MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7, 2017

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 7, 2017. Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Judge Sara Lioi; Judge Scott M. Matheson, Jr. (by telephone); Judge Brian Morris; Justice David E. Nahmias; Hon. Chad Readler; Virginia A. Seitz, Esq.; Judge Craig B. Shaffer (by telephone); Professor A. Benjamin Spencer; and Ariana J. Tadler, Esq.. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair, Professor Daniel R. Coquillette, Reporter, and Professor Catherine T. Struve, Associate Reporter (by telephone), represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated (by telephone). The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Patrick Tighe, Esq. represented the Administrative Office. Judge Jeremy D. Fogel and Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included Alexander Dahl, Esq.(Lawyers for Civil Justice); Professor Jordan Singer; Brittany Kauffman, Esq. (IAALS); William T. Hangley, Esq. (ABA Litigation Section liaison); Dennis Cardman, Esq. (ABA); David Epps (ABA); Thomas Green, Esq. (American College of Trial Lawyers); Benjamin Robinson, Esq. (Federal Bar Association); John K. Rabiej, Esq. (Duke Center for Judicial Studies); Joseph Garrison, Esq. (NELA); Chris Kitchel, Esq.; Henry Kelston, Esq.; Robert Levy, Esq.; Ted Hirt, Esq.; John Vail, Esq.; Susan H. Steinman, Esq.; Brittany Schultz, Esq.; Janet Drobinkske, Esq.; Benjamin Gottesman, Esq.; Jerome Kalina, Esq.; Jerome Scanlan, Esq. (EEOC); Leah Nicholls, Esq.; and Andrew Pursley, Esq.

Judge Bates welcomed the Committee and observers to the meeting. He noted that two members have joined the Committee. Ariana Tadler has attended many past meetings and participated actively as an observer; she is well known. Professor Spencer, of the University of Virginia, has substantial rules experience and has written widely on rules subjects.

Judge Bates reported that in June the Standing Committee approved for adoption amendments of Rules 5, 23, 62, and 65.1, basically as they were published and recommended for adoption. In September these amendments were approved by the Judicial Conference without discussion as consent calendar items. They have been transmitted to the Supreme Court. If the Court prescribes them by

May 1, 2018, they will go to Congress and take effect on December 1, 2018, unless Congress acts to delay them.

April 2017 Minutes

The draft minutes of the April 2017 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Julie Wilson presented the Legislative Report. She noted that while the Administrative Office tracks and often offers comments on many legislative proposals that affect court procedure, the agenda materials include only bills that would operate directly on court rules — for this Committee, the Civil Rules. There is little new since the April meeting. H.R. 985 includes provisions aimed at class actions and multidistrict litigation. It passed in the House in March, and remains pending in the Senate. The Lawsuit Abuse Reduction Act of 2017, H.R. 720, renews familiar proposals to amend Rule 11. It has passed in the House. A parallel bill has been introduced in the Senate, where it and the House bill are lodged with the Judiciary Committee. She also noted that AO staff will attend a hearing on the impact of frivolous lawsuits on small businesses that is not focused on any specific bill.

Rule 30(b)(6)

Judge Ericksen delivered the Report of the Rule 30(b)(6) Subcommittee. She began by describing the "high-quality input" from the bar that has informed Subcommittee deliberations. An invitation for comments was posted on the Administrative Office website on May 1. There were more than 100 responses. Subcommittee representatives attended live discussions with Lawyers for Civil Justice and the American Association for Justice. The many responses reflect deep and sometimes bitter experience. These comments helped to shape what has become a modest proposal. Three main sets of observations emerged:

First, there has not been enough time for the new discovery rules that took effect on December 1, 2015 to bear on practice under Rule 30(b)(6).

Second, there is a deep divide between those who represent plaintiffs and those who represent defendants. Examples of bad practice are presented by both sides. Plaintiffs encounter poorly prepared witnesses. Defendants encounter uncertainty, vague requests, and overly broad and burdensome requests. All agree that courts do not want to become involved with these problems. These divisions urge caution, invoking the first principle to do no harm.

Third, most of the issues get worked out. But the problem is that there is no established process for working them out before expending a great deal of time and cost. These reports are consistent with the common observation that judges seldom encounter these problems — the problems are there, but are resolved, often at high cost, without taking them to a judge.

These and other observations led to substantial trimming of the proposals that the Subcommittee had considered. When the Subcommittee reported to the April meeting, it had an "A List" of six proposals, supplemented by a "B List" of many more. All but one of the A list proposals have been discarded, including those addressing the use of Rule 30(b)(6) testimony as judicial admissions, the opportunity or obligation to supplement Rule 30(b)(6) testimony, the use of "contention" questions, a formal procedure for objections, and applying the general provisions governing the number of depositions and the duration of a single deposition.

What remained was a pair of proposals aimed at encouraging early discussion of potential Rule 30(b)(6) problems, most likely through Rule 16 pretrial conference procedures or through the Rule 26(f) party conference. There has been hope that substantial relief can be had by encouraging the parties to anticipate problems with Rule 30(b)(6) depositions and to discuss them in the Rule 26(f) conference. But in many cases it is not feasible to anticipate the timing or subjects of these depositions as early as the 26(f) conference — often they come after substantial other discovery has been had and digested. A central question has been whether a way can be found to engage the parties in direct discussions when the time is ripe.

During Subcommittee discussions, Judge Shaffer suggested that encouraging discussion between the parties is more likely to work if a new provision is lodged in Rule 30(b)(6) itself. That is where the parties will first look for guidance. The Subcommittee developed this proposal into the version presented in the agenda materials:

> (6) *Notice of Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. Before [or promptly after] giving the notice or serving a subpoena, the party must [should] in good faith confer [or attempt to confer] with the deponent about the number and description of the matters for examination. The named organization must then designate one or more officers, directors, or

> managing agents, or designate other persons who consent to testify on its behalf, and it may set out the matter on which each person designated will testify. * * *

In addition, the Subcommittee also considered adding a direction in Rule 26(f)(2) that in conferring the parties should "consider the process and timing of [contemplated] depositions under Rule 30(b)(6)." It recommends the Rule 30(b)(6) proposal for further development. The Rule 26(f)(2) proposal bears further discussion, but may be put aside as unnecessary.

Professor Marcus added that the basic questions presented are "wordsmithing" with the Rule 30(b)(6) text and whether adding to Rule 26(f) a reference to Rule 30(b)(6) would be useful. The Rule 16 alternative to Rule 26(f) is only an alternative; the Subcommittee does not favor it. Some of the rule text questions are identified by brackets in the proposal. Choices remain to be made, but it may be that the rule text should include "or promptly after," carry forward with "must" rather than "should," and recognize that "attempt to confer" should be retained to prevent intransigence from blocking a deposition.

Judge Ericksen explained that providing for conferring promptly after giving notice or serving a subpoena facilitates discussions informed by actually knowing the number and description of the matters for examination. Professor Marcus added that with a subpoena to a nonparty, it may be difficult to arrange to confer before the subpoena is served.

Judge Ericksen further explained that "must" confer is more muscular than "should," and may prove important in making the conference requirement work. So it has proved useful to recognize in Rule 37 that an attempt to confer may be all that can be required, an insight that may also be useful here.

Judge Ericksen repeated the advice that the Committee should consider the possibility of adding a cross-reference to Rule 30(b)(6) in Rule 26(f)(2), but that it may be better to drop this possibility. The concern that lawyers often cannot look ahead to Rule 30(b)(6) problems at the time of the Rule 26(f) conference is offset by the information that Rule 30(b)(6) depositions often are sought at the beginning of discovery in individual employment cases. But it seems awkward to refer to only one specific mode of discovery in the list of topics to be addressed at the conference.

A Subcommittee member stated that the Rule 26(f) proposal is not a bad idea, but it is not necessary. The present general language of Rule 26(f) calling for a discovery plan covers Rule 30(b)(6) along with other discovery questions; it is indeed odd to single out one particular subdivision of one discovery rule for

specific attention. He does support the 30(b)(6) proposal.

Another Subcommittee member was slightly in favor of adopting the Rule 26(f) cross-reference, but thought the question is "not to die for." A second Subcommittee member shared this view.

