrate lost opportunities to appeal.

1313 There is no sense of imminent need to consider rules that might
1314 establish a different rule of finality for appeal.

1315 Discussion began with a judge's observation that the Supreme
1316 Court chose one of the various possible rules. That may be reason
1317 to let the question rest.

1318 The choice now seems to be whether to leave this topic to rest
1319 for a while without further work, or instead to disband the
1320 subcommittee. There is no present plan to expand the informal
1321 survey. Expanding the FJC study would be costly, and there is little
1322 reason to suppose that it would produce markedly different results.
1323 "We're really doing nothing." But retaining the topic in a state of
1324 suspension may be useful, looking both for developing experience in
1325 practice and for possible reasons to believe that, even without
1326 evidence of lost appeal opportunities, integrating consolidation
1327 practice with the partial final judgment provisions of Rule 54(b)
1328 might better serve the needs of the parties, the trial court, and
1329 appeals courts.

1330 Because the subcommittee was appointed by the Standing
1331 Committee as a joint subcommittee, action by the Standing Committee
1332 will be required to dissolve it. The question will be taken to the
1333 Appellate Rules Committee for further consideration.

1334 *Rules 12(a)(2), (3): Statutory Appeal Times*

1335 Rule 12(a)(1) sets general times to respond to a pleading,
1336 subject to a qualification: "Unless another time is specified by *
1337 * * a federal statute." No similar qualification appears in either
1338 paragraph (2) or (3), which set 60-day response times for actions
1339 against the United States and for actions against a United States
1340 officer or employees sued in an individual capacity. The problem is
1341 that at least a few statutes -- most prominently the Freedom of
1342 Information Act -- set shorter periods. On its face, the rule
1343 supersedes any statute enacted before the rule was adopted, and is
1344 superseded by any statute enacted after the rule was adopted. There
1345 is no reason to believe that this result was intended. The problem
1346 also is easily fixed by revising the structure of Rule 12(a):

1347 (a) TIME TO SERVE A RESPONSIVE PLEADING. Unless another time
1348 is specified by a federal statute, the time for
1349 serving a responsive pleading is as follows:

1350 Paragraphs (1), (2), and (3) would all be subject to a statute that
1351 sets a different time.

1352 Two arguments have been advanced for deciding not to fix this
1353 textual misadventure. One is that it has not given rise to any
1354 practical problems. The Department of Justice reports that it is
1355 fully aware of the 30-day response times set in the Freedom of
1356 Information Act and the Sunshine in Government Act, and generally
1357 complies with them or, in appropriate cases, seeks an extension.
1358 Extensions are often requested in cases that combine claims, one
1359 subject to a 30-day response period and the other subject to the
1360 general 60-day response period. But it fears that if the statutes
1361 are explicitly recognized in Rule 12(a) text, courts may be less
1362 willing to grant extensions in the combined-claim cases.

1363 At the October meeting, these competing concerns led the
1364 Committee to an equally divided vote on recommending publication of
1365 the proposed amendment, six votes for publication and six votes
1366 against.

1367 Since the October meeting, an extensive PACER survey of actual
1368 response times in FOIA action was made by John A. Hawkinson, a
1369 freelance news reporter, and Rebecca Fordon of the UCLA Law School.
1370 The survey covers FOIA actions in 87 districts from 2018 up to 2021.
1371 It shows nationwide mean times of 42 days, with 66% of responses
1372 received outside of 30 days. A spreadsheet shows the experience in
1373 each district. 1,391 of the 2,115 case total were filed in the

1374 District Court for the District of Columbia, a court that has a
1375 "mechanism" for issuing summonses that set a 30-day response time.
1376 The median there is 31 days, and the mean 40 days. The four other
1377 districts with more than 30 cases during this period show comparable
1378 or shorter times. The method used for preliminary analysis did not
1379 show whether the Department of Justice had moved for an extension
1380 of time during the 30-day period. Nor does it seem to show whether
1381 the FOIA claim was joined with a claim not subject to the 30-day
1382 response period.

1383 This survey is remarkably helpful. It seems to confirm the
1384 description of Department of Justice practice.

1385 The Department of Justice representative repeated the earlier
1386 descriptions of Department practice, adding that there has been no
1387 reason to think that plaintiffs are concerned about its practices.

1388 Discussion concluded with the reminder that this topic was not
1389 listed for action at this meeting. The division of votes at the
1390 October meeting suggests that it deserves further consideration. It
1391 will be brought back for disposition at the next October meeting.

1392 *Rule 4(f)(2)*

1393 This suggestion raises a question about the interplay between
1394 paragraphs (1) and (2) of Rule 4(f).

1395 Rule 4(f)(1) authorizes service "at a place not within any
1396 judicial district of the United States: (1) by any internationally
1397 agreed means of service * * * such as those authorized by the Hague
1398 Convention * * *." (f)(2) authorizes service "if there is no
1399 internationally agreed means, or if an international agreement
1400 allows but does not specify other means, by a method that is
1401 reasonably calculated to give notice."

