
**ADVISORY COMMITTEE
ON
CIVIL RULES**

March 28, 2023

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Meeting of the Advisory Committee on Civil Rules
March 28, 2023

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(2022–2023)**

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<p><u>Multidistrict Litigation Subcommittee</u> Judge R. David Proctor, Chair Judge M. Hannah Lauck David Burman, Esq. Joe Sellers, Esq. Ariana Tadler, Esq. Helen Witt, Esq.</p>	<p><u>Rule 41 Subcommittee</u> Judge Cathy Bissoon, Chair Dean Ben Spencer Ariana Tadler, Esq. David Burman, Esq.</p>

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Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. <i>(Standing)</i>
Liaisons for the Advisory Committee on Civil Rules	<p>Hon. D. Brooks Smith <i>(Standing)</i></p> <p>Hon. Catherine P. McEwen <i>(Bankruptcy)</i></p>
Liaison for the Advisory Committee on Criminal Rules	TBD <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	<p>Hon. Robert J. Conrad, Jr. <i>(Criminal)</i></p> <p>Hon. Carolyn B. Kuhl <i>(Standing)</i></p> <p>Hon. M. Hannah Lauck <i>(Civil)</i></p>

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TAB 1

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

January 4, 2023

The Judicial Conference Committee on Rules of Practice and Procedure (the “Standing Committee”) met in a hybrid in-person and virtual session in Fort Lauderdale, Florida, on January 4, 2023. The following members attended:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Robert J. Giuffra, Jr., Esq.
Judge William J. Kayatta, Jr.
Judge Carolyn B. Kuhl
Dean Troy A. McKenzie
Judge Patricia A. Millett

Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge D. Brooks Smith
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate
Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca Buehler Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate
Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate
Reporter
Professor Edward H. Cooper, Consultant

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee’s Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Brittany Bunting–Eminoglu and Shelly Cox, Rules Committee Staff; Christopher I. Pryby, Law Clerk to the Standing Committee; Hon. John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge Bates called the meeting to order. He welcomed new Standing Committee members Judge D. Brooks Smith and Andrew Pincus; the new chairs of the Advisory Committees on Bankruptcy and Civil Rules, Judge Rebecca Connelly and Judge Robin Rosenberg; and the new Associate Reporter for the Civil Rules Committee, Professor Andrew Bradt. Judge Bates noted the departures of Judge Gary Feinerman from the Standing Committee and former Civil Rules Committee Chair Judge Robert Dow. He stated that he would work to find new members to fill the vacancies on the Standing and Civil Rules Committees. In addition, Judge Bates welcomed the members of the public who were attending remotely or in person.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee unanimously approved the minutes of the June 7, 2022, meeting.**

Judge Bates highlighted pending rules amendments, including new emergency rules arising out of the CARES Act and amendments to Evidence Rules 106, 615, and 702. These amendments will take effect on December 1, 2023, assuming that the Supreme Court approves them and absent any contrary action by Congress.

For the legislative update, Judge Bates observed that with the end of the 117th Congress, all pending legislation had expired. Law clerk Christopher Pryby noted that, of the Fiscal Year 2023 National Defense Authorization Act provisions that he had highlighted at earlier Advisory Committee meetings, none remained in the enacted version of the bill.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which is under consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. He thanked Professor Struve for her leadership on this project and her coordination among the Advisory Committees, and he invited her to provide an update on those discussions.

Professor Struve began by acknowledging the group effort that had gone into the project so far, especially from the FJC team, including Tim Reagan, Carly Giffin, and Roy Germano, who had done phenomenal work that culminated in a study released in 2022.

This project originated from several proposals about electronic filing for self-represented litigants. The current rules provide for electronic filing as a matter of course by those who are represented by lawyers, but self-represented litigants must file nonelectronically unless allowed to file electronically by court order or local rule. The proposals take two main forms: one advocates a national rule presumptively allowing self-represented litigants to file electronically, while the other advocates disallowing categorical bans on, and setting a standard for granting permission for, electronic filing by self-represented litigants.

Recounting the FJC's findings, Professor Struve noted that, in the courts of appeals, there is a close split between the circuits that presumptively give self-represented litigants access to the Case Management/Electronic Case Filing system ("CM/ECF") and those that allow that access

with permission; one outlier circuit currently has a local provision prohibiting self-represented litigants from filing electronically. In the district courts, the picture is more mixed—the bulk of districts allow self-represented litigants to file electronically with permission, a bit less than 10% presumptively permit self-represented litigants to file electronically, and about 15% do not allow it at all. And in the bankruptcy courts, it is rare for self-represented litigants to have access to CM/ECF.