Discussion turned to the draft Committee Note. A Subcommittee member noted that the Note reflects some of the problems that the Subcommittee had struggled with but decided not to address in rule text. Discussion of the Note will help the Subcommittee.

This suggestion was supplemented by another Subcommittee member. The Subcommittee spent a lot of time on these ideas and the comments directed to them. It proved difficult to address them in rule language. The issues are better resolved by discussion among the lawyers, acting in the spirit of Rule 1 (which is being invoked by a number of courts around the country). Judges can help when necessary. "We hope for reasonable responses." "Reasonable" appears more than 75 times in the Rules, and more than 25 times in Rules 26 and 37. But "there are a lot of emotional responses to Rule 30(b)(6) on both sides."

A Committee member suggested that some of the statements in the third paragraph of the draft Committee Note, remarking on notices that specify a large number of matters for examination, or ill-defined matters, or failure to prepare witnesses, seem "extreme" in some ways. These are the kinds of issues that will be addressed by the Subcommittee as it goes ahead. Committee members should send their suggestions to Judge Ericksen and Professor Marcus.

Judge Bates raised a different question: We continually hear that judges do not often encounter Rule 30(b)(6) disputes. Is there a prospect that requiring lawyers to confer will lead to more litigation about the disputes, so judges will see more of them? Judge Ericksen and Professor Marcus responded that while there might be a flurry of activity during the early days of an amended rule, the long-term goal is to reduce the occasions to go to the judge. Still, "judge involvement can be good." Something like the proposed process happens now, without generating much work for judges.

A Subcommittee member agreed. "Good lawyers do this now." It is hard to expect that making it more general will bring problems to judges more often. Lawyers are very reluctant to do that.

Attention turned to the question whether the rule should be satisfied by an attempt to confer. A judge observed that a suggestion in a rule will help only if it encourages lawyers to talk early. "I've been impressed by the ability of lawyers to avoid conferring." A rule provision that requires conferring may lead to

protracted avoidance. A Subcommittee member agreed that "lawyers are really good at avoiding conferring." Does that mean that a lawyer will be able to stymie a deposition by avoiding a conference? And what of a nonparty deponent — it may be especially difficult to get it to confer before a subpoena is served.

Judge Ericksen observed that these problems do come to magistrate judges. Part of the goal is to get a better result when you do have to go to the court. Repeated unsuccessful attempts to confer will help persuade the judge that it is useful to become involved.

A Subcommittee member agreed that the Committee should carefully consider the parallel to the "attempt to confer" provision in Rules 26(c) and 37.

Professor Marcus explained that the idea in Rule 37 is that you have to certify at least an attempt to confer to get to court with a motion. It shows there is a need for judicial involvement. But it is important to be satisfied with a good-faith attempt, lest a motion be defeated by evading a conference. The draft Rule 30(b)(6) is not exactly the same — it does not expressly say that you cannot proceed with the deposition absent a conference or attempt to confer. In response to a question, he elaborated that the Rule 30(b)(6) provision is not framed as a precondition to a motion. "It addresses a different sort of event, and analogizes."

A Subcommittee member suggested that the problem is often simple. One party may try hard to confer, while the other may not.

A judge agreed that it is a judgment call whether to include "attempt," or to rely directly on mandatory language alone. Why not put the obligation to initiate a conversation on the party or nonparty deponent?

Another question was raised: should the conference include discussion of who the witnesses will be? The draft Committee Note suggests this may be useful; should it be added to rule text? A Subcommittee member said that the Subcommittee had considered this, as well as other subjects addressed in the Note — how many witnesses there will be for the deponent, and how much time for examination. A Committee member agreed that it is useful to discuss who the witnesses will be. That can lead to discussions whether this is an appropriate witness — indeed the party noticing the deposition may already have documents or other information suggesting that a different witness would be more appropriate. Or it may be that discussion will show that a proposed witness should be deposed as an individual, not as a witness for an organization named as deponent.

Another Committee member suggested that the point of the

proposal is to encourage bilateral discussion. Burying important parts of the discussion in the Committee Note is not enough. It may be better to add more to the rule text. What are the obligations of the noticing party, or of the deponent, in conferring? This might be easier if the text is rearranged a bit: the first two sentences of the present rule could remain as they are, identifying the opportunity and obligations of the party noticing the deposition and then the obligations of the organization named as deponent. The new text, identifying a new obligation to confer that is imposed on both, could come next, and perhaps provide greater detail without interfering with the flow of the rule text.

Judge Ericksen responded that the Subcommittee has considered that an obligation to confer is inherently bilateral, but it will consider further how much should be in the rule text.

Judge Bates said that the Committee had had a good discussion. There is more work ahead for the Subcommittee. The Rule 26(f) proposal "remains alive." All agree that amending Rule 16 is out of the picture. The goal will be to draft a proposal for the April meeting, based on this discussion. Thanks are due to Judge Ericksen, Professor Marcus, and the Subcommittee for their work.

Social Security Disability Claims Review

Judge Bates introduced the proposal by the Administrative Conference of the United States (ACUS) that explicit rules be developed to govern civil actions under 42 U.S.C. § 405(g) to review denials of individual disability claims under the Social Security Act.

The Standing Committee has decided that this subject should be considered by the Civil Rules Committee. The work has started. An informal Subcommittee was formed. Initial work led to a meeting on November 6 with representatives of several interested groups. The meeting resembled a hearing. Matthew Wiener, Executive Director and acting Chair of the Administrative Conference, made the initial presentation. Asheesh Agarwal, General Counsel of the Social Security Administration, followed. Kathryn Kimball, counsel to the Associate Attorney General, represented the Department of Justice. And Stacy Braverman Cloyd, Deputy Director of Government Affairs, the National Organization of Social Security Claimants' Representatives, presented the perspective of claimant representatives. Susan Steinman, from the American Association for Justice, also participated. Professor David Marcus, co-author with Professor Jonah Gelbach of a massive study that underlies the ACUS proposal, participated and commented by video transmission.

Social Security disability review annually brings some 17,000 to 18,000 cases to the district courts. The national average experience is that 45% of these cases are remanded to the Social

Security Administration, including about 15% of the total that are remanded at the request of the Social Security Administration.

Here, as generally, there is some reluctance about formulating rules for specific categories of cases. But such rules have been adopted. The rules for habeas corpus and § 2255 proceedings are familiar. Supplemental Rule G addresses civil forfeiture proceedings. A few substance-specific rules are scattered around the Civil Rules themselves, including the Rule 5.2(c) provisions for remote access to electronic files in social security and some immigration proceedings. It is important to keep this cautious approach in mind, both in deciding whether to recommend any rules and in shaping any rules that may be recommended.

One problem leading to the request for explicit rules is that a wide variety of procedures are followed in different districts in § 405(g) cases. Some districts have local rules that address these cases. The rules are by no means consistent across the districts. Other districts have general orders, or individual judge orders, that again vary widely from one another. The result imposes costs on the Social Security Administration as its lawyers have to adjust their practices to different courts — it is common for Administration lawyers to practice in several different courts. The disparities in practice may raise issues of cost, delay, and inefficiency. As essentially appellate matters, these cases are in some ways unique to district-court practice, and there are many of them. These considerations may support adoption of specific uniform rules that displace some of the local district disparities.

At the same time, most of the problems that give rise to high remand rates lie in the agency. Delays are a greater issue in the administrative process than in the courts. And there are great disparities in the rates of remands across different districts, while rates tend to be quite similar among different judges in the same district, and also to cluster among districts within the same circuit. There is sound ground to believe that these disparities arise in part from different levels of quality in the work done in different regions of the Social Security Administration.

The people who appeared on November 6 did not present a uniform view. The Administrative Conference believes that a uniform national rule is desirable. The Social Security Administration strongly urges this view. But discussion seemed to narrow the proposal from the highly detailed SSA rule draft advanced to illustrate the issues that might be considered. There was not much support for broad provisions governing the details of briefing, motions for attorney fees, and like matters. Most of the concern focused on the process for initiating the action by a filing essentially equivalent to a notice of appeal; service of process — the suggestion is to bypass formal service under Rule 4(i) in favor of electronic filing of the complaint to be followed by direct

transmission by the court to the Social Security Administration; and limiting the answer to the administrative record. There has been some concern about how far rules can embroider on the § 405(g) provision for review by a "civil action" and for filing the transcript of the record as "part of" an answer.