1402 The suggestion points out that the Hague Convention establishes
1403 a system for service through the central authorities in states that
1404 are parties to the convention. At the same time, it permits service
1405 by other means, all of which are specified. Thus these other means
1406 do not fall within (f)(2) -- the Convention authorizes them, but
1407 also does specify them.

1408 Although this limit in (f)(2) is said to present a problem,
1409 the suggestion does not deal with the more apparent reading of
1410 (f)(1). Service by means that are both authorized and specified by
1411 the Hague Convention fits squarely within (f)(1). There is no

1412 apparent reason to undertake some revision of (f)(2) to include
1413 these circumstances.

1414 The committee voted to remove this item from the agenda.

1415 *Rule 65(a)(2): Interlocutory Statutory Interpleader Injunctions*

1416 This suggestion points out that Rule 65(e)(2) seems curiously
1417 incomplete:

1418 (e) These rules do not modify the following:

1419 (2) 28 U.S.C. § 2361, which relates to
1420 preliminary injunctions in actions
1421 of interpleader or in the nature of
1422 interpleader;

1423 The suggestion points out that § 2361 includes two paragraphs.
1424 The first provides that the court may issue its process for all
1425 claimants "and enter its order restraining them from instituting or
1426 prosecuting any proceeding" affecting the subject of the
1427 interpleader "until further order of the court." Without using the
1428 exact words, this provision seems to relate to interlocutory or
1429 preliminary injunctions. The second paragraph provides that the
1430 court may "make the injunction permanent."

1431 The question asked, without further elaboration, is why does
1432 the rule address only preliminary injunctions?

1433 The question in part may reflect a change made when Rule 65(e)
1434 was restyled in 2007. From 1938 to 2007, it referred to the
1435 provisions of the interpleader statute "relating to" preliminary
1436 injunctions. That language did not imply that § 2361 relates only
1437 to preliminary injunctions. As restyled, "which relates to" seems
1438 to say that § 2361 relates only to preliminary injunctions,
1439 apparently excluding permanent injunctions.

1440 This potential explanation still leaves the question: Why
1441 should the statutory provisions for preliminary injunctions in
1442 interpleader actions be protected against modification by Rule 65,
1443 while the provisions for permanent injunctions are not?

1444 Preliminary research, stretching back into the Equity Rules
1445 that preceded the Civil Rules, has revealed no indication of the
1446 purposes that underlie the distinction. One plausible speculation
1447 may be that the original advisory committee thought that the statute

1448 might imply power to issue preliminary injunctions by a process,
1449 and perhaps on terms, not consistent with Rule 65. Rule 65(e)(2)
1450 then reflects an intent to avoid modifying the statutory powers.

1451 There has been no indication that the uncertain purpose of Rule
1452 65(e)(2) has caused any difficulties in practice. The few courts
1453 that have confronted this question have suggested that departures
1454 from regular Rule 65 procedure may be required by the imperative
1455 for immediate action to forestall competing judicial proceedings
1456 that might effectively defeat the interpleader action by disposing
1457 of the contested property. Permanent injunctions at the conclusion
1458 of the interpleader action do not present like problems.

1459 It would be possible to reexamine the question whether changed
1460 circumstances, perhaps most plausibly the development of widespread
1461 means of instantaneous communication, justify the cautious approach
1462 reflected in Rule 65(e)(2). That would be a substantial undertaking,
1463 perhaps difficult to justify absent any sign of problems in
1464 practice. It would be much easier to undo the style revision, but
1465 that work too might fall before the general practice that avoids
1466 amendments framed only to revisit earlier styling decisions.

1467 The Committee voted to remove this item from the agenda.

1468 *Rules 6, 60*

1469 This suggestion, addressing some effects of the Civil Rules on
1470 the Appellate Rules, raises separate questions for Rules 6 and 60.

1471 Rule 6(d) Rule 6(d) provides that "3 days are added" when a party
1472 may or must act within a specified time after being served and
1473 service is made under Rule 5(b)(2)(C), (D), or (F). The proposal is
1474 that 3 days should be added when a party must act within a specified
1475 time "after entry of judgment" and service is made by any of the
1476 same three means.

1477 The underlying concern is that notice of judgment may be served
1478 by mail, delaying receipt of notice and thus shortening, as a
1479 practical matter, the time to make motions under Rules 50, 52, 59,
1480 or 60 after judgment is entered. The running of appeal time can be
1481 affected as well. (Service by leaving with the district court clerk
1482 or "other means consented to" does not seem likely to be at issue.)