The fall Advisory Committee meetings provided an opportunity to get members' senses about the current situation and their reactions to the possibility of adopting a default rule of presumptive access to CM/ECF for self-represented litigants. Those discussions also considered potential alternate means of electronic access for self-represented litigants, like those that courts experimented with during the COVID-19 pandemic. The discussions also included the possibility of policy changes not based on rules amendments as well as the need for coordination with other committees of the Judicial Conference.

A second question concerns the rules governing service of papers during a lawsuit. As between any pair of litigants who are both users of CM/ECF, service is simple, because the notice of electronic filing produced when the paper is filed in CM/ECF constitutes service. By contrast, a form of service other than the notice of electronic filing is necessary when the party to be served is not a CM/ECF user. But when a party that is not a CM/ECF user files a paper by some other means, must that party separately serve the parties who *are* users of CM/ECF? Those parties will receive the notice of electronic filing after the court clerk scans and uploads the nonelectronic filing to CM/ECF. The rules nevertheless appear to require the non-CM/ECF user to serve these parties. The questions before the committees were: Why? Is this burden on self-represented litigants necessary? Should the rules be amended to eliminate this requirement? Some districts have eliminated the requirement for service on parties who are CM/ECF users, and those districts have generally reported positive experiences with that change.

Professor Struve reported a fair amount of interest in investigating the possibility of eliminating that requirement. But there are still some details to be worked out: (1) How does the court make clear to a nonelectronic filer which parties are, and which are not, on CM/ECF—and, thus, who does and does not need separate service? (2) Would the three-day rule work seamlessly with this change, or would it need some wording adjustments? For example, the time calculation might need to be clarified or adjusted to ensure no unfairness to a party if there is some delay between when the clerk receives a filing and when the clerk docket it in CM/ECF. Professor Struve believes this proposal contains the germ of an idea that may be appropriate for a possible rule amendment, and she expressed her hope that the Advisory Committees would continue working on the project in the spring.

Returning to whether there should be a change in the default rule governing self-represented litigants' access to CM/ECF, Professor Struve surveyed the reactions of the Advisory Committees on that proposal. The Bankruptcy Rules Committee took a positive view of the overall idea, viewing it as a matter of access to the courts. Notably, the court-clerk representative on that committee supported the proposal, saying that it is helpful for filings to be electronic whenever possible. But there was some division of views on the committee, with a couple of members expressing the need for caution and raising important questions that are detailed in the committee's minutes and reports.

The Appellate Rules Committee took a somewhat positive view of the overall concept of access to CM/ECF for self-represented litigants, in line with the current policies of the courts of appeals. Professor Struve thought that the interesting question for this committee was whether the Appellate Rules should be amended to reflect or encourage that outcome, given that the courts of appeals are already increasing CM/ECF access for self-represented litigants (with greater celerity than the lower courts). A default rule of access to CM/ECF for self-represented litigants might be easiest to adopt in the Appellate Rules, given the movement in that direction in the courts of appeals. A question for the Appellate Rules Committee may be how to balance that consideration against the value of uniformity across the national sets of rules.

Professor Struve reported that there were more skeptical voices in the Civil Rules Committee on the proposal relating to CM/ECF access. Some members wondered whether the matter might be more appropriately treated by another Judicial Conference actor such as the Committee on Court Administration and Case Management (“CACM”). Overall, there was much less momentum on the Civil Rules Committee for a rule change.

Turning to the Criminal Rules Committee, Professor Struve first noted that this committee’s interest was different from that of the other Advisory Committees. There are very few nonincarcerated, self-represented litigants appearing in situations covered by the Criminal Rules. (Professor Struve noted that, even in the districts that presumptively allow self-represented litigants CM/ECF access, that presumption of access typically excludes incarcerated litigants because of the logistical particulars of carceral settings. So, at least in the near future, even the most expansive grant of electronic-filing permission to self-represented litigants would likely not encompass incarcerated self-represented litigants.) But the committee had an excellent discussion of the service issue, and the committee would be open to exploring that question further.

Professor Struve concluded by welcoming the input of the Standing Committee members on any of these topics. She noted that the project continues to operate in an information-gathering mode, especially on the service issue and the various ways by which electronic-filing access could be expanded for self-represented litigants, including by working in tandem with other Judicial Conference actors.