Beyond these initial steps, attention turned to the process of developing the case. It was recognized that there are appropriate occasions for motions before answering — common occasions are problems with timeliness in filing, or filing before there is a final administrative decision. Apart from that, the focus has been on framing the issues in an initial brief by the claimant, followed by the Administration's brief and, if wished, a reply brief by the claimant.

Discovery was discussed, but it has not really been an issue in § 405(g) review proceedings.

Discussion also extended to specific timing provisions and length limits for briefs. These are not subjects addressed by the present Civil Rules. And the analogy to the Appellate Rules may not be perfect.

Professor Marcus added that the Conference and other participants agreed that adopting uniform procedures for district-court review is not likely to address differences in remand rates, differences among the circuits in substantive social-security law, or the underlying administrative phenomena that lead to these differences. There was an emphasis on different practices of different judges. Local rules and individual practices must be consistent with any national rule that may be developed, but reliance must be placed on implicit inconsistency, not on explicit rule language forbidding specific departures that simply carry forward one or many of the present disparate approaches.

Further initial discussion elaborated on the question of serving notice of the review action. The Social Security Administration seems to be comfortable with the idea of dispensing with the Rule 4(i) procedure for serving a United States agency. Direct electronic transmission of the complaint by the court is more efficient for them. This idea seems attractive, but it will be necessary to make sure that it can be readily accomplished by the clerks' offices within the design of the CM/ECF system. Some claimants proceed pro se in § 405(g) review cases, and are likely to file on paper even under the proposed amendments of Rule 5. The clerk's office then would have to develop a system to ensure that electronic transmission to the Administration occurs after the paper is entered into the CM/ECF system.

This presentation also suggested that the question whether it is consistent with § 405(g) to adopt the simplified complaint and

answer proposals may not prove difficult. The Civil Rules prescribe what a complaint must do, and that is well within the Enabling Act. Prescribing what must be done by a complaint that initiates a "civil action" under § 405(g) seems to fall comfortably within this mode. So too the rules prescribe what an answer must do. A rule that prescribes that the answer need do no more than file the administrative record again seems consistent both with § 405(g) and the Enabling Act. The rules committees are very reluctant to exercise the supersession power, for very good reasons. But there is no reason to fear supersession here.

A member of the informal Subcommittee noted that none of the stakeholders in the November 6 meeting suggested that uniform procedures would affect the overall rate of remands or the differences in remand rates between different districts. The focus was on the costs of procedural disparities in time and expense.

Another Subcommittee member said that the meeting provided a good discussion that narrowed the issues. The focus turned to complaint, answer, and briefing. Remand rates faded away.

Yet another Subcommittee member noted that she had not been persuaded at first that there is a need for national rules. But now that the focus has been narrowed, it is worthwhile to consider whether we can frame good rules. As one of the participants in the November 6 discussion observed, good national rules are a good thing. Bad national rules are not.

Professor Coquillette provided a reminder that there are dangers in framing rules that focus on specific subject-matters. Transsubstantivity is pursued for very good reasons. The lessons learned from rather recent attempts to enact "patent troll" legislation provide a good example. It would be a mistake to generate Civil Rules that take on the intricacy and tendentiousness of the Internal Revenue Code. But § 405(g) review proceedings can be addressed in a way that focuses on the appellate nature of the action, distinguishing it from the ordinary run of district-court work. Even then, a rule addressed to a specific statutory provision runs the risk that the statute will be amended in ways that require rule amendments. And above all, the Committee should not undertake to use the supersession power.

A judge suggested that this topic is worth pursuing. Fifteen to twenty of these review proceedings appear on his docket every year. These cases are an important part of the courts' work. Both the Administrative Conference and the Social Security Administration want help.

Another judge agreed. A Civil Rule should be "very modest." The Federal Judicial Center addresses these cases in various ways. They are consequential for the claimants. The medical-legal issues

can be complicated. Better education for judges can help. The problems mostly lie in the administrative stages. But it is worthwhile to get judges to understand the importance of these cases.

Another judge observed that the importance of disability review cases is marked by the fact that they are one of the five categories of matters included in the semi-annual "six month" reports. The event that triggers the six-month period occurs after the initial filing, so a case is likely to have been pending for nine or ten months before it must be included on the list, but the obligation to report underscores the importance of prompt consideration and disposition. There is at least a sense that the problems of delay arise in the agency, not in the courts.

A Committee member observed that § 405(g) expressly authorizes a remand to take new evidence in the agency. "This is different from the usual review on the administrative record." This difference may mean that at times discovery could be helpful. "We should remember that this is not purely review on an administrative record."

A judge noted that the discussion on November 6 suggested that discovery has not been an issue in practice.

A Committee member observed that other settings that provide for adding evidence not in the administrative record include some forms of patent proceedings and individual education plans. In a different direction, she observed that the emphasis on the annual volume of disability review proceedings in arguing for uniform national rules sounds like the questions raised by the agenda item on multidistrict litigation. If we consider this topic, we should consider how it plays out across other sets of problems.

Another judge renewed the question: Do the proposals for uniform rules deviate from the principle that counsels against substance-specific rules?

Judge Bates responded that neither the Administrative Conference nor the Social Security Administration have linked the procedure proposals to the remand rate. They are concerned with the inefficiencies of disparate procedures.

A Committee member asked whether it is possible to adopt national rules that will really establish uniformity. Local rules, standing orders, and individual case-management practices may get in the way.

A judge responded that one reason to have local rules arises from the lack of a national rule. The Northern District of Illinois has a new rule for serving the summons and complaint in these

cases. "It's all about consent; the Social Security Administration consents all the time." But "local rules are antithetical to national uniformity." If national rules save time for the Social Security Administration, that will yield benefits for claimants and for the courts. Another judge emphasized that local rules must be consistent with the national rules, but it can be difficult to police. At the same time, still another judge noted that the Federal Judicial Center can educate judges in new rules. And a fourth judge observed that local culture makes a difference, but "some kind of uniformity helps."

Judge Bates concluded the discussion by stating that the Committee should explore these questions. A start has been made. The Subcommittee will be formally structured, and will look for possible rule provisions. We know that the Southern District of Indiana is working on a rule for service in disability review cases.

Third-Party Litigation Financing

Judge Bates introduced the discussion of disclosing third-party litigation financing agreements by noting that additional submissions have been received since the agenda materials were compiled. One of the new items is a letter from Representative Bob Goodlatte, Chair of the House Committee on the Judiciary.

The impetus for this topic comes from a proposal first advanced and discussed in 2014, and discussed again in 2016. Each time the Committee thought the question important, but determined that it should be carried forward without immediate action. The Committee had a sense that the use of third-party financing is growing, perhaps at a rapid rate, and that it remains difficult to learn as much as must be learned about the relationships between third-party financers and litigants. It is difficult to develop comprehensive information about the actual terms of financing agreements. The questions have been renewed in a submission by the U.S. Chamber Institute for Legal Reform and 29 other organizations.

The specific proposal is to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of

> any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

Detailed responses have been submitted by firms engaged in providing third-party financing, and by two law professors who focused on the ethical concerns raised by the proponents of disclosure.

The first point made about the proposal is that it does not seek to regulate the practice or terms of third-party financing. It seeks nothing more than disclosure of any third-party financing agreement.

Many arguments are made by the proponents of disclosure. They are summarized in the agenda materials: "third-party funding transfers control from a party's attorney to the funder, augments costs and delay, interferes with proportional discovery, impedes prompt and reasonable settlements, entails violations of confidentiality and work-product protection, creates incentives for unethical conduct by counsel, deprives judges of information needed for recusal, and is a particular threat to adequate representation of a plaintiff class."

