MINUTES
CIVIL RULES ADVISORY COMMITTEE
Washington, D.C. | October 29, 2019

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on October 29, 2019. Participants included Judge John D. Bates, Committee Chair, and Committee members Judge Jennifer C. Boal; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Hon. Joseph H. Hunt; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.; Joseph M. Sellers, Esq.; Professor A. Benjamin Spencer; Ariana J. Tadler, Esq.; and Helen E. Witt, Esq. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair; Professor Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq., 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. The Department of Justice was further represented by Joshua E. Gardner, Esq. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Allison A. Bruff, Esq., represented the Administrative Office. Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included John Beisner, Esq.; Fred Buck, Esq. (American College of Trial Lawyers); Andrew Cohen (Burford Capital); Alexander Dahl, Esq., and Andrea Looney, Esq. (Lawyers for Civil Justice); David Foster, Esq., and David Mervis, Esq. (SSA); Joseph Garrison, Esq. (NELA); William T. Hangley, Esq. (ABA Litigation Section liaison); Max Heerman, Esq. (Medtronic); Ted Hirt, Esq.; Robert Levy, Esq. (Exxon Mobil); Jonathan Redgrave, Esq.; Benjamin Robinson, Esq. (Federal Bar Assn.); John Rosenthal, Esq.; Jerome Scanlan, Esq. (EEOC); and Susan H. Steinman, Esq. (AAJ).

Judge Bates announced that Laura Briggs, who has served for many years as the Clerk of Court Representative, is retiring from the judiciary and from her work with the Committee. She has been an essential member, offering conceptual and practical insights on the working of the Civil Rules and providing countless examples of how she has addressed and resolved issues in implementing the rules that influence the shape of new rules. The Committee acknowledged her work with warm applause.

Judge Bates reported that the Standing Committee and the Judicial Conference had approved and recommended for adoption the proposed amendments of Rule 30(b)(6). The rule is in the Supreme Court, on track to take effect on December 1, 2020.

Hearing, Rule 7.1 amendments

Judge Bates noted that the proposed amendment of Rule 7.1 was published for comment last August. Only one person asked to testify at the October hearing. The hearing will begin today's meeting.

GianCarlo Canaparo began by stating that the proposal to amend Rule 7.1 is good. It is important to identify the parties' citizenships early in every action. Early identification avoids the waste occasioned by tardy discovery of a diversity-destroying citizenship. But the amendment should be expanded to reach beyond attributed citizenships to include disclosure of the parties' own citizenships. Imagine a simple action in which three co-owners, each a citizen of a different state, sue a single trespasser who might be a cocitizen of one plaintiff. This should be found out early in the action.

Mr. Canaparo noted that other comments have expressed concerns about the working of the proposed amendment when an action is removed from state court, but suggested that the proposed language reaches removed cases. At the same time, he suggested that Rule 7.1(b) should be revised to require that the disclosure be filed within 21 days after service of the first filing.

Mr. Canaparo answered a question by saying that the need to disclose the parties' citizenships arises from the prospect that the complaint may not comply with the Rule 8(a)(1) requirement to state the grounds for the court's jurisdiction.

April 2019 Minutes

The draft Minutes for the April 2-3, 2019 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Rebecca Womeldorf presented the legislative report.

The Rules Committee Staff is tracking several bills that would amend the Civil Rules. None of them has yet gained traction.

There was a hearing on transparency in the courts, addressing PACER fees, cameras in the courtroom, and sealed court filings. The Administrative Office helped to arrange for testimony by judges. There is not yet anything further to report.

Social Security Disability Review

Judge Bates introduced the report of the Social Security Disability Review Subcommittee by noting that it has been at work for more than two years. It has received repeated input from many sources including the Administrative Conference, the Social Security Administration, the National Organization of Social Security Claimants Representatives, the American Association for Justice, district and magistrate judges, academics, and still others. Its work has been very productive. Successive drafts have advanced to a point that makes it appropriate to confront the next step: is it appropriate to adopt an Enabling Act rule that is this far substance-specific, either as a Civil Rule or as a Supplemental Rule?

Judge Lioi, Chair of the Subcommittee, began the presentation by a brief outline of the most recent draft Rule 71.2. It addresses only § 405(g) review actions that present only an individual claim. Successive subdivisions provide for simplified pleading by a brief complaint and an answer that need be no more than the administrative record and any affirmative defenses; for the court to transmit a Notice of Electronic Filing to SSA and the local United States Attorney that displaces any need to serve summons and complaint under Rule 4; timing requirements for answer and motions; and presentation of the case for decision by briefs. This procedure is calculated to reflect the character of these cases as appeals, quite unlike actions that involve initial litigation and original decision by a district court.

The draft rule has been continually revised in response to comments by the many organizations and people that have contributed to Subcommittee deliberations. The Subcommittee brings to the Committee three questions about alternatives for the next steps: The Subcommittee might continue to seek further assistance from others with the goal of further refining the draft. Or it might rely on the extensive work already done to move toward preparing a proposal for publication with the help of the Committee and the Standing Committee. Or it might conclude, with the advice of the Committee and Standing Committee, that however good a proposed rule might be, it is unwise to adopt an Enabling Act rule that is limited to a single area of substantive law. If the project is to continue, the Subcommittee will welcome Committee contributions to further refine the proposal.

Several reasons can be found for carrying the work forward. The project was brought to the Judicial Conference as a proposal by the Administrative Conference of the United States, based on a deep study of widely divergent practices across different district courts. SSA strongly supports the proposal, even though it has been

pared back from the much more elaborate draft that SSA provided at the outset. SSA is in a good position to evaluate the effects of local rules — and there are many and quite different local rules — and less formal local practices.

Every effort has been made to ensure that Rule 71.2 is neutral as between claimants and SSA. It reflects what some courts are doing by explicit local practices, and what some others are doing at least de facto.

NOSSCR representatives have expressed concerns that it is important to keep judges happy by submitting these review actions through the familiar procedures they have shaped and to which they have become accustomed. That concern, however, has been significantly reduced by the reactions of magistrate judges and district judges that have reviewed Rule 71.2 drafts. Some now use procedures closely similar to draft Rule 71.2. Others attempt to use general Civil Rules procedures, such as summary judgment, but report that they do not work well. The Subcommittee may seek reactions from a greater number of judges. Judge Boal added that the magistrate judges who met with the Subcommittee on October 3 generally accepted the rule draft, and did not object to it. Indeed, those who now use Rule 56 find ways to work around it, and welcomed the Rule 71.2 approach.

The Department of Justice has created a model local rule that closely resembles the Rule 71.2 draft, and has recommended adoption by district courts.

A central reason for the Rule 71.2 approach is that the § 405(g) cases it reaches are appeals on an administrative record. They are quite unlike original actions in the district courts. As one example, there is no need for discovery in the vast majority of § 405(g) actions, and the rare action that may entail discovery is taken outside Rule 71.2 and governed by the full sweep of the Civil Rules.

Every year brings some 17,000 to 18,000 § 405(g) actions to the district courts. Many districts adopt local rules, or less formal local practices, because they have found that the general Civil Rules do not work for these actions. Draft Rule 71.2 brings them into an appeal process that reflects the actual character of the proceedings.

Finally, concerns about transsubstantivity may be deflected by recognizing that many local rules have been adopted specifically for § 405(g) actions. If local rules can do it, why not a national rule?

Judge Lioi turned to the argument that the transsubstantivity principle must defeat any attempt to craft a rule specifically limited to social security review actions.

One concern is that, because the Subcommittee wished to ensure that it crafted a rule that was neutral, the draft rule is modest. And even if the rule in fact is neutral, some parties to § 405(g) review actions — even all parties — may perceive that the rule favors their adversaries.

Another concern is the familiar "slippery slope" problem. Once even a single rule sets a precedent, interest groups will begin to agitate for other substance-specific rules, arguing that this rule shows there is no principle that requires transsubstantivity.

The first reaction to this presentation was that the modest character of the draft rule will encourage supplemental local rules. One obvious example is provided by the deliberate choice to avoid setting page limits for briefs in a national rule. Local rules will set limits, and in the process may supplement the national rule in ways that impair its operation. More generally, the existing body of local rules have an inertia that will carry beyond adoption of a national rule.

Discussion continued with a set of reflections on these themes expressed in parallel terms.

Draft Rule 71.2 seeks to establish an appeal framework that adapts the Civil Rules to § 405(g) review actions. The introduction that sets the scope of the rule is critically important. It seeks to limit the rule to the vast majority of actions that require review and decision on the administrative record. The appellate character of the proceedings is not altered by the practice of remanding for further administrative proceedings. The underlying study by Professors Gelbach and Marcus shows that the rates of remand for further administrative proceedings range from a low of about 20% in some districts to a high of about 70%. But when the action is ready for decision in the district court, it acts on the administrative record and award. It does not make an independent determination, but reviews only for substantial evidence. These are appeals.

A very few § 405(g) actions do call for discovery in a district court. One example is provided by claims of ex parte contacts with the administrative law judge. An even more rare example is a claim of illegality not reflected in the administrative record. Whatever the reasons may be, such actions are taken outside draft Rule 71.2 and are governed by all of the Civil Rules.

Section 405(g) itself requires that district courts provide review in the framework of the Civil Rules or supplements to them. It provides for review by a civil action. It includes some provisions to govern the civil proceeding, including three distinct provisions for remand to SSA. Filling out an appropriate appeal procedure by a Civil Rule seems an appropriate accommodation of the Rules Enabling Act to the Social Security Act.