Judge Bates thanked Professor Struve and opened the floor to comments and questions.

A practitioner member suggested that greater access for self-represented litigants is a good thing, but also that some fraction of self-represented litigants would abuse electronic-filing access. This member asked which would be easier for courts to administer: a rule requiring courts to deal with requests for permission, or a rule granting access by default and leaving the courts to deal with the task of revoking that access in particular cases? Professor Struve noted that Dr. Reagan and his colleagues at the FJC had talked with clerk’s offices around the country and would be in a good position to answer that question. Dr. Reagan reported that, in speaking with personnel in several districts that had recently expanded self-represented litigants’ access to CM/ECF, he and his colleagues heard that court personnel’s fears were not particularly realized. He also observed that self-represented litigants can disrupt the work of the court regardless of their filing method. In fact, some courts appreciated receiving documents electronically because they did not have to receive things in physical form that would be unpleasant to handle. And every court is quite capable of limiting improper litigant behavior.

A judge member appreciated the thoroughness of the FJC report in obtaining input from clerk's offices and considering the pros and cons of a change in the rules and other issues that would arise. The member thought that the primary focus of this project ought to be learning about the experiences of clerk's offices. The clerk's office of the member's court had strong views on this matter, especially on who should bear the burden of the work generated by noncompliant self-represented litigants.

Ms. Shapiro asked whether the FJC report looked at whether self-represented litigants complied with redaction and privacy-protection rules. Dr. Reagan responded that the report did not get into the weeds with this question, but he did note that this same problem occurs with represented litigants as well. One appellate clerk had mentioned locking a document and later posting a corrected version; he was not sure whether that had to do with redaction problems. He stated that there is a way to configure CM/ECF so that the court must "turn the switch" before a submitted filing is made available in the record.

Judge Rosenberg reiterated her comments from the October Civil Rules Committee meeting, which reflected feedback from her court's clerk: Most courts are not equipped to accept self-represented litigants' filings through CM/ECF. So, while it is a good idea to expand electronic filing to all litigants, until all courts can comply, it is not advisable to amend the federal rules to establish a presumption in favor of allowing electronic filing. Additionally, different courts use different versions of CM/ECF, and the version used affects both the court and the filer. Further, there is not a unique identifier for many self-represented litigants. By contrast, attorneys have unique bar numbers.

Professor Struve responded that, if a court would not be able to function with a presumption in favor of electronic access for self-represented litigants, then that court could adopt a local rule to opt out of the presumption. It is true that, if the bulk of districts opted out, that might lead one to question the wisdom of the rule. As to the point about identifiers, Professor Struve suggested that the districts currently allowing presumptive or permissive electronic access by self-represented litigants would have had to solve that problem, so it would be helpful to ask those districts for their experiences with that issue.

Judge Bates concluded by recognizing that cases involving self-represented litigants make up a large part of the civil and bankruptcy dockets in federal court, and this is a project that the committees will continue to work on. He hoped that the committees and reporters would continue to provide a high level of participation, and he thanked Professor Struve and everyone else who had worked on the project with her so far.

Presumptive Deadline for Electronic Filing

Judge Bates reported on a joint committee project that arose from a suggestion by Chief Judge Chagares of the Third Circuit, the former chair of the Appellate Rules Committee, that the committees consider changing the presumptive deadline for electronic filing from midnight to an earlier time. Judge Bates observed that the FJC had done excellent research for this project, and that one of the relevant FJC reports was included in the agenda book. The status of the project is uncertain. The Civil Rules Committee has recommended that the project be dropped. But the Appellate Rules Committee recommended that the question of how to proceed be posed, in the

first instance, to the Joint Subcommittee on E-filing Deadlines, because that Subcommittee has not convened recently. Judge Bates agreed that the Joint Subcommittee should be asked to undertake a careful review of the project, and he noted that he would also continue to seek Chief Judge Chagares’s input.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met in Washington, D.C., on October 13, 2022. The Advisory Committee presented several information items and no action items. The Advisory Committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 134.

Information Items

Amicus Disclosures. Judge Bybee reported on this item. He described it as perhaps the highest-profile matter before the Advisory Committee. There has been a long exchange of correspondence between the Clerk of the Supreme Court and the chairs of the Senate and House Judiciary Committees over amicus practice, and, during the previous Congress, legislation was introduced in each house that would regulate amicus practice. The Supreme Court and its Clerk referred the matter to the Advisory Committee. The Advisory Committee has made some progress, but it seeks input from the Standing Committee on some important policy questions.