These arguments are countered in simple terms by the financers: None of them is sound. They do not reflect the realities of carefully restrained agreements that leave full control with counsel for the party who has obtained financing. In addition, it is argued that disclosure is actually desired in the hope of gaining strategic advantage, and in a quest for isolated instances of overreaching that may be used to support a campaign for substantive reform.

The questions raised by the proposal were elaborated briefly in several dimensions.

The first question is the familiar drafting question. How would a rule define the arrangements that must be disclosed? Inevitably, a first draft proposal suggests possible difficulties. The language would reach full or partial assignment of a plaintiff's claim, a circumstance different from the general focus of the proposal. It also might reach subrogation interests, such as the rights of medical-care insurers to recover amounts paid as benefits to the plaintiff. It rather clearly reaches loans from family or friends. So too, it reaches both agreements made directly with a party and agreements that involve an attorney or law firm.

Parts of the submissions invoke traditional concepts of champerty, maintenance, and barratry. It remains unclear how far these concepts persist in state law, and whether there is any relevant federal law. There may be little guidance to be found in those concepts in deciding whether disclosure is an important shield against unlawful arrangements.

Proponents of disclosure make much of the analogy to Rule 26(a)(1)(A)(iv), which mandates initial disclosure of "any insurance agreement under which an insurance business may be liable" to satisfy or indemnify for a judgment. This disclosure began with a 1970 amendment that resolved disagreements about discovery. The amendment opted in favor of discovery, recognizing

that insurance coverage is seldom within the scope of discovery of matters relevant to any party's claims or defenses but finding discovery important to support realistic decisions about conducting a litigation and about settlement. It was transformed to initial disclosure in 1993. At bottom, it rests on a judgment that liability insurance has become an essential foundation for a large share of tort law and litigation, and that disclosure will lead to fairer outcomes by rebalancing the opportunities for strategic advantage. The question raised by the analogy is whether the same balancing of strategic advantage is appropriate for third-party financing, not only as to the fact that there is financing but also as to the precise terms of the financing agreement.

Much of the debate has focused on control of litigation in general, and on settlement in particular. The general concern is that third-party financing shifts control from the party's attorney to the financer. Financers and their supporters respond that they are careful to protect the lawyer's obligation to represent the client without any conflict of interest. Indeed, they urge, their expert knowledge leads many funding clients to seek advice about litigation strategy, and to seek funding to enjoy this advantage.

The concern with influence on settlement is a variation on the control theme. The fear is that litigation finance firms will influence settlements in various directions. At times the pressure may be to accept an early settlement offer that is unreasonably inadequate from the litigant's perspective, but that ensures a safe and satisfactory return for the lender. An alternative concern is that at other times a lender will exert pressure to reject an early and reasonable settlement offer in hopes that, under the terms of the agreement, it will win more from a higher settlement or at trial. Funders respond that it is in their interest to encourage plaintiffs to accept reasonable settlement offers. They avoid terms that encourage a plaintiff to take an unreasonable position.

Professional responsibility issues are raised in addition to those presented by the concerns over shifting control and impacts on settlement. Third-party financing is said to engender conflicts of interest for the attorney, and to impair the duty of vigorous representation. Special concern is expressed about the adequacy of representation provided by a class plaintiff who depends on third-party financing. Fee splitting also is advanced as an issue.

A different concern is that a judge who does not know about third-party funding is deprived of information that may be necessary for recusal. A response is that judges do not invest in litigation-funding firms, and that it reaches too far to be concerned that a family member or friend may be involved with an unknown firm that finances a case before the judge. In any event, this concern can be met, if need be, by requiring disclosure of the financer's identity without disclosing the terms of the agreement.

Yet another concern is that the exchanges of information required to arrange funding inevitably lead counsel to surrender the obligation of confidentiality and the protection of work product.

Disclosure also is challenged on the ground that it may interfere with application of the rules governing proportionality in discovery. Rule 26(b)(1) looks to the parties' resources as one factor in calculating proportionality. The concern is that a judge who knows of third-party financing may look to the financing as a resource that justifies more extensive and costly discovery, and even may be inclined to disregard the terms of the financing agreement by assuming there is a source of unlimited financing.

Finally, it is urged that third-party financing will encourage frivolous litigation. The financers respond that they have no interest in funding frivolous litigation — their success depends on financing strong claims.

All of these arguments look toward the potential baneful effects of third-party financing and the reasons for discounting the risks.

There is a more positive dimension to third-party funding. Litigation is expensive. It can be risky. Parties with viable claims often are deterred from litigation by the cost and risk. Important rights go without redress. Third-party financing serves both immediate private interests and more general public interests by enabling enforcement of the law. It should be welcomed and embraced, no matter that defendants would prefer that plaintiffs' rights not be enforced.

The abstract arguments have not yet come to focus, clearly or often, on the connection between disclosing third-party financing agreements and amelioration of the asserted ill effects that it would foster. One explicit argument has been made as to settlement — a court aware of the terms of a financing agreement can structure a settlement procedure that offsets the risks of undue influence. More generally, a recent submission has suggested that "if a party is being sued pursuant to an illegal (champertous) funding arrangement, it should be able to challenge such an agreement under the applicable state law — and certainly should have the right to obtain such information at the outset of the case." This argument relies on an assumption of illegality that may not be supported in many states (some states have undertaken direct regulation of third-party financing), and leaves uncertainty as to the consequences of any illegality on the conduct and fate of the litigation.

Professor Marcus suggested that it is important to recognize that proponents of disclosure may have "collateral motives." He

noted that third-party financing takes many forms, and that the forms probably will evolve. Financing may come to be available to defendants: how should a rule reach that? More specific points of focus should be considered. Rule 7.1 could be broadened to add third-party financers to the mandatory disclosure statement. Rule 23(g)(1)(A)(iv) already requires the court to consider the resources that counsel will commit to representing a proposed class; it could be broadened to require disclosure of third-party funding. Third-party financing also might bear on determining fees for a class attorney under Rule 23(h).

Professor Marcus continued by observing that there may be a need to protect communications between funder and counsel for the funded client. And he asked whether the jury is to know about the existence, or even terms, of a funding arrangement?

The local rule in the Northern District of California was noted. It provides only for disclosure of the fact of funding, not the agreement, and it applies only to antitrust cases. Including patent cases was considered but rejected.

A judge suggested that third-party funding seems to be an issue primarily in patent litigation and in MDL proceedings.

Professor Coquillette offered several thoughts.

First, he observed that the common-law proscriptions of maintenance, barratry, and champerty have essentially disappeared. "We keep tripping over the ghosts and their chains." State regulation has displaced the ghosts, in part because these are politically charged issues.

Second, he urged that even coming close to regulating attorney conduct raises sensitive issues for the Civil Rules. The rules do approach attorney conduct in places, such as Rule 11 and regulation of discovery disputes. The prospect of getting into trouble is reflected in the decision to abandon a substantial amount of work that was put into developing draft Federal Rules of Attorney Conduct. That effort inspired sufficient enthusiasm that Senator Leahy introduced a bill to amend the Enabling Act to quell any doubts whether the Act authorizes adoption of such rules. But there was strong resistance from the states and from state bar organizations.

Third, Professor Coquillette noted that third-party funders argue that the relationships are between a lay lender and a lay litigant-borrower. The lawyer, they say, is not involved. "I do not believe that lawyers are not involved." Lawyers are involved on both sides, dealing with each other. "There are major ethical issues." These issues are the focus of state regulation. Here, as before, the Committee should anticipate that proposals for federal

regulation will meet substantial resistance from the states.

A Committee member identified a different concern about conflicts of interest. Often she is confident that there is funding on the other side. The risk is that her firm has a conflict of interest because of some involvement with the lender. She also noted that she believes that some judges have standing orders on disclosure. A judge agreed that there are some. Patrick Tighe, the Rules Committee Law Clerk, stated that many courts have local rules that supplement Rule 7.1 by requiring identification of anyone who has a financial interest in an action. But it is not clear whether these rules are interpreted to include third-party financing.

A Committee member stated that he has worked with third-party financing in virtually every patent case he has had in the last five years. He is not confident, however, that his experiences and the agreements involved are representative of the general field.