The origins of the transsubstantivity concern are reflected in the earlier discussion. Section 2072(a) authorizes "general rules of practice and procedure," and § 2072(b) exacts that they "shall not abridge, enlarge or modify any substantive right." Honoring those limits calls for more than ingenious speculations about the meanings of words or attempts to be sure about what the framers of the Enabling Act would have intended for circumstances difficult to foresee when the statutory words were crafted. A rule that applies to a defined set of § 405(g) actions across all districts can be seen as a general rule. The goal of adapting the procedures of courts that ordinarily exercise original jurisdiction to the needs of an appeal jurisdiction mandated by statute need not of itself abridge, enlarge, or modify the substantive rights governed by the statute.

The modest character of the Rule 71.2 draft may bear on the transsubstantivity concern. A plaintiff need plead only enough to identify the SSA decision and invoke § 405(g) review jurisdiction. That is enough to satisfy Rule 8(a)(1), (2), and (3) in an appeal setting. At the same time, the plaintiff is left free to plead more, an opportunity that may be seized to educate SSA lawyers about the nature of the claims and the opportunities to meet them. SSA can answer with nothing more than the administrative record and any affirmative defenses; the Rule 8(b) obligation to respond to each allegation in the complaint is excused. Notification by the court's transmitting a Notice of Electronic filing has worked well in the districts that do this now, and has been accepted on all sides. The provisions that integrate motions practice with pleading deadlines are simple. And the heart of the rule provides for presentation of what is in fact an appeal by the briefing procedure used for appeals. These are procedures designed to advance the interests of both parties and the court. The facts and the law are focused through the governing standard of review in a way that does not favor any party or alter underlying substantive rights.

The Subcommittee considered the alternative of proposing a rule that would govern all "administrative review" proceedings in the district courts. Such a rule would unarguably be transsubstantive. But it soon became apparent that drafting any such rule would be enormously difficult. A wide range of actions by quite distinctive executive offices and more nearly independent

regulatory agencies may become the subject of civil actions in the district courts. Some are familiar, such as actions under the Freedom of Information Act. Many invoke the Administrative Procedure Act. The elements that resemble appellate review are mixed in quite different proportions with elements that clearly involve original decision and action by the district court. Many years of effort would be required to produce a workable rule, if the task could be managed at all. The clearly appellate character of the § 405(g) proceedings brought within draft Rule 71.2 is much different. And, as compared to the full range of administrative "review" actions in the district courts, § 405(g) actions present a clearly identified opportunity to establish a good and uniform national rule.

General discussion began with a theme that emerged in earlier Committee meetings. There are several examples of Rules Enabling Act rules that are substance-specific. Looking only to the Civil Rules, Rule 5.2(c) establishes distinctive limits on remote access to court dockets in social security and immigration actions. Rule 71.1 provides distinctive procedures for condemnation actions. The Supplemental Rules for Admiralty and Maritime Claims were focused on that particular substantive area until they were expanded to include Asset Forfeiture Actions. The separate sets of Supplemental Rules for § 2254 and § 2255 cases invoke the Civil Rules for many matters. These very examples, however, pose the question whether any § 405(g) rule or rules should be lodged in the body of the general Civil Rules or should instead be framed as another set of supplemental rules.

Experience suggests that various groups are eager to get special sets of procedures for their own special interests. A recent example focused on legislation that would require adoption of specific rules to address "patent troll" litigation. Powerful arguments are made that one or another substantive area requires special procedures. Adhering to the model of supplemental rules may make it easier to resist these pressures. And the supplemental rules model may facilitate drafting more detailed provisions that might be more difficult to frame as part of new provisions inserted into the general body of the Civil Rules. More detailed supplemental rules also might prove more effective in discouraging local rules that deflect uniform national practices. This "is not academic, but political reality."

This reference to focused substantive interests prompted the observation that this project had its origins in SSA concerns about the workload imposed by § 405(g) actions on its understaffed legal resources. The work springs from what may be seen as specific interests.

Another early observation was that the Appellate Rules include several provisions that do not seem transsubstantive. The circumstances of appeal procedure may be better suited to such rules, but then proposed Rule 71.2 provides an appeal procedure lodged in the Civil Rules to honor the mandate of § 405(g) that these appeals come to the district courts.

Department of Justice views were sought by observing that SSA favors the proposed rule, even though the proposal does not include everything initially suggested by SSA, and that claimants groups seem neutral or opposed. Department representatives responded that "the executive branch is not unanimous." The Department is worried that one specialized set of rules will lead to pressure for other sets of specialized rules. A § 405(g) review rule does not seem necessary. Although the draft rule is neutral between claimants and SSA, the concern about pressure for other specialized rules remains. The Department has generated a model local rule to guide districts that may want a local rule, but guidance is not a mandate and is not likely to lead to uniform adoption across all districts. The Department is not now prepared to support a new national rule.

This observation spurred a comment that a similar choice may confront the MDL Subcommittee, asking whether to draft model local rules or instead to propose new national rules.

The concern that a § 405(g) rule might become the thin edge of the wedge that pries open a path for other specialized rules was addressed by suggesting that § 405(g) review presents a distinctive circumstance. The sheer volume of actions outstrips any other set of administrative review actions in the district courts, and quite possibly all other administrative review actions taken together. And the cases present uniform procedural issues. These strong differences can thwart efforts to claim that other specialized settings present equally strong claims for distinctive rules.

The number of habeas corpus cases governed by supplemental rules was offered as a comparison. Without knowing exact numbers, it may be that the number of actions is similar to the number of § 405(g) proceedings. They too are governed by specialized statutes. But the comparison to § 405(g) actions remains uncertain.

Comparisons continued. Section 405(g) cases are a "different subset" of the civil docket. "Appellate cases in the district courts do not fit the rules for trial cases." It might be said that the current Civil Rules are not truly transsubstantive, since they do not include separate provisions for appeal-like actions. A set of rules to govern all administrative-review actions in the district courts would be truly transsubstantive.

A judge suggested that following the general Civil Rules in social security cases imposes delay on claimants. And that is a bad thing. Any rule that increases efficiency would be desirable.

Another judge observed that the sheer number of social-security review cases is important. It will be important to figure out what is going on. Many district courts have pro se law clerks to help pro se parties. Section 405(g) records are lengthy, and often are not clear. More work is lavished on an individual case in the district court than the case got in SSA proceedings. "Something has to be done." The problem is inefficiency and delay. Any new rule, however, should focus on the administrative record, without much energy devoted to pleading.

A lawyer member said that uniformity has great value. Present circumstances show a great deal of disuniformity.

Freedom of Information Act cases were offered as a distinctive subset of administrative review actions. They could easily become a source of pressure to adopt distinctive rules.

Transsubstantivity returned with a suggestion that § 405(g) review actions should be addressed by a supplemental rule or rules, not placed within the Civil Rules. One potential advantage would be that supplemental rules could provide greater particularity. But do we want that much particularity, or is the simplicity of the present draft better? Whichever form, however, the project is worth pursuing.

A different twist on the choice between supplemental rules and a general civil rule was provided with the observation that "different courts handle these cases differently." Some rely on magistrate judges to enter judgment. Others rely on magistrate judges to make a report and recommendation, leading to review and judgment by a district judge. Still others act only through a district judge. If the supplemental rule approach is adopted, should it address these variations?

A related question asked whether supplemental rules might be written in a form that pro se litigants can understand more readily than the conventional drafting of the Civil Rules? That approach might even lend itself more readily to creating a separate pamphlet explaining the rules to pro se plaintiffs.

A different question asked whether adopting supplemental rules for § 405(g) cases would prompt more or less pressure to adopt rules for other administrative-review actions in the district courts. A judge answered that whatever form is chosen for § 405(g)

rules, it is answer enough that these cases account for something like 8% of the civil docket and present uniform procedural issues. Section 405(g) cases are different from other administrative-review actions, but not from each other. But "pitching it toward a large audience in a way that only supplemental rules can do may be worth exploring."

Another member thought the idea of a general administrative-review rule "is interesting." These cases appear frequently. Further discussion suggested that some districts may have local rules for them. But they are different from § 405(g) cases, and from each other. ERISA cases, for example may have discovery.

Following these lines, a participant suggested that it would be difficult to define the scope of a rule for "administrative review." Actions framed by specific statutory provisions, like § 405(g), are one thing, at least if they relate to the work of an independently defined agency. But the range and variety of government entities that are not part of Article I or Article II is great. And the variety of appropriate procedures may be equally great. Discovery is often required. Indeed there is a growing and active body of law about discovery in ERISA and FOIA actions. Summary judgment may be useful.

The core of the supplemental rules discussion returned with the observation that in some ways we have already started down the slippery slope. The Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions is an undeniable beginning, authorized by the Rules Enabling Act and joined to the Civil Rules. But transsubstantivity "is a presumption, no more." Non-transsubstantive rules can be adopted for weighty reasons. The presumption would hold if litigants on all sides of a given subject area see no need for substance-specific rules. But the objections here seem less weighty. The Department of Justice fears that future committees will give way to pressure. Claimants' representatives fear to discomfort judges accustomed to present ways. But the draft rule is a modest, incremental improvement that should work well for cases that share unique but uniform procedural characteristics. There are a significant number of these cases. Although a general administrative-review rule would be nice, "it's a thicket."