Judge Bybee directed the Standing Committee’s attention to draft Rules 29(c)(3) and (c)(4) as set out in the agenda book; he noted that this was a working draft, not yet a proposal. Draft Rule 29(c)(3) would require an amicus to disclose any party that has a majority interest in or control of the amicus. Draft Rule 29(c)(4) would require the amicus to disclose any party that has contributed 25% or more of the amicus’s gross annual revenue over the last 12 months. The Advisory Committee sought input on two questions: (1) Is 25% the right number? (2) Is the last 12 months the right lookback period, or should it be the previous calendar year? As to question (1), at the October 2022 Advisory Committee meeting, some members had expressed concern that, if the rule set one particular percentage—such as 25%—as the trigger for disclosure, then where a party’s contributions were anywhere above that single threshold the amicus might not file a brief out of concern that the court would assign the brief little weight. An alternative suggestion was to require an amicus to disclose that the contribution percentage lay within some “band” of amounts—such as from 20% to 30%, 30% to 40%, and so on.

A practitioner member wondered whether there was a need to regulate this area. However, given that Congress has expressed an interest in the topic, the member suggested that perhaps it did make sense for the committees to consider possible rule amendments. The member thought 25% was a reasonable number because, in the member’s experience, that contribution level would be highly unusual and could indicate that the amicus is acting as a front for a party. The member also thought it more administratively feasible to use the last calendar year than the last 12 months.

Judge Bates asked whether the current draft Rule 29(c)(3) would capture a situation in which a party and the party’s counsel each had a one-third interest in the amicus. Should the rule capture that situation? The draft wording—“whether a party or its counsel has (or two or more

parties or their counsel collectively have) a majority ownership interest”—addresses a situation in which “two or more parties or their counsel” have a collective interest, but it is not clear if it captures situations in which a single party and its counsel have a collective interest. Should “a party or its counsel has” be “a party and/or its counsel have”?

Professor Garner opined that a hard contribution threshold might encourage parties to structure their contributions in such a way as to avoid meeting the threshold. He suggested that the Advisory Committee instead consider a rule requiring disclosure of “the extent to which” a party has contributed to the amicus. The court could decide for itself what contribution amount was de minimis. And an organization that goes to the trouble of preparing an amicus brief would be able to answer the contribution question with a fair degree of certainty.

Professor Hartnett responded that the Advisory Committee had some concern about requiring that amount of precision. Instead, requiring disclosure within a band of contribution percentages tried to address the structuring issue. The Advisory Committee also wanted to build into the rule a floor beneath which amici need not worry about having to make a disclosure.

Judge Bates noted that the rule could also be tweaked to require disclosure of a precise percentage above a floor. Those below that floor would not have to make a disclosure.

A practitioner member commented on the general view of practitioners in this area: If an amicus must make a disclosure, then its brief will probably not get much attention. A rule that requires a disclosure suggests that a brief containing that disclosure is tainted in some way. In many of these situations, an amicus would likely choose not to file a brief rather than to make a disclosure. So there should almost certainly be a floor before disclosures are required. There is also a First Amendment interest in this area (the member noted the decision in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021))—and whatever rule is adopted must be examined through that lens. That interest further weighs in favor of a floor below which no disclosure is required. Because the disclosure requirement will change the dynamics of amicus filings, the calculus on whether and how to amend the rule should consider whether the benefits of disclosure outweigh the harm of deterring amicus filings.

Judge Bates agreed that the goal is not to dissuade the filing of amicus briefs but rather to provide information to the courts and public with respect to those who file these briefs.

A judge member had difficulty recalling any amicus briefs as to which it was not obvious who was filing the brief and as to which more information about the amicus would have made a difference. It is the brief’s contents that matter, not its author. If other appellate judges feel similarly, then the member would not worry about trying to craft a rule that would require complete disclosure of all details about the amicus.

Judge Bybee noted that one concern is that parties are evading their own page limits by inserting their arguments into amicus filings. The judge member suggested skepticism about the gravity of that particular concern. He conceded that Congress’s interest in the amicus-disclosure issue weighs in favor of careful consideration of a possible rule amendment. But, he suggested, if the courts of appeals generally feel that they are not being hoodwinked by amici or deluded into believing something about which they otherwise would have been more suspicious had amici’s

relationships with the parties been apparent, that should temper the rulemakers' zeal for pursuing an all-encompassing, exhaustive disclosure requirement.