His first observation was that disclosure of insurance is unlike the general scope of discovery in Rule 26(b)(1). There are reasons to question whether disclosure of third-party funding should be treated as a phenomenon so much like insurance as to require disclosure. "We need to know exactly what we're dealing with." Third-party funding creates risks, including ethical risks. The duty of loyalty may be affected. The lawyer still must let the client make the decision whether to settle, but third-party financing may generate pressures that make settlement advice more complex. Disclosure, of itself, will not bear on these problems. Many steps must be taken from the disclosure to make any difference.

"Warring camps" are involved. The proponents of disclosure have strategic interests. They would like to outlaw third-party financing because it enables litigation that would not otherwise occur. There is no question that funding enables lawsuits. Many of them are meritorious, though perhaps not all. In present practice, defendants seek discovery about financing. Objections are made. The law will evolve, and may come to allow routine discovery. There are settings in which funding can become relevant, as in the class-action context noted earlier. There may be guidance in decisional law now, but "I'm not aware of it."

Another Committee member responded that case law is emerging. Financing agreements are listed on privilege logs. Motions are made for in camera review. State decisions deal with work-product protection for communications dealing with third-party financing. Something depends on how the agreement is structured. Some courts say third-party funding is not relevant. For that matter, how about disclosure of contingent-fee arrangements? The Committee has never looked at that. Disclosure of third-party funding is increasingly required in arbitration, because of concerns about conflicts of

interest, and also because of concerns that a party who depends on third-party financing may not have the resources required to satisfy an award of costs.

The Committee member who described experiences with third-party funding suggested that disclosure of the existence of funding may be less problematic than disclosing the terms of the agreement.

A Committee member suggested that ethics issues "are not our job." At the same time, it seems likely that there will be an increase in local rules.

A judge suggested that care should be taken in attempting to define the types of agreements that must be disclosed. A variety of forms of financing may be involved in civil rights litigation, in citizen group litigation, and the like. One example is litigation challenging election campaign contributions and activities. "We need to think about the impact." Another judge suggested that in state-court litigation it is common to encounter filing fees borrowed from family members, and many similar instances of friendly financing, with explicit or implicit understandings that repayment will depend on success.

A third judge suggested that it would be useful to know about financing in appointing lead counsel, and also in settlement. He can "ask and order" to get the information when it seems desirable.

These questions about defining the kinds of arrangements to be disclosed prompted a suggestion that some help might be found in the analogy to insurance disclosure, which covers only an insurance agreement with an insurance business. Other forms of indemnity agreements, and business or personal assets, are not included. Although further refinement would be needed, it might help to start by thinking about disclosure, more or less extensive, of financing agreements with enterprises that engage in the business of investing in litigation.

A judge said that he had encountered various forms of funding arrangements on the defense side. Others who are interested in the outcome, directly or precedentially, may help fund the defense. Joint defense agreements often address cost sharing, and contributions may be set by making rough calculations of likely proportional liability. The prospect of such arrangements, and perhaps investments by firms that now engage in funding plaintiffs, should be considered in shaping any disclosure proposal that might emerge.

The Committee member who has dealt with third-party funding in patent litigation responded to questions by noting that he has clients who can fund their own patent litigation. But patent cases have become increasingly costly. The cost increase is due in part

to an increasing number of hurdles a plaintiff must surmount to get to verdict and then through the Federal Circuit. The pendulum has shifted in patent law, making it more difficult to get to trial. In the old days, his firms and others could pay the expenses. But "as costs rose, and risks, we became less willing to cover the expenses." Third-party financing is replacing law firms as the source of financing.

Professor Coquillette observed that "we need to learn more." If work goes forward, it will be important to learn what states are doing about third-party financing. The states are better equipped than the federal courts are to deal with ethical issues such as conflicts of interest and control.

A judge suggested that it may not be useful to require disclosure of information when the courts are not equipped to do anything with the information. An example is suggested by litigation in which a defendant, after a number of unfavorable rulings, retained as additional counsel a law firm that included the judge's spouse. Rather than countenance this attempt at judge shopping, the chief judge ordered that the new firm could not play any role in the litigation. Something comparable might happen with third-party financing, without the opportunity for an analogous cancellation of the financing agreement. It does not seem likely that judges will invest in enterprises that engage in third-party financing, but there may be a risk, especially with networks of related interests. Judge Bates noted that similar concerns had emerged with filing amicus briefs on appeal.

Judge Bates summarized the discussion by suggesting that a sense of caution had been expressed. Further discussion might be resumed in the discussion of MDL proposals, one of which explicitly adopts the disclosure proposal that prompted this discussion.

Rules for MDL Proceedings

Judge Bates opened the discussion of the proposals for special Multidistrict Litigation Rules by suggesting that two of the proposals are essentially the same, while the third is distinctively different.

All three proposals agree that MDL proceedings present important issues. They account for a large percentage of all the individual cases on the federal court docket. The Civil Rules do not really address many of the issues encountered in managing an MDL proceeding. Proponents of new rules suggest that courts often simply ignore the Civil Rules in managing MDL proceedings. And Congress has shown an interest. H.R. 985, which has been passed in the House, includes several amendments of the MDL statute, 28 U.S.C. § 1407.

The major concerns focus on cases with large numbers of claimants. The perception is that many of the individual claimants have no claim at all, not even any connection with the events being litigated by the real claimants. The concern is that there is no effective means of screening out the fake claimants at an early stage in the litigation. Many alternative means of early screening are proposed. But it is not clear what differences may flow from early screening as compared to screening at the final stages of the litigation if the MDL leads to resolution on terms that dispose of the component actions. Apart from the several proposals for early screening, concerns also are expressed about pressures to participate in bellwether trials and about the need to expand the opportunities to appeal rulings by the MDL court.

Several different early screening proposals are advanced. Some of them interlock with others.

An initial proposal is that Rule 7 should be amended to expressly recognize master complaints and master answers in consolidated proceedings, and also to recognize individual complaints and individual answers. Subsequent proposals focus on requirements for individual complaints or supplements to them.

A direct pleading proposal is that some version of Rule 9(b) particular pleading requirements should be adopted for individual complaints in MDL proceedings. An alternative is to create a new Rule 12(b)(8) motion to dismiss for "failure to provide meaningful evidence of a valid claim in a consolidated proceeding." The court must rule on the motion within a prescribed period, perhaps 90 days; if dismissal is indicated, the plaintiff would be allowed an additional time, perhaps 30 days, to provide "meaningful evidence." If none is provided the dismissal will be made with prejudice.

A related proposal addresses joinder of several plaintiffs in a single complaint. The suggestion is that Rule 20 be amended by adding a provision for a defense motion to require a separate complaint for each plaintiff, accompanied by the filing fee.

The next proposal is for three distinct forms of disclosure. One would require each plaintiff in a consolidated action to file "significant evidentiary support for his or her alleged injury and for a connection between that injury and the defendant's conduct or product." The second disclosure tracks the disclosure of third-party financing agreements as proposed in the submission already discussed. The third would require disclosure of "any third-party claim aggregator, lead generator, or related business * * * who assisted in any way in identifying any potential plaintiff(s) * * *." This proposal reflects concern that plaintiffs recruited by advertising are not screened by the recruiters, and often do not have any shade of a claim.

Turning to bellwether trials, the proposal is that a bellwether trial may be had only if all parties consent through a confidential procedure. In addition, it is proposed that a party should not be required to "waive jurisdiction in order to participate in" a bellwether trial. This proposal in part reflects concern with "Lexecon waivers" that waive remand to the court where the action was filed and also waive "jurisdiction." (Since subject-matter jurisdiction cannot be waived, the apparent concern seems to be personal jurisdiction in the MDL court.)

Finally, it is urged that there should be increased opportunities to appeal as a matter of right from many categories of pretrial rulings by the MDL court. The concern is both that review has inherent values and that rulings made unreviewable by the final-judgment rule result in "an unfair and unbalanced mispricing of settlement agreements."