A Department of Justice representative responded that "if we look to the Committee's ability to weigh these considerations, we will be adding to the precedent for the next" set of substance-specific rules. "We have seen incredible, increasing discovery in APA cases." This discovery "changes the nature of practice," and is a big problem for the executive branch. Matters are further complicated by joining other claims to APA claims "as a hook into discovery."

The central question was repeated: What advice should the Committee give to the Subcommittee? There seems to be enough support to continue to study the possibility of recommending a new rule or rules, while reconsidering the question whether any new rules should be adopted directly into the Civil Rules or instead should be framed as supplemental rules integrated with the Civil Rules.

One question is whether adopting the supplemental rules format would encourage recommendation of more detailed provisions. Some expansion might be considered. Examples of matters considered in earlier drafts and abandoned include uniform page limits for briefs, provisions recognizing the various occasions for remanding to SSA, and explicit procedures for awarding attorney fees for work done on review in the district court. These drafts were abandoned on their own merits, but it may be that they would seem more attractive as part of a more elaborate set of supplemental rules. Adopting just a single supplemental rule might seem rather odd.

The case for doing nothing was advanced. The October 3 conversation with some magistrate judges seemed to at least one participant to provoke an underwhelmed response. They seemed to say that the proposed rule would make little difference in what they are doing now. "There will be local practices." Claimants are opposed. SSA will not get all it wants. "This proposal is not reason enough to venture into the transsubstantivity debates." A more general administrative review rule might make sense, but not a limited § 405(g) review rule. The work that has been done could be put to good use by framing a model local rule. A model rule could include very detailed provisions, at a level that would not be attempted even in supplemental rules. "It is good to let local courts do their own thing."

One response was to ask whether a model local rule could provide for relying on a Notice of Electronic Filing to displace formal Rule 4 service of summons and complaint on SSA and the local United States Attorney. That practice has been enthusiastically received on all sides, but would be hard to square as a local rule consistent with Rule 4. It might be adopted as a new provision in Rule 4.

Another response asked whether it is necessary to keep open the possibility of discovery. Discovery is used now in rare circumstances, and indeed may be useful, as noted in the earlier discussion.

The Committee concluded that the Subcommittee should continue its work, keeping in mind the views of those who doubt that any rule should ultimately be proposed. The work should include

consideration of the supplemental rules alternative.

Discussion turned for a moment to what the Committee might say to direct further Subcommittee work on the details of rule provisions. Is it time for comments on details of the draft rule?

Some specific questions were raised.

The first addressed the provision in draft Rule 71.2(a)(2)(B) that calls for the "last four digits of the social security number of the person on whose wage record benefits are claimed." SSA says that this information is important to enable it to identify the correct administrative proceeding and record.

Draft Rule 71.2(c)(1)(A) says that the answer "must include" a certified copy of the administrative record. Perhaps this should be "may be limited to" the record and any affirmative defenses, the better to reflect the proposition that Rule 8(b) does not apply, freeing SSA from the obligation to respond to allegations in the complaint.

Draft subdivision (c)(2)(B) begins "Unless the court sets a different time * * *." Is this needed, given the general Rule 6(b) authority to extend time limits for good cause?

The subdivision (c)(2)(B) time provisions also tie back to (c)(1)(B). This part of (c)(2)(B) suggests that a motion under Rule 71.2(c)(2)(A) may be made and decided in less than 60 days after notice of the action is served on SSA and the United States Attorney. Is that prospect so plausible as to warrant a separate rule provision? Perhaps so, as a matter of foreseeing what is possible, even if not particularly likely.

Draft subdivision (d)(1) sets the time for the claimant's brief at 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 71.2(c)(1)(A), "whichever is later." Is it likely that the answer will be filed before all motions are disposed of? Serving the motion defers the time to answer as provided by Rule 12(a)(4). The time for making a motion is set at the same 60-day period as the time for serving the answer, which includes the administrative record. But the administrative record may prove useful to support a Rule 12(b) motion, for example by showing the date of the event that starts the time allowed to file the action.

Draft subdivision (d)(1) also directs that the plaintiff file a motion for the relief requested along with the plaintiff's brief. What does the motion add to the request for relief that is made in

the brief? The judge who asked this question noted that his clerk's office reports that a motion is not needed to track the case for case-management purposes. Another judge noted that in her district the time for 6-month reports is triggered by filing the administrative record, and some judges fear that adding a motion requirement to (d)(1) may confuse matters. Clerk Briggs suggested that "the motion easily could serve no purpose." The judge who first raised the question added that if a motion is required, symmetry might seem to suggest that a cross-motion should be required, and that "makes even less sense."

Discussion concluded with the observation that the Subcommittee had been provided some guidance, even if the guidance "is not always clear."

MDL Subcommittee

Judge Bates introduced the MDL Subcommittee report by noting that the Subcommittee has gathered a great deal of information. The issues on its agenda are evolving. Some of the questions they are finding may be difficult to address by court rules. The Judicial Panel on Multidistrict Litigation has been actively engaged in the Subcommittee's inquiries, as have some MDL judges and some academics.

Judge Dow delivered the report, framing it as a "high-level summary." The Subcommittee has whittled its recent list of six subjects down to four, and will propose that the Committee approve deferral of one of the four. Three will remain for continuing active study.

Third-Party Litigation Funding: The Subcommittee has done extensive work on third-party funding, including attendance at a one-day conference arranged by George Washington University Law School last November. Third-party funding is extensive, and seems to be still growing. Financing is used for a wide variety of litigation, and in forms that tie more or less directly to particular litigation. Individual arrangements can be complicated, and there are many varieties of arrangements. Plaintiffs as well as defendants arrange financing. As a potential Civil Rules matter, the focus has been on disclosure. Some district local rules and some circuit local rules are written in terms that at times explicitly look to disclosure of third-party financing, but that more often seem to reach third-party financing by requiring disclosure of anyone who has a financial interest in the litigation.

While third-party financing is thriving and seems to be expanding, there are no signs that it is peculiarly involved in MDL proceedings. MDL judges, at least, commonly report that they are

not aware of third-party financing in the proceedings they have managed. But there have been prominent signs of interest, including an order for in camera disclosure of any third-party financing arrangements in the pending opioid MDL.

It has been suggested that third-party funding could be useful to expand the universe of lawyers who can participate in leadership roles in MDL proceedings. Participation can require costly investments that will be repaid only after protracted proceedings. Not all lawyers or firms have the required resources.

Professor Marcus added that the Committee first received proposals calling for disclosure of third-party funding some five years ago. Those proposals were general, not focused on MDL proceedings alone. "We've learned a lot. It is not an MDL-specific issue."

The Subcommittee will continue to monitor third-party funding developments, but does not plan to work toward possible rules proposals. A judge asked what does "monitoring" mean? Possibilities include further "mail box" suggestions from outside observers; attention to JPML annual survey answers to the question whether MDL judges are aware of third-party funding in their proceedings; attention to developments in local court rules; keeping informed about any action in Congress (S. 471 in Congress now addresses disclosure in MDLs and class actions); and sending a few Subcommittee members to programs arranged by others. The Subcommittee Chair and Reporter, consulting with the Committee Chair, will determine how best to survey local rules.

Early "Vetting" and Initial Census: Efforts have long been made to get behind or beyond individual complaints in the individual actions consolidated in an MDL. The purpose can be to advance management by finding out more about the topics the cases present. It can be to advance discovery, and with that to weed out unfounded claims. There is an apparent consensus that there are problems with unfounded claims in the truly large-scale, "mega" MDLs. The common problems involve plaintiffs who were not even exposed to the challenged product, or have no evidence that exposure caused any injury.

Plaintiff fact sheets have been used to gather information from individual plaintiffs, and have come to be used in almost all of the largest MDL proceedings. Defendant fact sheets also are common in those cases. They are a subject of discussion at the JPML program for MDL judges being held today. Wide use might suggest that there is little need to consider a rule regulating the practice.

But wide use of plaintiff fact sheets has shown some dissatisfaction. They are tailored to the circumstances of each particular MDL, and months may be needed to develop the form. This delay can impede the next steps in managing the proceeding. And there have been at least some complaints that fact sheets impose an undue burden.

A recent development in efforts to gather information about individual cases in an MDL without imposing undue delay or effort has been called an "initial census." This approach is on track to be used soon in two pending MDLs. The information may be used not only to guide ongoing management, but also to determine whether it is feasible to certify a class action, a class action with subclasses, or perhaps more than one class action.

This is an important subject. There is general agreement that some efforts to gather information about individual actions in an MDL is a good thing. Rather than indicate that no rule is needed, agreement might suggest the value of a rule to ensure that the effort is made in all appropriate MDLs, and is made in the best form.

Discussion began with an echo of the initial observations: fact sheets, initial censuses, or something of the sort meet broad acceptance. But it is not so clear that a new rule is appropriate.

Another observation was that agreement on the value of these approaches is often accompanied by disagreement about the time needed to develop plaintiff fact sheets. An initial census might be simpler.

Another Committee member observed that MDLs come in all kinds of shapes, leaving the question whether an "initial census" should be used in all cases.

Professor Marcus suggested that a rule would have to say when the rule applies. Is it for all MDLs? Only "mega" MDLs? Only personal-injury MDLs, and if so what counts as personal injury? And something is likely to depend on the purpose, whether it is to screen out unfounded claims or to get a jump-start on managing the MDL. Apart from that, there are forms of mass litigation outside the MDL world: should a rule apply to them?