1483 This proposal enters a web of related rules that run time to
1484 act from the entry of judgment, not from being served. Rules 50,
1485 52, 59, and 60 set the time for various post-judgment motions to

1486 run from the entry of judgment. Appellate Rule 4(a) sets the time
1487 to appeal to run from the entry of judgment. Rule 77(d)(1) directs
1488 the clerk to immediately serve every party with notice of the entry
1489 of judgment "as provided in Rule 5(b)." Rule 77(d)(2) provides that
1490 lack of notice of entry does not affect the time for appeal or
1491 authorize the court to relieve a party for failing to appeal within
1492 the time allowed "except as allowed by Federal Rule of Appellate
1493 Procedure 4(a)." Rule 4(a)(5) provides a general authority to extend
1494 appeal time. Rule 4(a)(6) specifically allows the district court to
1495 extend appeal time for a party who did not receive the Rule 77(d)
1496 notice within 21 days after entry of judgment, subject to several
1497 limits.

1498 The integrated framework of these rules shows that the
1499 Appellate and Civil Rules Committees have worked to coordinate the
1500 provisions for notice of judgment, post-judgment motions, and appeal
1501 times. Amending to allow "3 added days" would revise this system,
1502 and should be approached with care, if at all.

1503 A potential complication was pointed out. It can be expected
1504 that ordinarily notice of judgment will be provided through the
1505 court's CM/ECF system. Mail is likely to be used primarily for pro
1506 se parties. A revised rule should resolve the question whether
1507 different parties should have different times for post-judgment
1508 motions and appeal, or whether all parties should get an additional
1509 3 days because one party received notice by mail.

1510 It also was suggested that automatically allowing an additional
1511 3 days would seldom be the best way to address such legitimate needs
1512 as may arise in a few cases.

1513 The Committee voted to remove this item from the agenda.

1514 <u>Rule 60(c)(1)</u>: Rule 60(c)(1) sets the time for making motions for
1515 relief from judgment under Rule 60(b). As reflected in the
1516 discussion of draft Rule 87 and Emergency Rule 6(b)(2), integration
1517 of Rule 60(b) motions with Appellate Rule 4(a)(4)(A) has been more
1518 complicated than integration of post-judgment motions under
1519 Rules 50, 52, or 59. Rule 4(a)(4)(A)(vi) gives a Rule 60(b) motion
1520 the same effect as timely Rule 50, 52, or 59 motions "if the motion
1521 is filed no later than 28 days after the judgment is entered."

1522 The proposal is to add a cross-reference to Appellate Rule 4
1523 as a new subparagraph Rule 60(c)(1)(B): "A motion under Rule 60(b)
1524 must be made * * * (B) within 28 days to toll the time for filing
1525 an appeal." The idea of adding a cross-reference is clear, although

1526 the wording might need some work, particularly if Appellate
1527 Rule 4(a)(4)(A)(vi) is amended to refer to the time for a Rule 59
1528 motion rather than 28 days.

1529 The question is whether to add another cross-reference to the
1530 Appellate Rules in the Civil Rules. The cross-reference to Appellate
1531 Rule 4 in Rule 77(d) was noted above. Another example appears in
1532 Rule 58(e). Both of these provisions were worked out in careful
1533 coordination with the Appellate Rules Committee. Similar work
1534 integrated the general entry of judgment provisions of Rule 58 with
1535 Appellate Rule 4, leaving the task of cross-reference to Appellate
1536 Rule 4.

1537 The purpose of adding a cross-reference to Rule 60(c)(1) would
1538 be a simpler purpose to provide notice to litigants who are not
1539 familiar with the interplay of appeal time provisions with Rule 60.
1540 Similar opportunities for cross-references have not been seized.
1541 The Rule 54(b) provisions for partial final judgment do not warn
1542 that appeal time starts to run on entry of the judgment. Nor has
1543 any attempt been made to provide notice, perhaps in Civil Rule 42,
1544 of the effects of the decision in *Hall v. Hall*, noted above, on the
1545 time to appeal. Cross-references may be difficult to draft -- just
1546 what sorts of consolidations might fall into a potential cross-
1547 reference, for example, might be challenging to identify. And a
1548 proliferation of cross-references might generate misleading
1549 implications that there is no need to worry about Appellate Rule 4
1550 when there is no cross-reference in a Civil Rule, for example when
1551 a preliminary injunction is entered.

1552 The Appellate Rules Committee has removed this proposal from
1553 its agenda.

1554 The Committee voted to remove this proposal from the agenda.

1555 *In Forma Pauperis Standards and Procedures*

1556 Judge Dow introduced this subject. Professors Clopton and
1557 Hammond have submitted a proposal that the Committee should renew
1558 its consideration of standards and procedures for granting petitions
1559 to proceed in forma pauperis. Similar issues were considered at the
1560 three most recent committee meetings. The submission underscores
1561 the evidence that standards for granting i.f.p. status vary widely
1562 across the country and even within a single district. And the forms
1563 used to collect information are confusing and often invade privacy,
1564 including privacy interests of nonparties, and may imply that it is
1565 appropriate to consider information that is not properly considered.