A quite different proposal was submitted by John Rabiej, Director of the Center for Judicial Studies at the Duke University School of Law. This proposal aims only at the largest MDL aggregations, those consisting of 900 or more cases. At any given time, there tend to be about 20 of these proceedings. Combined, they average around 120,000 individual cases. There are real advantages in consolidated pretrial discovery proceedings. But when the time has come for bellwether trials, the proposal would split the aggregate proceeding into five groups, each to be managed by a separate judge. Separate steering committees would be appointed. The anticipated advantage is that dividing the work would increase the opportunities for individualized attention to individual cases, although the large numbers involved might dilute this advantage.

One concern that runs through these proposals is that MDL judges are "on their own." Judicial creativity creates a variety of approaches that are not cabined by the Civil Rules in the ways that apply in most litigation.

Addressing rules for MDL proceedings "would be a big undertaking. It is a complex and broad project to take on." And it is a project affected by Congressional interest, as exhibited in H.R. 985, which includes a number of proposals that parallel the proposals advanced in the submissions to the Committee.

Professor Marcus reported that Professor Andrew Bradt has worked through the history of § 1407. The history shows a tension in what the architects thought it would come to mean for mass torts. The reality today presents "hard calls. The stakes are enormous, the pressures great. Judges have provided a real service."

Judge Bates predicted that a rulemaking project would bring out "two clear camps. We will not find agreement."

The appeals proposals were the last topic approached in introducing these topics. The suggestions in the submissions to this Committee are no more than partially developed. It is clear that the proponents want opportunities to appeal from pretrial rulings on *Daubert* issues, preemption motions, decisions to proceed with bellwether trials, judgments in bellwether trials, and "any ruling that the FRCP do not apply to the proceedings." It is not clear whether all such rulings could be appealed as a matter of right, or whether the idea is to invoke some measure of trial-court discretion in the manner of Civil Rule 54(b) partial final judgments. Nor is it clear what criteria might be provided to guide any discretion that might be recognized. One of the amendments of § 1407 embodied in H.R. 985 would direct that the circuit of the MDL court "shall permit an appeal from any order" "provided that an immediate appeal of the order may materially advance the ultimate termination of one or more civil actions in the proceedings." The proviso clearly qualifies the "shall permit" direction, but the overall sense of direction is uncertain. The Enabling Act and 28 U.S.C. § 1292(e) authorize court rules that define what are final judgments for purposes of § 1291 and to create new categories of interlocutory appeals. If the Committee comes to consider rules that expand appeal jurisdiction, it likely will be wise to coordinate with the Appellate Rules Committee.

The first suggestion when discussion was opened was that these questions are worth looking into. The Committee may, in the end, decide to do nothing. "Some of the ideas won't fly." But it is worth looking into.

Judge Bates noted that almost all of the input has been from the defense side. The Committee has yet to hear the perspectives of plaintiffs, the Judicial Panel on Multidistrict Litigation, and MDL judges.

A Committee member noted that his experience with MDL proceedings has mostly been in antitrust cases, "on both sides of the docket," and may not be representative. "The challenges for judges are enormous." Help can be found in the Manual for Complex Litigation; in appointing special masters; in seeking other consultants; and in adaptability. Still, judges' efforts to solve the problems may at times seem unfair. It is difficult to be sure about what new rules can contribute. If further information is to be sought before deciding whether to proceed, where should the Committee seek it?

Judge Bates suggested that it may be difficult to arrange a useful conference of multiple constituencies in the course of a few months or even a year. The Committee can reach out by soliciting written input. It can engage in discussions with the Judicial Panel. It can reach out to judges with extensive MDL experience. Judge Fogel noted that the FJC and the Judicial Panel have

scheduled an event in March. "The timing is very good." That could provide an excellent opportunity to learn more.

Another judge suggested that judges that have managed MDL proceedings with large numbers of cases might have useful ideas about what sort of rules would help. "We have nowhere near the information we would need to have" to work toward rules proposals. At least a year will be required to gather more information.

A Committee member echoed this thought. "We're far from being ready to think about this." She is not opposed to looking into these questions, "but we must hear from all sides."

Another judge noted that she has an MDL proceeding with more than 4,000 members. She has 17 *Daubert* hearings scheduled. "It's a lot of pressure" to get things right. We should think about working with the Appellate Rules Committee. Another judge described an MDL proceeding with 3,200 claimants and 20 *Daubert* hearings.

A Committee member asked whether the Judicial Panel has accumulated information about MDL practices.

Judge Campbell described resources available to MDL judges. The Judicial Panel has a web site with a lot of helpful information and forms. The Judicial Panel staff attorneys are very helpful about model orders. The Manual for Complex litigation is useful. There are annual conferences for MDL judges. And lawyers "bring a lot to the table." Experienced MDL lawyers reach agreement much more often than they disagree. But the question of appeal opportunities is important and should be explored. It would be very hard to manage an MDL if there are multiple opportunities to appeal. As an example, in one massive securities case a § 1292(b) appeal was accepted from an order entered in August, 2015. The appeal remains pending. The case has been essentially dead while the appeal is undecided. "Managing with appeals is a tough balance."

Judge Campbell continued by taking up the question of means for early procedures to weed out frivolous cases. In his 3,200-claimant MDL four new claims are filed every day. It is impossible in this setting to have evidential showings for each claimant. It would be all the more impossible in cases with 15,000 claimants and 20 new claimants every day. The lawyers seem to know there are frivolous cases, and bargain toward settlement with this in mind. They often establish a claims process that weeds out frivolous claims. What is the need to weed them out at an earlier stage? The flow of new cases has no effect on discovery, on the day-to-day life of the case. It will be useful to learn why early screening is important.

Another judge seconded these observations. "I don't think it

makes a difference to sort out the frivolous cases at the beginning. We know they're there. Weeding them out takes effort. Weeding them out before discovery is especially doubtful."

An observer from a litigation funder asked what is the overlap between MDL procedures and third-party financing? Judge Bates noted that one of the MDL submissions expressly incorporates the disclosure proposal advanced for third-party financing.

John Rabiej described his proposal. The Center for Judicial Studies has been holding conferences since 2011. Data bases show that a large share of all the federal-court case load is held by 20 judges. "This holds over time. There is a business model that will endure for the foreseeable future." They are planning a conference for April, asking lawyers to address problems in practice. The Center has prepared a set of best practices guidelines that are being updated. It is a mistake to underestimate the burden that frivolous claims impose on defendants. The problem is the frivolous cases, not the "gray-area" cases. Reliable sources suggest that in big MDLS of some types 20% or more of the claims are "zeroed out."

There is some momentum in practice for providing some minimum information about each claimant at the outset. In drug and medical products cases, for example, the information would show a prescription for the medicine, and a doctor's diagnosis.

MDL proceedings are a big part of the caseload. "The Civil Rules are not involved." Judges like the status quo because they like the discretion they have. "Plaintiffs are basically happy," although they recognize there is room for rules on some topics such as the number of lawyers on a steering committee. "The Civil Rules Committee should be involved in this."

Judge Bates agreed that the Committee needs to learn more about the basis for the positions taken than the simple facts of what plaintiffs say, what defendants say, what MDL judges say.

Responding to a question, John Rabiej said that he has not found anyone who wants to talk about third-party financing in the MDL setting. It would be difficult for the Center to devise best practices for third-party financing. "It does come up in MDL proceedings — funders even direct attorneys where to file their actions."

Susan Steinman noted that most American Association for Justice members work on contingent-fee arrangements. "They have no incentive to take cases that are not meritorious." Third-party financing is not an issue to be addressed in the Civil Rules. "It is a business option some members choose." There may be some areas of disagreement among plaintiffs, but they tend to have negative views of disclosure.

Alexander Dahl said that weeding out frivolous claims is an important part of the system. "Rules 12 and 56 are designed for this." In MDL proceedings, the weeding-out function is still more important. "It is numbers that make them complex." The numbers are inaccurate in ways that we do not know. "Numbers raise the stakes and pressures." "Some courts see MDL proceedings as a mechanism for settlement, not truth-seeking. Settlements require a realistic understanding of what the case is worth." And there is an important regulatory aspect. A publicly traded company has to disclose litigation risks. If it loses a bellwether trial, it has to disclose the 15,000 other cases, even though many of them are bogus, inflating the apparent exposure to risk of many losses.