Further discussion noted the view of one prominent MDL judge that it takes too long to finish the plaintiff fact sheet process to gain much help in managing an MDL. An initial census might be faster in generating a sense whether there are categories of dubious claims, which might then be explored by plaintiff fact sheets. H.R. 985 in the last Congress took an approach to initial

plaintiff statements that was extremely demanding as to content, time to complete the fact sheet, and time for judicial consideration of each fact sheet. The initial census may prove effective, and at much lower cost.

A judge described an MDL that grew to 8,500 cases. A plaintiff was required to file a fact sheet within 60 days of filing a complaint, providing under oath such information as when the plaintiff got the implant and what the injuries were. Defendants were allowed to challenge the sufficiency of individual fact sheets, and if not satisfied by the plaintiff's response could take the question to the judge. No defendant took any fact sheet to the judge. Then settlement came on. At that point the defendants brought up 120 cases in which they never got a fact sheet, an event suggesting that the defendants had not thought it important to get the information early in the proceedings.

The Subcommittee will continue to consider these topics, paying close attention to the proceedings that will use the initial census approach. Much may be learned from them. The Subcommittee may develop a rule proposal. Or it may conclude that the best approach is to leave these practices for continuing evolution in the overall MDL world.

The Committee was comfortable with this approach.

Settlement Review: Judge Dow suggested that the MDL judge's role in the settlement process is perhaps the toughest question the Subcommittee faces. Rule 23 provides protection for class members through the judge. Some MDL proceedings approach dimensions that look much like class actions in the sense that individual plaintiffs who are represented by attorneys not included in the MDL leadership are not effectively represented by the lead attorneys. Attorneys who represent plaintiffs and those who represent defendants join in asking that settlement not become a subject for rules. The pressure for judicial involvement comes mostly from academics.

That sets the question: Should there be a rule addressing settlement of MDL proceedings, perhaps one designed to ensure that the lawyers who lead and control an MDL proceeding are responsible for representing all plaintiffs in the MDL, particularly for settlement? One illustration is the certification of a settlement negotiating class in the opioid MDL. Another illustration is an MDL in which the defendants retained a separate team of lawyers charged with negotiating settlements with individual-case plaintiffs.

Judges commonly agree that they have no role to play with respect to individual settlements. If a plaintiff and defendant

settle and seek to dismiss, the judge cannot intrude.

Many MDL judges, on the other hand, view global settlement as their primary responsibility. And there is no rule structure for this.

The Subcommittee is exploring questions as to present sources of a judge's authority with respect to MDL settlements. Is there inherent power, drawing not only from the nature of judicial office but from the very structure and purpose of MDL consolidation? Can authority be found in the duty to police the professional responsibility of the lawyers who appear in an MDL and act in ways that reach beyond their own clients? Would it help judges to provide a clear basis of authority in a rule? And would the clear authority protect individual plaintiffs? The Subcommittee realizes that proposing a rule on settlement would be "swimming against the tide," but will continue to explore the waters.

Professor Marcus offered a perspective on the issues that trouble academic commentators on this question. On most issues of MDL procedures, such as interlocutory appeals, clear and opposing positions can be found for plaintiffs and defendants. That they join in agreeing that rules should not be developed for settlement is one of the things that worries academic observers. They worry that individually represented plaintiffs are confronted with backroom deals negotiated by lead lawyers who do not represent them. This concern may explain why judges often become involved. Rule 23 protections are provided if class certification becomes the means of implementing settlement. Many observers believe that judges become involved in large-scale MDL settlements in ways that parallel their role in class-action settlements. "It is difficult to say who is being injured." Any effort to frame a rule must confront the "perimeter" question that defines the circumstances that authorize judicial involvement.

These questions were approached from a somewhat different slant by the observation that it may be possible to frame a rule around the common tendency in the Civil Rules to rely on case-specific exercises of discretion by the judge. MDL proceedings, as constantly emphasized, come in myriad sizes and shapes. They may involve as few as four, or perhaps even fewer, individual actions. They span the entire range of subject matters. The individual plaintiffs may be unsophisticated real persons, or highly sophisticated persons and businesses. There may not be any officially recognized lead lawyer or leadership structure. There may be an elaborate structure of lead counsel, executive committee, steering committee, discovery committee, liaison counsel or committee for actions outside the MDL, and settlement committee. Lawyers who are not members of any of the leadership committees may

have significant influence on them, or little or no voice. The question is very much an MDL-specific question of identifying the point at which the proceedings inflect away from effective individual representation of all plaintiffs toward de facto representation by the leadership. Attempting to define that point by formula would indeed be difficult. Leaving it to judicial discretion could provide ample authority for judicial involvement without requiring involvement in most proceedings.

A participant elaborated on this subject. One possible approach would be to turn the judge's role in settlement on the judge's responsibility for recognizing a formal lead-counsel structure. Some MDLs will enjoy coordinated work by plaintiffs' counsel without any need for court direction or formal recognition. But when the court undertakes to define leadership roles and responsibilities, it can address many topics that surround the defined roles. Rule 23 provides a ready model, all the more fit because the concern in MDL proceedings is often expressed by judges by referring to a quasi-class action. Not only is lead counsel recognized, but attorney fees are addressed. In MDL proceedings, common-benefit funds to compensate lead counsel are typical and important. The role of lead counsel in settlement is equally important. The MDL structure, moreover, may provide reason for judicial involvement in the fees charged by counsel who are not appointed to the leadership structure — they may seem more engaged in the proceeding when they settle through it than are lawyers who may represent class members who are not class representatives.

A judge observed that many judges believe they have ample inherent authority, and also feel responsible to protect the interests of plaintiffs represented by individually retained lawyers. At least one judge who has issued opinions justifying inherent authority, however, has said that it would be helpful and reassuring to have a solid foundation in a court rule.

Subcommittee work will continue.

Interlocutory Appeals: Judge Dow said that "interlocutory appeals are the hottest topic for the Subcommittee."

The Subcommittee report provides a summary of several research projects that have been undertaken by plaintiffs' groups, defense groups, and for the Committee. The research shows there are not many § 1292(b) appeals in MDL proceedings. The low reversal rate on the appeals that are taken seems to parallel the rate for all § 1292(b) appeals or appeals generally. There may be indications that courts of appeals take a practical approach — leave to appeal is somewhat more likely to be granted in an MDL that includes many individual actions than in smaller-scale MDLs. There may be some

issues with the statutory criteria for § 1292(b) appeals, particularly with the requirement that there be a controlling question of law as to which there is substantial ground for difference of opinion. A case may involve a vitally important application of well-settled law to the specific circumstances of the MDL, and deserve interlocutory review accordingly. Defendants, moreover, frequently say that getting important questions settled is almost as important as getting them settled the right way. Continuing proceedings will go more smoothly, particularly toward settlement, when uncertainty is removed.

The research, however, also shows that the median time to decision of a § 1292(b) appeal is nearly two years. Some circuits are considerably faster, while others are considerably slower. Plaintiffs assert that any increased opportunity for interlocutory appeals will tempt defendants to seek appeals for the purpose of delay. Whatever the purpose, the MDL court may be left in a quandary over continuing management even though the appeal does not of itself stay proceedings. The Subcommittee believes that the problem of delay will persist, and is not likely to be controlled by proposing an appeal rule that mandates disposition by the court of appeals within a defined time limit.

The model being considered at the moment relies on discretion in the court of appeals to decide whether to grant permission to appeal. The MDL judge could not veto the appeal, as can be done by simply refusing to make the findings that enable application to the court of appeals for permission to appeal under § 1292(b). But the MDL judge would be responsible for stating reasons why an interlocutory appeal might, or might not, best serve the interests of the MDL proceeding.

The possibility of an interlocutory appeal rule has been discussed at several conferences organized by outside groups. The evolution of the defense proposals has been remarkable. Proposals to establish appeals as a matter of right from some more or less loosely described categories of orders have been abandoned. The question instead has become whether to adopt a rule that eliminates any MDL-judge veto and relies on criteria that look to advancing the purposes of the MDL proceeding.

Initial discussion asked whether a rule would be confined to some category of MDL proceedings — for example those that include more than a threshold number of individual actions — or would reach all? A rule available in every MDL proceeding would generate far more opportunities for interlocutory appeals. Judge Dow responded that discussion at the October 1 meeting sponsored by Emory Law School suggested that it would be difficult to draft a rule that excludes some MDLs. The standard might look to something borrowed

from 28 U.S.C. § 158(d) for bypass appeals in bankruptcy: "may materially advance the progress of the case or proceeding in which the appeal is taken."

The suggestion that a rule might apply to all MDLs prompted a further question: why, then, not adopt a similar rule for class actions, which may involve similar opportunities for useful interlocutory appeals? Or, extending it, for other large aggregations of cases that are in the same district?

One response suggested that setting a number-of-cases threshold might prove tricky when the number of cases in the MDL continues to grow with tag-along transfers and original filings.

A Committee member suggested that "this seems to be working into a broader scope than we have data for." It is important to recognize the problem of delay in getting an appellate decision. We need more information to support consideration of a rule that would apply to all MDL proceedings, much less to class actions as well.

Another member suggested that the first question is whether the criteria of § 1292(b) in fact constrain district judges who believe that an interlocutory appeal is desirable. Research for the Committee failed to find any case in which a judge said that an appeal would be desirable, but § 1292(b) does not authorize it. On the other hand, some defense counsel say that they get signals from the judge that they should not ask for certification. "There is some concern about denial of access to appellate review."