Another judge member disclaimed knowledge as to whether the 25% figure was "right," but stated that this figure was "not wrong." The member suggested that searching for the precisely "right" number was not worthwhile. Responding to Professor Garner's prior suggestion, this member warned against building into the rule any subjectivity that would allow a court to decide whether to require disclosure based on who the participants are. If a proposal is adopted, it should use an objective number rather than a moving target. As to the lookback period, the member suggested that the prior fiscal or calendar year would be more administrable than a moving 12-month period; the latter would require a lot of research and calculation.

A practitioner member acknowledged the focus on drawing a line between helpful disclosure requirements and unhelpful, unwarranted disclosure requirements. But the member also wondered whether a lower threshold might normalize disclosure, making it not such a negative thing. A lower threshold like 5% or 10% would generate a lot more disclosures, but such a disclosure would not necessarily discredit a brief as much as a disclosure in response to a higher threshold that is only infrequently met.

A judge member thought that a threshold above 25% would be too high. And if the threshold were set higher than 25%, a disclosure would really mark the amicus brief because it would be extremely unusual. The member also suggested that judges' views on the optimal level of disclosure are not the only consideration. Members of the public may not have the same information or reactions that judges do. Part of the value of the disclosures was to let the public know who is responsible for filing amicus briefs. This transparency concern is particularly strong when amicus filings are cited by judges as persuasive in their decisionmaking.

A practitioner member expressed doubt about the idea of normalizing disclosures. The purpose of a disclosure is to flag something relevant about a brief. The member questioned whether lowering the threshold would serve that purpose. Instead, the goal should be to identify a category of briefs to treat with caution.

Another practitioner member thought that more regulation of amicus briefs was not a good idea. If a relevant industry group files an amicus brief in a case on appeal, that tells the court that the industry is concerned about some issue—it does not matter only to the parties. The rule should encourage filing amicus briefs. Judges can pay attention to what they want to in those briefs. The member thought that 25% was the right threshold because it is objective and because, if a party is paying for 25% or more of the amicus organization's cost, it is largely a party-controlled organization. As to most big organizations that routinely file amicus briefs, the number would probably be 5% or less. The member also agreed that required disclosures may chill the filing of amicus briefs.

Professor Garner suggested that a rule requiring disclosure of "the extent to which" a party has contributed to the amicus could be combined with a provision stating a presumption that any contribution over 25% would be excessive. Judge Bates noted that this presumption would change the thrust of the rule by expressly stating how the court would view the brief. Judge Bybee did not think the Advisory Committee had been going in that direction; he could not remember a judge

having said anything like, “if the party contributes over 50%, I won’t consider the brief.” Instead, some judges have suggested that it is important to have more information, not less. Professor Hartnett agreed that the rule has governed only when disclosure is required; discounting a brief’s weight has not been addressed in the rule’s text. This kind of modification would significantly change how the rule operates.

Professor Hartnett sought more comment on the banding idea. He thought it might mitigate the risk of using a single number—if that number is too high, it works like an on–off switch; if too low, it does not give enough information because a court cannot tell how far the contribution amount is above the threshold. Banding would provide more information than a single threshold, while not requiring the same degree of precise calculation as the “extent to which” option. Would this idea work as a compromise?

Judge Bates agreed that using banding would require more information from an amicus than would a single percent threshold above which disclosure is required.

A practitioner member stressed that the disclosure requirement would need to include a floor beneath which disclosure is not required. This member suggested that, once there is a floor, having banding in addition would not do much work, especially if the floor is as high as 25%.

Another practitioner member liked the banding approach because it would provide more information to the courts and public. The question would then be where to start and end each band. More disclosure is better, and so long as it remains up to the judges to decide at what level a disclosure matters, then the rule introduces no presumption of taint.

A third practitioner member remarked that a member of a big amicus organization generally must undergo a rigorous application process before the organization will sign onto an amicus brief for that member. That process is useful because courts can then take that organization’s reputation as a signal—if it signs a brief, then the issue is one that matters to more than just the litigants. The member liked the 25% threshold because it indicates that the amicus is not really a broad-based group that represents the industry. Lowering the threshold defeats the purpose of having amicus briefs and introduces a false perception of taint if there is a disclosure of a low percentage. The lower threshold would lead to too much micromanaging of amici. The member also expressed concern that a lower threshold could disadvantage plaintiff-side amici because bigger organizations tend to be on the defense side. And one can look at the website of a large organization to see if a party is a member.