Alexander Dahl also provided a reminder that the proposal to disclose litigation-financing agreements calls only for disclosure. There is no need to resolve all the mysteries that have been identified in discussing third-party financing.

A judge asked whether a "robust fact sheet" would satisfy the need for early screening? She requires them. A defendant can look at them. Alexander Dahl replied that there are a lot of cases where that does not happen. When it does happen, it can work well. What is important is uniformity of practice.

A Committee member observed that not all MDL proceedings involve drugs or medial devices.

Another Committee member asked what is the "simple disclosure" of litigation-funding that is proposed? Alexander Dahl replied that the proposal seeks the funding agreement, although "the existence of funding is the most important" thing.

Judge Campbell noted that he understands the argument for early screening. In his big MDL there is a master complaint. Each plaintiff files a fact sheet. The defendant carefully tracks the fact sheets and identifies suspect cases. "But I never see them." The defendants identify the suspect cases in bargaining. "How is it feasible for the judge to screen them"? Alexander Dahl responded that the use of fact sheets varies. Compliance varies. "Often defendants have to gather the information on their own." Defendants eventually bring motions to dismiss where that is important. Again, "uniformity in practice is important," including "uniform standards for dismissal." Further, we need to know what ineffectual judges are doing. The rulemaking process would be beneficial to all sides. Rules can allow sufficient flexibility while still providing guideposts for cases where guidance is needed.

John Rabiej described an opinion focusing on a proceeding with 30% to 40% "zeroed-out plaintiffs." Fact sheets are used in many of these cases. That is why lawyers are devising procedures to get some kind of fact information. That is all they need.

A Committee member asked why is it necessary to consider particularized pleading, or motions to dismiss for want of meaningful evidence? Why is it not sufficient to apply the pleading standards established by the Twombly and Iqbal decisions?

Judge Bates summarized the discussion by stating that the Committee needs to gather more information. Valuable information has been provided, but it is mostly from one perspective. The Committee has learned a lot from the comments provided this day. But the Committee needs more, particularly from the Judicial Panel. The Committee should launch a six- to twelve-month project to gather information that will support a decision whether to embark on generating new rules. A Subcommittee will be appointed to develop this information. For the time being, third-party financing will be part of this, at least for the MDL framework.

Rule 16: Role of Judges in Settlement

A proposal to amend Rule 16 to address participation by judges in settlement discussions is made in Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement,* 78 Ohio St.L.J. 73 (2017). The proposal calls for a structural separation of two functions — the role of "settlement neutral" and the role of the judge in "management and adjudication." The judge assigned to manage the case and adjudicate would not be allowed to participate in the settlement process without the consent of all parties obtained by a confidential and anonymous process. The managing-adjudicating judge could, however, encourage the parties to discuss settlement and point them toward ADR opportunities. A different judge of the same court could serve as settlement neutral, providing the advantages of judicial experience and balance.

The proposal reflects three central concerns. The judge's participation may exert undue influence, at times perceived by the parties as coercion to settle. Effective participation by a settlement neutral usually requires information the parties would not provide to a case-managing and adjudicating judge. If the judge gains the information, it will be difficult to ignore it when acting as judge. In part for that reason, the parties may not reveal information that they would provide to a different settlement neutral, impairing the opportunities for a fair settlement.

The proposal recognizes contrary arguments. The judge assigned to the case may know more about it, and understand it better, than a different judge. The parties may feel that participation by the assigned judge gives them "a day in court" in ways not likely with a different judge or other settlement neutral. And the assigned judge may be better able to speak reason to unreasonably intransigent parties.

These questions are familiar. Professor Deason notes that after exploring these problems both the ABA Model Code of Judicial Conduct and the Code of Conduct for United States Judges adopted principles that simply forbid coercing a party to surrender the right to judicial decision.

These questions are regularly explained in the Federal Judicial Center's educational programs for judges, including the programs for new judges. Discussion at those programs shows that many judges prefer to avoid any involvement with settlement discussions. Some, however, believe that they can play an important role in facilitating desirable settlements. It may well be that judges who have this interest and aptitude play important roles.

Judge Bates followed this introduction by noting that this suggestion has not come from the bar. "Judges do have a variety of perspectives. I would guess that most judges work hard to avoid involvement in settlements." Judges often refuse active participation, but do encourage the parties to explore settlement.

Judge Fogel noted that some judges do become involved in settlements, usually with the parties' consent. Some, on the other hand, refuse to become involved even if the parties ask for help from the judge. Judges divide on the question whether it is even appropriate to urge the parties to consider settlement. "Judges have different temperaments and skill sets." The Code of Conduct gives pretty good guidance on the need to avoid coercion. "We should educate judges to be alert to uses of 'soft power.'" It is difficult to see how a court rule could improve on the present diversity of approaches.

Another judge fully agreed. "The key is coercion, and judges need to be aware of subtle pressure." Most often the judge assigned to the case assigns settlement matters to a magistrate judge. But as a case comes close to trial, and at the start of trial, the judge knows a lot about the case, and can really help the parties reach settlement. The proposed rule "would have my colleagues up in arms."

A Committee member described one case in which, before a jury trial, the judge told one party that something bad would happen if the case were not settled. Other than that, he had never encountered a judge who pressed one party to settle. "But as it gets closer to trial — often a jury trial — there may be pressure on both sides."

A judge suggested that it is easy to abide by the command of Criminal Rule 11(c)(2) that the judge not participate in discussions of plea agreements. "But for civil cases, where lawyers want the judge to talk to them, it is hard to draft a rule that would not make me nervous."

Another judge observed that there are different pressures in bankruptcy and other bench trials.

The discussion concluded by deciding to remove this proposal from the agenda.

Publication Under Rule 71.1(d)(3)(B)(i)

This proposal is easily illustrated, but then should be fit into the full context of Rule 71.1(d). Rule 71.1(d)(3)(B)(i) directs that when notice is published in a condemnation action, the notice be published:

> in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located.

The proposal would eliminate the preference for a newspaper published in the county where the property is located, calling only for publication "in a newspaper with general circulation [in the county] where the property is located."

Under Rule 71.1 the complaint in a proceeding to condemn real or personal property is filed with the court. A "notice" is served on the owners. The notice provides basic information about the property and condemnation, and information about the procedure to answer or appear. Service of the notice must be made in accordance with Rule 4. But the notice is to be served by publication if a defendant cannot be served because the defendant's address remains unknown after diligent inquiry within the state where the complaint is filed, or because the defendant resides outside the places where personal service can be made. Notice must be mailed to a defendant who has a known address but who cannot be served in the United States.

The suggestion to delete the preference for publication in a newspaper published in the county where the property is located picks up from other rules for publishing notice that require only that the newspaper be one of general circulation in the county. Several provisions of the Uniform Probate Code are cited, along with New Mexico court rules. The New Mexico rules add a further twist. Federal Rule 4(e)(1) and (h)(1), incorporated in Rule 71.1(d)(3)(A), allow service by "following state law." The New Mexico rule allowing service by publication in a newspaper of general circulation in the county, when incorporated in Rule 4, is said to create a conflict with the Rule 71.1(d)(3)(B)(i) priority for a newspaper published in the county.

This suggestion raises empirical questions that cannot easily be answered. It is easy to point to counties that are the place of

publication of intensely local newspapers that have limited circulation. And it is easy to point to out-of-county newspapers that have much broader circulation within the county. In many counties there may be more than one out-of-county newspaper of "general" circulation — one question might be whether a rule should attempt to require publication in the newspaper of broadest circulation. But a different empirical question follows. Where will people interested in local legal notices look? Does it make sense to recognize publication in a newspaper of nationwide circulation, or is it highly unlikely that a resident of Sanillac County, Michigan, would look to USA Today for local legal notices? A participant looked at the current issue of a local Sanillac County newspaper and found eight legal notices. Perhaps readers indeed will look first at a locally published newspaper.

A second question is part theoretical, part empirical. In adapting the rules to the displacement of paper by electronic communication, the Committee has avoided many issues similar to the questions raised by this modest proposal. What counts as a "newspaper"? Should some form, or many forms, of electronic media be recognized? And where is a newspaper "published," particularly those that appear daily in electronic form but only one or two days a week in paper form? What should be done with a newspaper that is published daily on paper, and also — perhaps continually updated — on an electronic platform? Should a rule direct publication in both forms, direct one form or the other, or leave the choice to the government?