A related defense concern is that there is asymmetric access to review under the final judgment rule, as is true in all civil cases. If a plaintiff loses a ruling that disposes of even a single case in the MDL, the plaintiff can appeal. If a defendant loses a ruling that allows many cases to continue, the defendant cannot appeal.

Another member remarked again on the evolution of the proposals. The initial proposal by defense interests was for appeal as of right, with no input from the MDL judge and a mandatory stay of proceedings. "Protections have been added," with contractions as well as expansions.

Yet another member agreed that the kinds of issues and rulings being offered as reasons for interlocutory appeal may not meet § 1292(b) criteria. And there may be judicial signaling that deters requests for certification. But certifications do happen in MDLs, and may be followed by the appellate court's denial of permission to appeal.

The problem of delay recurred. A judge described an MDL that reached a ruling on a preemption issue just a few months before the schedule to hold Daubert hearings and to begin bellwether trials. If an appeal were certified and accepted, a decision could not be had from the court of appeals before the MDL would otherwise have been resolved. So an appeal was not certified. If a rule is to be recommended, it should in some way address the problem of delay.

The problem of delay was further addressed by a reminder that a single MDL might involve a series of orders that seem likely subjects for interlocutory appeal. Successive delays could be a truly serious problem.

One approach to delay was suggested: a rule that calls for the MDL judge's views on the value and risks of an interlocutory appeal could recognize advice that an appeal would be useful if it can be resolved within a stated period, but not otherwise. Different circuits seem to vary in their ability to produce prompt decisions, but a circuit court that grants permission to appeal with this advice from the MDL judge might respond by moving faster than its general § 1292(b) pace.

The last question raised asked whether any rule should be located in the Civil Rules. There was no response.

Judge Bates thanked the Subcommittee for its continuing work.

Final Judgment Appeals after Rule 42(a) Consolidation

Judge Rosenberg delivered the report of the joint Appellate-Civil Rules Subcommittee appointed to study the effects of the decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). She reminded the Committee of the basic ruling: no matter how complete the Rule 42(a) consolidation of cases that were initially filed as separate actions, an order that disposes of all claims among all parties to any component that began life as a separate action is a final judgment. Appeal may be taken under § 1291. Failure to take a timely appeal forfeits the right to appeal when the remaining components of the consolidated proceeding are later resolved by a final judgment. This rule had been anticipated by some circuits, but a majority of the circuits took one of three other approaches — the disposition is never final, or it is sometimes final depending on the circumstances, or it is presumed not final but may be final in special circumstances. She also noted that the Court suggested that if this rule has untoward consequences, the cure should be found in the Rules Enabling Act process.

The Subcommittee has met by two conference calls. Some of its members have had additional exchanges with Emery Lee to help design

Federal Judicial Center research. Dr. Lee has begun a docket search of all cases filed in 2015, 2016, and 2017 in twelve districts. The work will continue, and may be concluded as to those years by next spring. It may be useful, however, to expand the project to include cases filed in 2018, 2019, and 2020.

The reason for pursuing this work is the prospect that allowing and forcing immediate appeals in consolidated proceedings may not be efficient. If new rules provisions are proposed, the likely starting points will be Rule 42(a) and Rule 54(b).

Dr. Lee described his work. The first task is to determine how many consolidations occur, and how many cases are included in the consolidations. The 12 districts examined so far have been selected to represent circuits that include each of the four different approaches identified before *Hall v. Hall*. It appears that between 1% and 2% of all cases on the docket are consolidated. The meaning of that number depends in part on what is selected as the denominator. If actions of types not likely to be consolidated could be identified and taken out of the count, the fraction would be higher. But it appears that consolidations "show up in a lot of places." There are a lot of prisoner cases, bankruptcy appeals, even administrative review cases. FOIA cases often show up in the District of Columbia District. Cases involving complex subject matter also show up.

Another step is to determine the purposes of consolidation, particularly whether it is intended to be "for all purposes." This will be a tricky inquiry, because judges do not always describe the nature of the consolidation, and often will justifiably not be thinking ahead to the many possible paths to decision that might lead to complete disposition of one originally separate action before others are decided. And it may be difficult to "code" docket entries, which often may not say "this is a final judgment."

Work so far suggests that more than 5,000 cases are consolidated annually. If that number holds, it will be necessary to proceed by sampling the cases.

E-Filing Deadline

Judge Bates reported that the Appellate, Bankruptcy, Civil, and Criminal Rules Committees are represented on a joint committee to study a suggestion by Judge Chagares that the deadline for electronic filing be changed from midnight in the court's time zone to "when the clerk's office is scheduled to close." The relevant rule for this Committee is Civil Rule 6(a)(4)(A). Civil Rules Committee members Ericksen and Seitz are working on the subcommittee. Member Seitz observed that the proposal was prompted

by a similar local rule in the District of Delaware setting the time at 6:00 p.m., and a later rule by the Supreme Court of Delaware that set the time at 5:00 p.m.

The Subcommittee has launched elaborate studies of practices around the country, not only as to other local rules that may change the deadline but also as to actual filing patterns — when are filings actually made; can differences be identified by type of action, firm size, or like factors; what times do clerk's offices actually close, and are means provided to file paper copies on the same day after closing; and what percentage of cases have at least one pro se filing. Work will be taken up as information is developed.

Rule 4(c)(3): Marshals Service in In Forma Pauperis Actions

Section 1915(d) of the Judicial Code directs that when a plaintiff is authorized to proceed in forma pauperis "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases."

The statute is reflected in Rule 4(c)(3), but at least some observers believe the rule is ambiguous. The first sentence provides that, at the plaintiff's request, the court may order service by a marshal. The second sentence reads: "The court *must so order* if the plaintiff is authorized to proceed in forma pauperis * * * or as seaman * * *." Does "so order" mean always must order service by the marshal in i.f.p. or seaman cases? Or does it mean that the court must make the order only if the plaintiff requests it? This subject was launched by a suggestion of Judge Furman at the January 2019 Standing Committee meeting. Opinions in the Second Circuit have divided on the question whether the court must order marshal service only if the plaintiff requests it.

Those who find the text ambiguous might resort to the pre-style version, which might more easily be read to mandate an order for marshal service whether or not the plaintiff requests the order.

One possible approach is to do nothing. Rules amendments are not proposed every time an ambiguity appears, nor every time some court somewhere seems to get an issue wrong, nor every time conflicting interpretations appear.

Three basic alternatives can be evaluated if something is to be done. One is to resolve the ambiguity by requiring an order for marshal service in every case that recognizes i.f.p. status or involves a seaman. That might seem to fit better with the broad command of § 1915(d).

The second approach would be to confirm that the court must order marshal service only if an i.f.p. plaintiff makes a request.

A third approach, perhaps closer still to the spirit of the statute, would dispense with the need for a court order: the marshal would automatically be required to make service in every i.f.p. action.

The choice among competing approaches should be informed by information from the Marshals Service. The Marshals Service has reached out to the districts for advice but got only a low response rate. Responses were mixed. One district automatically issues service orders. There is a general belief that clarity would be helpful, but it is not certain whether there is a real need.

Clerk Briggs observed that "marshals despise making service." The Bureau of Prisons "gives us a waiver."

A judge noted that service is a big burden on marshals, especially when it must be made in remote areas. "If the plaintiff doesn't ask, don't jump."

Another judge said that his district routinely appoints marshals. But it is a "huge imposition." When lawyers are appointed, the lawyers agree to make service, in part because they will do it faster than the marshals can do it. Pro se litigants have difficulties, but sometimes they make service and then fail to note service on the docket.

Two other possibilities were noted. One is that service by marshals might be a good place to begin experimenting with electronic service of the summons and complaint. The marshals could set up a reliable system and provide good information on the likely advantages of efficiency and any likely difficulties and disadvantages. Another is that marshals might be encouraged to appoint persons not marshals to make service for the marshals. That might well satisfy both § 1915(d) and Rule 4(c)(3).

Other possible questions about marshals service were noted in the agenda materials but not discussed.

Discussion concluded by suggesting that it may be useful to find some means of providing further advice to the Reporter.

Rules 4, 5: 19-CV-N

These suggestions for Rules 4 and 5 come from Dennis R. Brock, a prisoner plaintiff who encountered some uncertainties in pursuing a pro se action. He paid the filing fee, and he says that in some

unspecified way he requested service by a marshal. (The docket does not reflect the request.) The clerk notified him that he should make service, and mailed him copies of the summons and complaint. He made service by mail. He suggests that "the applicable statutes" should be included in Rule 4.

A second suggestion for Rule 4 arises from a local practice that defers the time to answer until after an Initial Phone Status Conference. Apparently relying on the times specified in Rule 12, Mr. Brock believed the defendant had not timely answered and was preparing to write a motion for default that he did not file because a fellow inmate told him the motion would make the judge mad. He suggests that notice of the local practice should be included in the Civil Rules.

The Rule 5 suggestion arises from the amendments that address electronic filing. Mr. Brock did not use e-filing, and suggests that the court should have sent him a copy of his own filings with the CM/ECF header added by the court. He believes that not having the number will cause confusion when another party refers to a document only by number.

Discussion focused on the high and perhaps growing number of actions that include at least one pro se party. It was noted that in forma pauperis plaintiffs usually appear pro se. Official statistics on the numbers of pro se parties were thought to be skewed. As an extreme example, there may be a single pro se party in a large-scale MDL proceeding.

Discussion concluded by a vote to remove these suggestions from the agenda.