An academic member expressed a preference for keeping the rule as simple as possible. That militates in favor of a single number. The member liked 25%—it is high enough that if an amicus is above that threshold, it will raise eyebrows. The difficulty with banding is that compliance could be complicated, particularly if there is no lower bound. Without a lower bound, if a party had bought a single table at a fundraiser for the amicus, the amicus would then have to divide the value of the contribution associated with buying that table by the amicus’s overall revenue in order to determine the percentage value of its contribution. A disclosure requirement without a lower bound would discourage potential amici from filing. It would signal that courts do not want to hear their voices.

The conversation then turned to draft Rule 29(e). Judge Bybee introduced this draft rule, which appeared on page 137 of the agenda book. The draft rule would require an amicus to disclose any nonparty that contributed over \$1,000 to the amicus with the intent to fund the amicus brief. Judge Bybee asked two questions: (1) Is the \$1,000 figure the right threshold? This figure was meant to exclude disclosures for crowdfunded briefs. (2) Should the draft rule contain provisions like those in draft Rules 29(c)(3) and (c)(4), requiring disclosures of contributions even if they are not earmarked for funding an amicus brief?

Judge Bates remarked that a \$1,000 cutoff, although high enough to address the crowdfunding issue, seems very low.

A judge member thought that this draft rule would require amici to make greater disclosures than parties themselves must. Parties may obtain funding from undisclosed sources, raising issues about third-party litigation funding. The draft rule overemphasizes the importance of amicus briefs and mistakenly suggests that courts are more concerned with who is speaking than with the merits of the argument. The member also thought that this is a policy question that should be deferred until the discussion of third-party litigation funding of parties; in the meantime, this member suggested, subpart (e) should be deleted from the draft. Professor Hartnett observed that the current rule requires disclosure if someone other than the amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. The member acknowledged that fact, but argued that proposed subdivision (e) would heighten the issue.

Judge Bates remarked that there may be greater First Amendment issues in requiring disclosure of nonparty contributions than in requiring disclosure of party contributions.

A practitioner member stated that adopting draft Rule 29(e) would be a mistake. It would open up a hornet's nest concerning intentionality. How can you determine whether someone intended to fund a brief? Suppose an organization told potential donors the topics of ten amicus briefs it intended to file over the coming year. Or suppose that a donor bought a ticket to a dinner at which a representative of the organization discussed some of its amicus filings. The member also thought that \$1,000 was a low threshold.

Another practitioner member commented that the innovation in draft Rule 29(e) is really about contributions by members of amicus organizations—there is already a disclosure requirement as to contributions by nonmembers. The member differentiated two types of amicus organizations: larger organizations with annual budgets that include a chunk of money for amicus briefs, and organizations (typically smaller) that “pass the hat” to fund a particular amicus brief. Draft Rule 29(e), this member suggested, would unfairly burden such smaller organizations by requiring them to make disclosures, whereas dues payments probably would not have to be disclosed. Draft Rule 29(e) would make it harder for those smaller amici to file briefs.

A judge member thought that the draft rule could lead to an escalation of corporate screens and shielding to evade required disclosures. A would-be funder might set up an LLC to make the donation; would the rule also have to require disclosure of the LLC's funding? This judge sees briefs from a number of amici for which the funding is unknown. The draft rule aims for more disclosure than is currently required for dark-money contributions to political campaigns. There is a public interest in disclosure, but there are practical limitations on what the committees can do.

The member cautioned against increasing the complexity of the disclosure scheme (for example, with banding)—such new hurdles could be leapt over as easily as the current ones.

A practitioner member supported omitting draft Rule 29(e). Congress, this member suggested, is concerned about parties, not nonparties. Nonparties do not implicate the same concerns. The member also noted that, under the current Rule (as well as under draft Rule 29(c)(2)), if a party contributes any money intended to fund an amicus brief, the fact of the contribution must be disclosed.

Judge Bates asked why, in draft Rule 29(d), the language is limited to only a *party's* awareness. Draft Rule 29(c) is worded in terms of *party or counsel*; why should 29(d) be different? Judge Bybee agreed with that wording change and, more generally, thanked the Standing Committee for its input.