It would be possible to recommend the proposed amendment without addressing these broader questions. But they must at least be considered in the process of framing a recommendation.

The Department of Justice does not object to the proposal.

A Committee member asked whether the proposed change raises due process problems. The Supreme Court has recognized that as compared to other means of notice, publication is a mere feint. But publication is recognized in circumstances that make better notice impracticable. So it is for a defendant in a condemnation action who has no known address. Rule 71.1(d)(3)(B)(i) begins the compromise by demanding that an address be sought only by diligent inquiry within the state where the complaint is filed. Publication is required only for "at least 3 successive weeks." The test is nicely expressed by asking what would satisfy a prudent person of business, counting the pennies but anxious to accomplish notice. In this setting, this simply returns the inquiry to the empirical questions: are there knowable advantages so general as to illuminate the choice between locally published newspapers and others that have general local circulation?

A judge expressed reluctance to change the rule. "You know to

look to the local newspaper for legal notices," even when a newspaper published in a nearby county has broader circulation in the county.

These exchanges prompted a general question: Should the Committee look at broader questions of publication by notice "in the world we live in"? The Committee agreed that the time has not come to address these questions.

Judge Bates summarized the discussion by suggesting that he and the Reporters will consider this proposal further. The present rule language is clear. The question is the wisdom of its choices. And it may be difficult to answer the empirical questions that underlie the choice, perhaps prompting a decision to do nothing.

IAALS FLSA Initial Discovery Protocol

The Institute for the Advancement of the American Legal System has submitted for consideration "and hopeful endorsement" the INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED AS COLLECTIVE ACTIONS.

The Protocols were developed by the people and process that developed the successful Initial Discovery Protocols for Employment Cases Alleging Adverse Action. IAALS was the overall sponsor. The drafting group included equal numbers of lawyers who typically represent plaintiffs and lawyers who typically represent defendants. Joseph Garrison headed the plaintiff team, while Chris Kitchel headed the defendant team. Judge John Koeltl and Judge Lee Rosenthal again participated actively.

The FLSA protocols appear to be headed for successful adoption by individual judges, just as the individual employment protocols have proved successful. The question for the Committee is whether to find some means of supporting and encouraging adoption.

The Committee can act officially only in its role in the Rules Enabling Act process by recommending rules to the Standing Committee. Formal endorsement of worthy projects does not fit within this framework, just as the Committee cannot revise earlier Committee Notes without proposing an amendment of rule text.

Judge Bates echoed this introduction, noting that rulemaking is not called for and asking how can the Committee approve or encourage this project?

Judge Campbell noted that with the individual employee protocols, the judges on the Committee "took them home," using them and encouraging other judges to use them. "I would encourage our judges to do this again."

Professor Coquillette agreed that there are many problems with acting officially. "Judge Campbell's suggestion is practical and gets results."

Joseph Garrison reported that plaintiffs' attorneys in Connecticut have changed their preference for state courts since the federal court adopted the individual employee protocols. They now prefer federal court because they get a lot of early discovery, often leading to early settlements. Participation by judges is important. It would be good to have this Committee's members, and members of the Standing Committee, pursue the new protocols enthusiastically. These protocols will be more important in individual FLSA cases than in individual employment cases because FLSA cases tend to involve small claims and benefit from prompt closure. Protracted litigation generates problems with attorney fees.

Brittany Kauffman, for IAALS, expressed the hope that the Federal Judicial Center will publish the FLSA protocols. Working with IAALS to get the word out will be helpful.

A Committee member noted that the 30-day timeline in the FLSA protocols will prove difficult for the Department of Justice.

Judge Bates thanked the participants in the FLSA protocols for putting them together. The advice provided by Judge Campbell and Professor Coquillette is wise.

Pilot Projects

Judge Bates reported on progress with the two Pilot Projects.

The Mandatory Initial Discovery project has been launched in two courts. It became effective in the District of Arizona on May 1, 2017. Most judges in the Northern District of Illinois adopted it, effective on June 1, 2017. The pilot discovery provisions require answers that reveal unfavorable information that a party would not use in the case. And they require detailed information be provided without waiting to be asked. The provisions are thoroughly developed.

Judge Campbell reported that Judge Grimm oversaw the effort of developing the Mandatory Initial Discovery project. It is great work. It was adopted in the District of Arizona by general order. The time to provide the initial responses, 30 days, is not deferred by motions except for those that go to jurisdiction. The court did a lot of work to make sure the CM/ECF system would record the events, supporting research by Emery Lee that will assess the effects of the pilot. Dr. Lee also will ask lawyers in closed cases to respond to a brief survey about their experiences, about how mandatory initial discovery affected their cases. The Arizona bar

is used to sweeping initial disclosure, so implementing initial discovery has gone smoothly. Almost all Rule 26(f) reports reflect compliance. The District's judges met in September and modified the general order to address some problems. The only downside has been that the District has had to suspend its adoption of the individual employment discovery protocols because they are inconsistent with the pilot project.

Judge Dow reported that the judges in the Northern District of Illinois have followed in the wake of the District of Arizona. Between 16 and 18 active judges, one senior judge, and all magistrate judges are participating in the pilot; collectively they account for about 80% of the cases in the District. The project is progressing smoothly. Lawyers have rarely had questions. And there have been few problems. When it is not feasible to complete the mandatory initial discovery in the prescribed time, additional time is allowed. "We aren't asking for production of 30 terabytes in 30 days." Some general counsel have been uncomfortable with a new practice — signing their filings. As compared to Arizona, the project will begin differently in Illinois because the lawyers are not accustomed to this kind of initial disclosure or discovery. For the judges, Judge Dow and Judge St. Eve provide guidance. "If the culture changes so lawyers do early case evaluations after they get the discovery responses, we will have made a difference." In response to a question, he said that lawyers do cooperate.

Judge Campbell noted that Arizona judges report that most issues with their sweeping initial disclosure rule arise on summary judgment or at trial, when objections are made to evidence that was not disclosed. "If you allow the evidence rather than exclude it, word gets out fast." In Arizona as in Illinois, more time to make the initial discovery is allowed in cases that involve massive information. In turn that prompts more active case management.

A Committee member expressed a hope that the experience in Arizona and Illinois can be used to leverage the project for adoption in other districts. Judge Dow noted that Arizona and Illinois have already "ironed out a lot of bugs." It will be a lot easier for other districts to sign on.

Judges Bates and Campbell responded that although the initial experience may help in recruiting new districts, "we have tried." Personal approaches have been made to about 40 districts. "It is not always a tough sell initially, but when it gets to discussion by a full court, issues arise." Work load, vacancies, and local culture are obstacles.

Judge Bates turned to the Expedited Procedure Pilot. This project is designed simply to expand adoption of practices that many judges follow now. But no district has yet adopted the project. Again, problems arise from the culture of the bar or

court, work load, and like obstacles. A concerted effort is being made to enlist some districts. Judge Sutton — former Chair of the Standing Committee — has engaged in the quest, and Judge Zouhary — a member of the Standing Committee — has joined the effort. They are prepared to consider more flexibility in the deadlines set by the project, and to accept participation by a district that cannot enlist all of its judges. In addition, the Federal Judicial Center study will be expanded to look at experience in districts that already are using practices like the pilot. And a group of leading lawyers are being enlisted to join a letter encouraging judges to participate.

Subcommittees

Judge Bates stated that the Social Security Review Subcommittee would be formally established, with Judge Lioi as chair.

Another Subcommittee will be established to consider the proposals for MDL rules, and also to consider the proposal for disclosure of third-party litigation financing agreements that is adopted in one of the MDL proposals. This Subcommittee's work will extend for at least a year, and perhaps more. If the task of framing actual rules proposals is taken up, the work will extend for years beyond that.

Next Meeting

The next meeting will be held on April 10, 2018. The place has not yet been fixed, but Philadelphia is a likely choice.

Respectfully submitted,

Edward H. Cooper
Reporter