Rule 12(a)(2): Statute Times

Judge Bates led the discussion of 19-CV-O, which proposes that Rule 12(a)(2) should be amended to include an exception for times set by statute to parallel the exception in Rule 12(a)(1).

Rule 12(a) sets the times for responsive pleadings. Rule 12(a) is the general rule. It begins:

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

There is no similar exception for statute-set times in Rule 12(a)(2), which sets a 60-day time to respond in actions against the United States or a United States agency or officer or employee

sued in an official capacity. The suggestion made by Daniel T. Hartnett, however, notes that the Freedom of Information Act sets a 30-day period to respond in some actions. He further notes that in a recent action the clerk's office initially refused to issue a summons with the 30-day deadline, relying on the 60-day time set by Rule 12(a)(2) and a computer programmed to set either 21- or 60-day response times. The clerk's office was cooperative, however, and was persuaded to issue a summons with the 30-day period.

Rule 12(a)(3) sets a 60-day response time in an action against a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Like Rule 12(a)(2), it says nothing of another time specified by a federal statute. No statute specifying a different time has been identified.

There is a strong case for recognizing the exception for statutory times in Rule 12(a)(2), now that specific statutory provisions have been identified. The question whether to amend Rule 12(a)(3) in parallel is more difficult. If the exception occurs in both subdivisions (a)(1) and (a)(2), difficulties will arise if there is — or in the future will be — a statute that sets a different time for an action covered by (a)(3). The lack of parallelism might be taken to imply a deliberate choice. The outcome, however, would likely turn on the "latest-in-time" rule: a statute enacted after (a)(3) would supersede the rule, while a statute enacted before (a)(3) would be superseded by the rule. There is no reason to wish to supersede an earlier statute by rule without even knowing of the statute, nor reason to court the difficulty of possible future statutes.

Still, it may seem awkward to imply the existence of statutory time periods in an amended Rule 12(a)(3) when no such period is known.

General discussion began with the observation that the Department of Justice complies with the 30-day periods set by FOIA. When an action combines a FOIA claim governed by the 30-day period with claims under other statutes, the Department asks for an extension of time to provide a single answer under the general 60-day period of Rule 12(a)(2). This does not seem to be a problem. The Department has not encountered a statute setting a different period than Rule 12(a)(3).

A question about the interpretation of current Rule 12(a) was raised. Rule 12(a)(1), quoted above, recognizes "another time specified by this rule or a federal statute." It would be possible to interpret that as a provision that recognizes statutory time periods and reaches subdivisions (a)(2) and (a)(3). But the more

apparent meaning may be that Rule 12(a)(2) is "another time specified by this rule" without an exception for different statutory periods. Clearly enough 12(a)(2) substitutes a 60-day period for the 21-day period set by Rule 12(a)(1). So for Rule 12(a)(3). It is not clear that the (a)(1) reference to a time specified by a federal statute extends beyond the 21-day periods set by (a)(1), or the 60- and 90-day periods set after waiver of service.

The pre-Style Rule 12(a) was noted. Former 12(a)(1) did not refer to a different time provided by Rule 12(a). It said only: "Unless a different time is prescribed in a statute of the United States * * *." Subdivisions (a)(2) and (3) did not say anything about statutes, or for that matter other rules. It is not clear how this history bears on the possible ambiguity in the present rule — perhaps it was intended to extend the statutory exception to (a)(2) and (3), or perhaps referring to times set in this rule meant only to clarify the role of (a)(2) and (a)(3) as exceptions to (a)(1).

Discussion finished by concluding that language should be drafted by make Rule 12(a)(2) parallel to Rule 12(a)(1). It may be unnecessary, possibly even dangerous, to do the same for Rule 12(a)(3).

In Forma Pauperis Practices: 19-CV-Q

Sai, who participated actively and constructively in the consideration of amendments to the electronic-filing rules, has made two sets of suggestions that point to serious questions. The first, addressed to the Appellate Rules and Criminal Rules as well as the Civil Rules, relates to in forma pauperis practices.

The first issue goes to the standards used to qualify a litigant for i.f.p. status. The argument that quite different standards are used by different courts, even by different judges on the same court, finds support in a recent law review article that thoroughly researched current practices. The governing statute, 28 U.S.C. § 1915(a), offers no real guidance. Rather than attempt to incorporate specific standards into Rule text, Sai suggests adoption of Legal Service Corporation regulations. Apparently the LSC regulations delegate many determinations to local organizations, a feature that could undercut uniformity. In addition, Sai suggests reliance on government benefit programs — any litigant who receives SSI, SNAP, TNAF, or Medicaid would automatically qualify for i.f.p. status. These proposals would incorporate standards developed for other purposes, and administered in different ways. Even rules to qualify for LSC services serve different purposes than determining i.f.p. status.

Additional difficulties appear. Giving specific content by way of income and asset ceilings for i.f.p. status comes close to the line of substantive rules. And wherever that line is drawn, the proposals delegate the actual standards to nonjudicial actors. Delegation may be convenient, but it may not be wise or authorized by the Rules Enabling Act.

The second suggestion is for clear rules on the responsibility to update information about financial status as circumstances change.

The third set of suggestions addresses a host of ambiguities found in the Administrative Office forms for requesting i.f.p. status. Many of the concepts are found inherently ambiguous: What is "income"? What are "assets"? Who counts as a "spouse"? Even, what is "cash" — a blockchain "currency"? Here too, the suggestion is to incorporate standards developed for other purposes. The Internal Revenue Code and Regulations could be incorporated. Here too, the problems of substantive meaning and delegation appear.

The fourth set of suggestions argues that much of the information requested by the current Administrative Office forms is irrelevant, intrusive, and at times so intrusive as to violate the Constitution. An applicant, for example, cannot constitutionally be directed to provide financial information about a nonparty, such as a spouse.

Discussion began by noting that the Northern District of Illinois i.f.p. forms have been twice revised in the last two years. One reason was that staff attorneys were "aggressive" in dealing with prisoner plaintiffs who got donations to their commissary accounts from family and friends. Sai is right that there are real problems. But it may be better to struggle with the problems on a local level. As one example, it is important to know what the Illinois prison system does.

A judge noted that many factors enter a determination whether to recognize i.f.p. status. Income, assets, number of dependents, financial obligations, ability to earn, and other circumstances may combine in myriad ways. Attempting to capture the calculation in a formula is not likely to be wise. Nor are alternative approaches to increasing uniformity among courts likely to work. As an easy example, a given level of income and assets may be barely adequate for survival in one part of the country, but provide some margin of discretionary expenditure in another part.

The difficulty with uniform standards was approached from a different angle. Courts of appeals may see the question differently than a district court sees it. The problems "touch on the

thoughtful discretion of judges all over the country. They might not welcome constraints."

A judge noted that similar problems arise in Criminal Justice Act cases, but that does not provide a foundation for considering a civil rule that sets i.f.p. standards.

Other participants agreed that these are big problems. But the rules committees are constrained in their ability to address them. Are there other groups that might provide some relief?

The Department of Justice will inquire into the possibility that some groups might be found to address some of these questions.

The Court Administration and Case Management Committee is another likely place for considering these questions. They have received Sai's proposal, and appear interested in working on it. Given this information, the Committee concluded that the proposal should be removed from the Civil Rules agenda. It can be left for such consideration as the Court Administration and Case Management Committee chooses to give it.

Calculating Filing Deadlines: 19-VC-R

Sai observes that parties frequently run into difficulties with filing deadlines. The difficulties may arise from inattention, miscalculation, lack of clarity in the rules or events that trigger deadlines, or even misinformation by the court clerk. These problems may be particularly pronounced for pro se litigants, but attorneys encounter them as well. Much time and no little agony are devoted to calculating and recalculating deadlines. Mistakes still happen. Sai's proposal is addressed to the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Sai's proposal rests on twin propositions: courts know what the deadlines are, and have authority to calculate them conclusively. Court clerks regularly have to calculate deadlines. So Sai proposes that courts be directed by rule to perform time calculations for all possible responses to every court or party action, and to give notice by order to all parties that have appeared. The rule would provide that all filers may rely on the court's calculation. And it is "deliberately cumulative": "The most recent calculation order should be the full calendar of a case listing all available, pending, or issued events, and their respective deadlines."

Missed deadlines can lead to forfeiture of important rights. Assistance for all parties, and particularly for pro se parties, is welcome. Court clerks frequently offer advice now.

But time deadlines are necessary to achieve the Rule 1 goal that every action and proceeding be determined, and be determined with some measure of speed. All of the deadlines in all sets of court rules were examined and many were amended ten years ago. One of the goals was to simplify the rules, reducing the risks of inadvertence and miscalculation. If a particular deadline proves undesirable in practice, it can be considered and modified. There may not be sufficient reason to undertake a sweeping review now, particularly in response to a proposal that does not aim at any particular time period in any particular rule.

The premise that courts know what the times are is not compelling. Some deadlines run from events the court does not learn of. Discovery responses under Rules 33, 34, and 36, for example, are due 30 days after the party is served, but the requests and responses are not filed with the court until they are used in the proceeding or the court orders filing. Some time periods are set before an event. A written motion and notice of hearing, for example, must be served at least 14 days before the time specified for the hearing.

Directing courts to continually calculate specific end-of-deadline days for every event in an action, in short, would impose a heavy burden. Mistakes would be made. And as the law stands now, a rule cannot protect a party who relies on a mistaken court calculation if the relevant time period is not only mandatory, but "jurisdictional" as well.