Rule 39 (Costs). Judge Bybee briefly covered this and the remaining items. The Supreme Court suggested in *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628, 1638 (2021), that “the current Rules . . . could specify more clearly the procedure that . . . a party should follow” to bring its arguments about costs to the court of appeals. The real problem in this situation is a narrow one that is nevertheless important in some big cases. It involves the disclosure to parties of the consequences for costs on appeal if a supersedeas bond is filed or another means of preserving rights pending appeal is used. A subcommittee is currently working on this issue. It may be useful for the Appellate Rules Committee to coordinate with the Civil Rules Committee to see whether the Civil Rules might also require changes.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis (“IFP”)). Form 4 concerns the disclosures required of a party seeking IFP status on appeal. The Advisory Committee has tried to simplify the form. Many of the circuits have ignored the form for years and have their own forms. The Advisory Committee is not purporting to change that fact, only to simplify the current national form. Also, the Supreme Court has incorporated the form by reference in Supreme Court Rule 39.1, so it would be advisable to ask if the Court has any input on changing the form.

Appellate Rule 6 (Appeal in a Bankruptcy Case) and Direct Appeals in Bankruptcy. Judge Bybee adverted briefly to this project, which dovetails with the Bankruptcy Rules Committee’s project (discussed later in the meeting) to amend Bankruptcy Rule 8006(g) to clarify that any party may request permission to appeal directly from the bankruptcy court to the court of appeals. He noted that the Appellate and Bankruptcy Rules Committees are coordinating their work on Bankruptcy Rule 8006(g) and Appellate Rule 6.

Striking Amicus Briefs; Identifying Triggering Person. Rule 29(a)(2) allows a court to refuse to file or to strike an amicus brief that would lead to a judge’s disqualification. A suggestion was made to modify this rule to require the court to identify the amicus or counsel who would have triggered a disqualification. After extensive discussion, the Advisory Committee removed this item from its agenda.

Appeals in Consolidated Cases. A suggestion to amend Rule 42 arose following *Hall v. Hall*, 138 S. Ct. 1118 (2018). After thorough discussion, the Advisory Committee removed this item from its agenda.

Judge Bates asked for comments on the other information items outlined in the Advisory Committee’s report. Hearing none, he invited the Bankruptcy Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met in Washington, D.C., on September 15, 2022. The Advisory Committee presented one action item and three information items. The Advisory Committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 175.

After Judge Connelly recognized the work of Judge Dennis Dow, the Advisory Committee’s previous chair, the committee began its report.

Action Item

Publication of Proposed Amendment to Official Form 410 (Proof of Claim). Judge Connelly reported on this item. The Advisory Committee sought the Standing Committee’s approval to publish for public comment an amendment to Official Form 410. A creditor must file this form for the creditor’s claim to be recognized in a bankruptcy case. Official Form 410 contains a field for a uniform claim identifier (“UCI”), which a creditor may fill in for electronic payments in Chapter 13 cases. The Advisory Committee has proposed a revision to remove both the specification of electronic payments and the reference to Chapter 13 cases, allowing a creditor to list a UCI for paper checks or electronic payments in any bankruptcy case.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee unanimously approved the publication for public comment of the proposed amendment to Official Form 410.**

Information Items

Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals). Professor Bartell reported on this item. As amended in 2005, 28 U.S.C. § 158 provides for direct appeals of final judgments, orders, or decrees from the bankruptcy court directly to the court of appeals upon appropriate certification and subject to the court of appeals’ discretion to hear the appeal. Bankruptcy Rule 8006(g) requires that, within 30 days after certification, “a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with” Appellate Rule 6(c). The bankruptcy rule is in the passive voice and does not specify who may file that request for permission. Bankruptcy Judge A. Benjamin Goldgar proposed an amendment to clarify what he—and the Advisory Committee—believed to be the meaning of the rule: any party, not just the appellant, may file the request for permission.

At Professor Struve’s request, the Bankruptcy and Appellate Rules Committees have worked together to draft amendments to ensure that Rule 8006(g) is compatible with Appellate

Rule 6(c). The Bankruptcy Rules Committee has approved an amendment to Rule 8006(g) that was the product of that collaborative effort. Because the Appellate Rules Committee has created a subcommittee to consider related amendments to Appellate Rule 6(c), the Bankruptcy Rules Committee will wait to seek approval for publication of amended Rule 8006(g) until publication is also sought for an amendment to the appellate rule.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). Professor Gibson reported on this item. Bankruptcy Rule 3002.1 requires the holder of a mortgage claim against a Chapter 13 debtor to provide certain information during the bankruptcy case. This information lets the debtor and the trustee stay up-to-date on mortgage payments. Significant proposed amendments to Rule 3002.1 were published in August 2021, and the Advisory Committee received very valuable comments. The Advisory Committee has improved the proposal in response to those comments. Because the post-publication changes are substantial, re-publication would be helpful. The Advisory Committee still needs to review comments on proposed amendments to related forms. The committee will likely seek approval to republish the amended rule and related forms at the Standing Committee's June 2023 meeting.