1566 This is a succinct suggestion. The Committee has recognized at
1567 its earlier meetings that "these are big problems." Both the Court
1568 Administration and Case Management Committee and the Appellate Rules
1569 Committee have considered proposals that relate to these topics.

1570 The Northern District of Illinois has taken a close look at
1571 its practices, prompted by the work of Professors Clopton and
1572 Hammond. The local rules committee studied the issues for many
1573 months, and the Chicago Council of Lawyers collected a lot of data.
1574 The local i.f.p. form has been revised a number of times --
1575 revisiting the form is a constant battle. The District has 12 staff
1576 attorneys for prisoner litigation; they do the preliminary screening
1577 of i.f.p. requests and apply uniform standards. Uniformity has been
1578 further promoted by the departure from the bench of judges who had
1579 adopted "outlier" practices.

1580 These are important issues, but it is not clear whether answers
1581 are best sought by adopting new Civil Rules to address a topic that
1582 has not been addressed by the rules. Would other means be more
1583 flexible, more readily adapted to different circumstances -- most
1584 notably the cost of living -- in different parts of the country,
1585 and perhaps better informed by procedures different from Rules
1586 Enabling Act procedures? Model standards, or model local rules,
1587 might be developed and offer better help than formal national rules.

1588 One beginning might be to collect information from the
1589 districts represented on the Committee. Further study may lead to a
1590 decision whether to proceed further.

1591 A judge noted that her district's pro se clerks show the judges
1592 of the district "are all over the map in standards," and even on
1593 whether they take up the i.f.p. question before or after screening.
1594 The Administrative Office has a working group for pro se issues.
1595 Perhaps they can help us gather information.

1596 Judge Dow noted that the very process of gathering information
1597 may show the districts that they need to get their practices in
1598 order. "Highlighting the issue can be helpful."

1599 Another judge suggested that this topic might benefit from
1600 joint work with the Appellate Rules Committee. They have an i.f.p.
1601 subcommittee at work now, investigating suggestions for revising
1602 the Appellate Form 4 affidavit to accompany a motion for permission
1603 to appeal in forma pauperis. It seems likely that the Bankruptcy
1604 Rules Committee also frequently encounters these problems.

1605 Judge Dow brought the discussion to a point by suggesting
1606 several steps that may be taken to gather more information. He will
1607 consult with the Federal Judicial Center. Judge Rosenberg can help
1608 with the Administrative Office pro se working group. The Appellate
1609 and Bankruptcy Rules Committees chairs and reporters will be
1610 consulted; it may make sense to establish a means for coordinating
1611 work, whether through a joint subcommittee or more informal
1612 coordination among the reporters. Emery Lee volunteered to cooperate
1613 with the work and with coordinating the reporters.

1614 *Initial Mandatory Discovery Pilot Projects*

1615 Judge Dow provided an interim summary of the mandatory initial
1616 discovery pilot projects in the Northern District of Illinois and
1617 the District of Arizona. It was a good thing to have done in
1618 Illinois. "What we learned is all in the eyes of the beholder." The
1619 FJC is mining the data to see what conclusions can be drawn beyond
1620 the impressions of each judge, both those who participated in the
1621 project and those who did not.

1622 Emery Lee offered a brief summary. Each pilot project ran for
1623 three years, concluding on April 30, 2020, in the District of
1624 Arizona, and on May 31, 2020, in the Northern District of Illinois.
1625 There will be no new pilot cases.

1626 More than 5,000 cases came into the project in Arizona; 90% of
1627 them had terminated by this April 1. Some 12,000 cases came into
1628 the project in Illinois; some 83% of them had terminated by April 1.

1629 The FJC is tracking the longer-pending cases. The pandemic
1630 disrupted the study; about two-thirds of the cases had terminated
1631 when the pandemic began, about the same proportion in both
1632 districts. It seems probable that the effect of the pandemic was
1633 the same in both districts, so comparisons will not be distorted.
1634 The same is true for the comparison districts. If problems do arise
1635 on that score, there are statistical techniques that can help
1636 adjust, but it is too early to know whether they should be used.

1637 The FJC is on the eighth round of closed-case attorney surveys.
1638 Response rates have held up across the pandemic.

1639 Judge Dow closed the meeting with thanks for the good work and
1640 attention of everyone involved. Let us hope that the next meeting,
1641 scheduled for October 5 in Washington, D.C., will indeed be held in
1642 person.

1643 Respectfully submitted,

1644 Edward H. Cooper
1645 Reporter

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