One alternative to alleviate forfeitures would be to relax the provision of Rule 6(b) that allows a court to extend the time to act "for good cause." One model of generosity is provided by Rule 15(a)(2), which directs a court to "freely give leave" to amend a pleading "when justice so requires." But the good cause standard was adopted for good reason. Relaxing it could discourage the impulse to honor deadlines, and create added work for courts.

Discussion began with the observation that the Bankruptcy Rules Committee quickly rejected this proposal. It is a "nice idea, but thoroughly impracticable." There are too many deadlines. Clerks' offices spend too much time advising on deadlines even now. And it is hard to be confident the court knows the deadlines.

It was reported that the Criminal Rules Committee also had rejected the proposal. It did ask whether the CM/ECF system automatically calculates some deadlines, but found real problems with the prospect of sharing even those calculations with litigants.

Discussion turned to the possibility of relaxing Rule 6(b). The good cause standard might be relaxed, at least for pro se litigants, even borrowing the "freely grant" approach of Rule 15(a). A judge observed that pro se status is part of the good-cause assessment under Rule 6(b). Three other judges agreed, with the note that the Seventh Circuit strongly encourages this practice. Another judge noted that Bankruptcy Rule 9006(b) is not the same as Civil Rule 6(b); if Rule 6(b) is to be taken up, the Bankruptcy Rules Committee will need to consider Rule 9006(b).

The conclusion was that the practice of considering pro se status in administering Rule 6(b) provides good reason to bypass any consideration of Rule 6(b). The problems with the proposal to require courts to provide notice of all deadlines are too great to justify pursuing the proposal further. It will be removed from the agenda.

Rule 68 Offers of Judgment: 19-CV-S

Retired Judge Mark W. Bennett submitted as a recommendation a twelve year old article by Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 Minn. L. Rev. 865-937 (2007).

Professor Shelton's article accepts Rule 68 pretty much as it has been interpreted in the courts. Her proposal focuses on increasing the clarity of Rule 68 offers. Clear offers will better enable the plaintiff to determine whether to accept the offer, and provide a better basis for comparing a rejected offer to a judgment. The offeror is better protected against unintended interpretations that add court awards of costs and perhaps fees to an offer that has been accepted. The plaintiff is better protected against a ruling that a judgment that seems to exceed a rejected offer actually falls below it after including the costs and perhaps fees the court would have added if the offer had been accepted.

The proposal would permit only two types of Rule 68 offers for money judgments. One is a "damage only" offer. The offer does not include any costs or fees, matters left to the court. Both parties know this is what the offer means, and the court knows when it comes time to compare offer and judgment. The other permitted offer is a "lump sum" offer that must be made in exact language provided by an amended Rule 68. The offer includes any prejudgment interest, costs, and attorney fees accrued at the time of the offer.

The concept is clear enough, although inevitable drafting issues would arise in undertaking to frame a rule that as far as possible reduces uncertainties about the impact of a Rule 68 offer.

The Committee's history with Rule 68 raises the question whether this relatively modest proposal could be taken up without going further into Rule 68. Rule 68 has been the subject of perhaps more spontaneously generated proposals than any subject other than discovery. Most of the proposals seek to "put teeth" into the rule by increasing the consequences for failing to win a judgment better than a rejected offer. The most common element would be to add attorney fees incurred by the offeror after the time of the offer.

More complex proposals for expanding Rule 68 often include provisions that enable a claimant to make offers, not only a party defending against a claim. Because a plaintiff who wins a judgment better than an offer rejected by the defendant will almost always recover costs, the proposals contemplate an award of post-offer attorney fees to the plaintiff, a substantial incentive in cases that do not include a statutory fee award. A variation on this theme would reduce the Rule 68 award by the "benefit of the judgment." As a simple illustration, a defendant rejects a $50,000 offer, the plaintiff incurs post-offer fees of $20,000, and wins a judgment for $60,000. The $10,000 part of the judgment that exceeds the rejected offer is deducted from the $20,000 fees, leaving a fee award of $10,000. The plaintiff would then be in as good a position as if the offer had been accepted.

A fundamental question asks whether a Rule 68 award should be made even when it was reasonable to reject the offer. Precise calculations of relief are often difficult, if not impossible, in many settings of factual or legal uncertainty. There may be excellent reasons to reject an offer, even when the final judgment is not more favorable. State offer-of-judgment rules often allow a margin of error. Perhaps Rule 68 should recognize some similar margin.

Many other issues have demanded attention in addressing Rule 68. One involves offers for specific relief: what tests should be used to compare an injunction against the terms of an injunction included in a Rule 68 offer? Is it possible or desirable to measure the overall value of a judgment that includes both damages and an injunction against an offer that included a different measure of damages and injunction terms?

Another set of questions arises from uses of Rule 68 offers in class actions. Attempts to use Rule 68 offers to moot class actions have been addressed by many recent decisions, and these issues may be coming under control. And there may be no practical problem with attempts to use Rule 68 offers to bind a class when the class judgment fails to provide greater relief than the offer. But if Rule 68 is taken up, it might be appropriate to exclude aggregate party representative actions from its scope.

Two questions arise from two Supreme Court decisions that rely on the "plain meaning" of Rule 68 text. One ruled that failure to win a judgment better than a rejected offer cuts off a statutory right to post-offer attorney fees under any statute that provides for recovery of fees as "costs," but not under a statute that provides for recovery of fees without characterizing them as "costs." Some proposals suggest that the happenstance of legislative language should not have this effect. And many proposals, siding with the dissent, urge that Rule 68 should not operate to cut off attorney fees for plaintiffs that have been the subject of special legislative solicitude and protection. Occasional suggestions have been made that cutting off statutory fee rights by rule forfeiture digs too deep into substantive rights.

The other decision is that a judgment for the defendant defeats any Rule 68 cost award because the award is available only "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer." The plaintiff does not "obtain" a "judgment" when the judgment is for the defendant. A judgment for the defendant, however, may seem to show that the plaintiff's failure to accept was all the less reasonable, and the defendant's post-offer costs all the more an appropriate subject for reimbursement.

Uncertainty also surrounds the debate whether Rule 68 is valuable because it promotes settlement. A common response is that so many cases in federal court settle that actual trials are near the vanishing point. The reply is that Rule 68 offers can encourage cases to settle earlier than they would settle otherwise. And the retort is that it may not be desirable to pressure plaintiffs to settle before the opportunity for discovery that will provide better information about the value of the claim.

A still more fundamental objection asks why there should be a duty to accept an offer to settle. Why impose any forfeiture, even as modest as post-offer costs are likely to be, when a claimant seeks to recover, and may urgently need to recover, the full value of a claim? Even an award for less money than the offer may provide invaluable vindication.

The Committee has repeatedly struggled with Rule 68. Proposals to amend Rule 68 were published in 1982, then in much revised form in 1983, and eventually abandoned. Extensive work was done 25 years ago, this time to be abandoned without publishing any proposal. The subject has been explored repeatedly since then, at times in depth and more frequently with reminders of earlier work, in response to suggestions from the bar and bar groups.

This history suggests that it would be difficult to take up any part of Rule 68 without facing strong pressures, both from without and from within Committee deliberations, to repeat the fundamental reexaminations of the past.

Discussion began with a suggestion that indeed taking up Professor Shelton's article as a proposal would generate strong pressures to explore "far greater" potential revisions.

A Committee member asked how often Rule 68 is used. Careful studies have been done in the past, but nothing recent has come to committee attention. The general assumption is that Rule 68 is not much used. One explanation is that defeating an award of post-offer costs does not provide much of an incentive. Cases that involve statutory fee shifting as costs are commonly thought to provide strong motives to make offers, and there are many such cases. But there too practice is uneven. Some institutional defendants have a routine practice of making Rule 68 offers, for example in police conduct cases. There is some sign of concern, however, that a routine practice may encourage ill-founded claims brought solely for the purpose of accepting the routine offer.

General discussion recognized that Rule 68 presents a complicated set of questions. Rule 68 offers often are ambiguous. But it would be difficult to confine any project to attempts to encourage clear offers, and even those attempts would require appointment of a subcommittee.

The Committee concluded that the time has not yet come to embark on a Rule 68 study.

Rule 26(b)(4)(E)(I): 19-CV-T

Judge Bennett submitted another article by Professor Shelton as a subject for Committee study. This article is Shelton, *Discovery of Expert Witnesses: Amending Rule 26(b)(4)(E) to Limit Expert Fee Shifting and Reduce Litigation Abuses*, 49 Seton Hall L. Rev. 475 (2019).

Rule 26(b)(4)(E)(i) says that the court must require that a party seeking discovery must pay an expert witness a reasonable fee for the time spent in responding to discovery under Rule 26(b)(4)(A). Rule 26(b)(4)(A) establishes a right to depose any person who has been identified as an expert whose opinions may be presented at trial. Professor Shelton identifies a large number of discrete questions that have divided courts that undertake to determine what is a reasonable fee.

Judge Bates introduced the topic by asking whether judges on the Committee have seen these problems.

Professor Marcus developed the topic by noting that the Committee heard nothing of these issues when it undertook the thorough study that led to Rule 26(b)(4) amendments ten years ago. He also noted that calculating "a reasonable fee for time spent in responding to discovery" raises questions similar to questions raised in calculating attorney fees. Experience shows that many details need to be addressed on a case-by-case basis.

The proposal does not address Rule 26(b)(4)(E)(ii), which provides that a party seeking discovery from an expert employed only for trial preparation must pay "a fair portion of the fees and expenses" incurred in obtaining the expert's facts and opinion.

One possible complication can be put aside at the outset. This proposal does not open up more general questions whether a party requesting discovery should pay the expenses incurred in responding. The expert's opinions will be described either in a detailed report under Rule 26(a)(2)(B) or in a Rule 26(a)(2)(C) disclosure that identifies the subject matter on which the expert will provide evidence and provides a summary of the facts and opinions to which the expert is expected to testify. Early hopes were that the Rule 26(a) disclosures would dispense with the need to depose experts. That does not seem to have happened in any general way. But the deposition is primarily for the purpose of preparing to examine the expert at trial. It is for the benefit of the deposing party. The expert's proponent has paid for developing the opinion — why should the proponent also have to pay the expert's fees and expenses for the deposition?

A partial list of the issues that may arise includes these:

How should preparation time be measured? Can preparation for the deposition be separated from preparation for trial, or should an attempt be made to determine what parts of time preparing for the deposition may reduce time to prepare for trial? What about time spent conferring with counsel? And how can a court decide how much time is reasonable in preparing for a deposition? Can an hourly rate be increased for time in deposition, as it may be for time in trial, as compared to time to undertake the initial study and prepare a report? Can an expert charge a daily fee, even for a deposition that lasts only a few hours or even less than an hour? What about fees to prepare for a canceled deposition?

Expenses also stir debate. What should be expected for travel — spartan, luxurious, or simply comfortable means? Who should be responsible for travel time if the deposition is not taken where

the expert works?

When should bills be submitted, when paid? Should interest be awarded after some period of delay? (An order in CVLO MDL 875 Proceeding offered as an example of various award provisions includes interest "at a rate of 3.5% per month for the length of time the invoice remains unpaid.")

All these questions and others are likely to be approached differently if the expert witness was not required to provide a written report under Rule 26(a)(2)(B). The most common examples are treating physicians.

These and many other questions would be subject to flat answers in the draft rule proposed by Professor Shelton. For example the draft provides that "'Time spent responding to discovery' includes only (1) the actual time the expert spends in a deposition, including any breaks during the day, and does not include time or fees spent preparing for a deposition, traveling to or from a deposition, reviewing a deposition transcript, or time otherwise relating to being deposed."

Discussion began with a lawyer's observation that "I've always worked this out with the other parties." We should leave it there.

Another lawyer fully agreed. "We always work this out. We never have to litigate" these issues.

Yet another lawyer agreed that "it is always worked out." Two more lawyers joined in.

A judge said that she had never seen these issues.

The Committee removed this proposal from the agenda.

19-CV-V: ESI Production, Cost-Shifting

These two related proposals were made by Judge Michael Baylson, a former Committee member. They relate to the 2015 proportionality amendments of the discovery rules.

The first proposal would authorize the court to require a party to "disclose details of its application of these Rules to its production of electronically stored information." It does not seem to venture into the contentious issues that arise when a party relies on computer searches or computer-aided intelligence to respond to discovery requests. A requesting party, for example, may wish to know how the producing party taught its system to identify relevant and responsive information. Privilege, work-product, and confidentiality issues all arise. Instead, the proposal seems to aim more at the level of research undertaken by a responding party as affected by the responding party's views of proportionality. A responding party may limit its search short of surveying all possible sources, concluding that proportionality justifies a more targeted search. The proposal seems aimed at allowing discovery of how the proportionality principle was implemented.

Professor Marcus observed that this proposal relates to issues that were thoroughly explored in proposing the 2015 amendments. The Rule 26 Committee Note explains that it is not feasible to assign a burden on proportionality, either to require the inquiring party to show that its requests are proportional to the needs of the action or to require the responding party to show that the requests are not proportional or that its efforts to respond are proportional. Instead, the requesting party is in the best position to explain why requested information is relevant, while the responding party is in the best position to explain the burdens that would be imposed by searching for it.

A judge suggested that it will be important to have another four or five years of experience with the 2015 amendments before attempting to deal with this proposal. Experience may show that courts find authority to resolve these issues, including disclosure of the burdens involved in producing electronically stored information. This proposal will be removed from the agenda.

The second proposal is to authorize the court to shift the cost of discovery from one party to another to ensure proportionality. This topic was addressed by the 2015 amendment of Rule 26(c)(1)(B), which allows entry of a protective order specifying terms for the allocation of discovery expenses. The Committee Note cautions that cost-shifting should not become a common practice.

The Committee agreed that explicit recognition of cost-shifting authority in Rule 26(c)(1)(B) suffices for the present. Time may show a need for more frequent or extensive exercise of this authority, but here too it seems better to await the lessons of time. This proposal will be removed from the agenda.

Rule 4(d): "Snap Removal": 19-CV-W

This proposal addresses dissatisfaction with a removal practice that many courts allow under the wording of 28 U.S.C. § 1441(b)(2). The statute allows removal of an action that rests only on diversity jurisdiction, but not "if any of the parties in interest properly *joined and served* as defendants is a citizen of the State in which such action is brought."

The proposal decries decisions ruling that the language of the statute clearly allows removal by non-local defendants if they act before the local defendant is served. It asserts that some defendants that are frequently sued in state courts have adopted a practice of searching court dockets to identify new actions and to remove before the local defendant, indeed before any defendant, is served. This is said to defeat the statutory purpose to defeat removal whenever the presence of a local defendant shows that the purposes that justify diversity jurisdiction are not involved.

Rather than propose a statutory amendment, clearly something beyond the reach of the Rules Enabling Act, the proposal is to adopt a new Rule 4(d)(6) that would expand the provisions for waiving service. The proposal is complicated, and rests on clear fictions. It is not quite clear just how it is intended to operate. But it seems an indirect way to provide that a plaintiff can defeat early removal by non-local defendants by serving a forum defendant within 30 days of a notice of removal. Service would show that the plaintiff actually means to proceed against the local defendant, and that the local defendant was not named solely to defeat removal. A rule that clearly and directly states that result would almost certainly run afoul of the Rules Enabling Act. Attempting to accomplish the same result by fictitious deemed waivers and relation back seems no better.

The Committee has learned that this proposal is already on the agenda of the Federal-State Jurisdiction Committee. It agreed that it is properly a matter for the Federal-State Jurisdiction Committee. It will be removed from the Committee's agenda.

Mandatory Initial Discovery Pilot Projects

Judge Bates noted that mandatory initial discovery pilot projects are well under way in the District of Arizona and the

Northern District of Illinois. The Federal Judicial Center is engaged in a continuing study of the effects.

Emery Lee began his description of the FJC Report on the pilot project surveys from Fall 2017 through Spring 2019 by saying that "it's going pretty well."

The Report describes closed-case surveys of cases that included a pilot project discovery order. "These are early-terminating cases." The first of them were filed in May, 2017. So far there are perhaps one or two trial cases in the mix. "These are early results."

The response rate to the surveys is better than 30%. "That's good."

Almost half of the respondents report making the required disclosures. That number is more impressive than it may seem, since many cases resolve early.

The executive summary reports:

> Survey respondents generally agreed that the MIDP resulted in relevant information being provided to the other side earlier in the case. Additionally, most survey respondents either disagreed with or were neutral to the concern that the required MIDP exchanges would result in disclosures that would not otherwise have occurred in the discovery process. They were more or less evenly divided on whether the MIDP focused discovery on important issues, reduced the volume of discovery requests, or reduced the number of discovery disputes in the closed cases. Plaintiff attorney respondents were more likely than defendant attorney respondents to agree that the MIDP enhanced the effectiveness of settlement negotiations, expedited settlement negotiation discussions among the parties, and reduced the number of subsequent discovery requests. In general, survey respondents tended not to agree that the MIDP reduced discovery costs or overall costs in the closed cases, nor did they agree that the disclosures reduced disposition times in the closed cases.

Judge Bates described these as pretty positive results.

Judge Campbell said that this is good FJC work. This report does not include statistics. Statistics may prove more reliable than impressionistic survey responses.

Overall, results in the District of Arizona were similar to results in the Northern District of Illinois. That may be a bit surprising, since lawyers in Arizona have had many years of experience with sweeping initial disclosure in Arizona state courts. It is not surprising that defense lawyers in Illinois are more negative about MID than Arizona defense lawyers or Arizona defendants.

Separate note was taken of charts showing substantial agreement with the propositions that in MIDP cases less discovery was needed to resolve the case and reduced discovery costs.

Judge Dow found it reassuring that the results in the Northern District of Illinois are similar to the results in Arizona. "Most Northern District lawyers are fine with it." Half-way through the program the rules were altered to give judges more discretion to pause MID pending disposition of a motion to dismiss. Many lawyers objected to the need to make initial discovery responses in actions that might well be dismissed on the pleadings. The change "was very welcome." And there are cases where MID is followed by little or no added discovery. That is one goal of the program. Here too, statistics may tell more than the survey responses. Some lawyers resisted the program fiercely, and have been hard to reconcile to it.

Dr. Lee noted that the FJC collected docket information this summer. The study remains in its early stages.

Judge Bates noted that it has been difficult to get courts to participate in pilot projects. He expressed the Committee's thanks to Judges Campbell, Dow, and St. Eve for their help in enlisting their courts in the MIDP, and to Dr. Lee for bringing the FJC study along.

New Business

No new business was suggested by any Committee member.

Next Meeting

The next Committee meeting will be on April 1, 2020, in West Palm Beach.

Respectfully Submitted,

Edward H. Cooper
Reporter