Electronic Filing by Self-Represented Litigants. Professor Gibson reported on this item as well. She agreed with Professor Struve that the Advisory Committee had a positive response to the prospect of expanding electronic filing by self-represented litigants. Professor Gibson noted her surprise at this response, given that bankruptcy courts are currently the least likely to allow self-represented litigants to file electronically. She concurred with Professor Struve that there were a couple of committee members who raised concerns, particularly about improper filings. Other committee members noted that self-represented litigants could make improper filings even in paper form. The Advisory Committee needs to think about the serious privacy concerns raised earlier. But, overall, the Advisory Committee supported looking at how to extend electronic-filing access to self-represented litigants in coordination with the other Advisory Committees.

Judge Bates opened the floor to questions or comments regarding the Advisory Committee's report. Hearing none, he invited the Civil Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus, Bradt, and Cooper presented the report of the Advisory Committee on Civil Rules, which last met in Washington, D.C., on October 12, 2022. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 203.

After Judge Rosenberg recognized the work of Judge Robert Dow, the Advisory Committee's previous chair, and welcomed Professor Bradt as the new Associate Reporter, the committee began its report.

Action Items

Publication of Proposed Amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing

Discovery). Judge Rosenberg reported on this item. The Advisory Committee sought the Standing Committee’s approval of proposed amendments to Rules 16(b)(3) and 26(f) for publication for public comment. These amendments would require the parties to focus at the outset of litigation on the best timing and method for compliance with Rule 26(b)(5)(A)’s privilege-log requirement and to apprise the court of the proposed timing and method. It can be onerous to create and produce a privilege log that identifies each individual document withheld on privilege grounds. The original submissions advocated revising the rule to call for the identification of withheld materials by category rather than identifying individual documents. The Advisory Committee examined that proposal as well as competing arguments for logging individual documents. Judge Rosenberg noted that there is a divide between the views of “requesting” and “producing” parties. The Advisory Committee concluded that the best resolution was to direct the parties to address the question in their Rule 26(f) conference, which would give the parties the greatest flexibility to tailor a privilege-log solution appropriate for their case. Thus, the proposed amendment to Rule 26(f)(3)(D) would add “the timing and method for complying with Rule 26(b)(5)(A)” to the list of topics to be covered in the proposed discovery plan. The proposed amendment to Rule 16(b)(3)(B)(iv) would make a similar addition to the list of permitted contents of a Rule 16(b) scheduling order. The proposed committee notes to the amendments stress the importance of requiring discussion early in the litigation in order to avoid later problems. The committee note to the Rule 26 amendment also references the discussion (in the 1993 committee note to Rule 26(b)(5)(A)) of the Rule’s flexible approach.

Professor Cooper added that the privilege-log problem stems from Rule 26(b)(5)(A)’s text, which requires the withholding party to “describe the nature of” the items withheld “in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” That is a beautiful statement of the rule’s purpose but it gives no guidance on how to comply. The Civil Rules Committee’s Discovery Subcommittee acknowledged the complex policy concerns at play and it consulted widely and at length. The picture that emerged is one in which the producing parties can face significant compliance costs, while the receiving parties are concerned about overdesignation and that the descriptions they receive do not enable them to make informed choices about whether to challenge an assertion of privilege. In addition, problems may surface belatedly because the privilege log is provided late in the discovery process. The subcommittee realized that there would be no easy prescription for every case, and it concluded that parties are in the best position to solve the problem by working together in good faith. The proposed amendment adds only a few words, but it is intended to start a very important process.

Professor Marcus noted that the Advisory Committee has heard from many commenters. The amendment had evolved quite a bit and was now ready for public comment.

Judge Bates observed that, although the changes to the rules’ text are modest, the proposed amendments are accompanied by three or four pages of committee notes. Some of that note discussion is historical, and some is explanatory, but some looks like best-practices guidance. He wondered whether this was unusual or a matter of concern.

Professor Marcus acknowledged the importance of that concern. He noted that this is a concise change to a rule that has a large body of contention surrounding it. Because the proposed amendment asks parties to discuss something that is not defined in the rule with great precision, it seems helpful for the committee note to provide some prompts for that discussion. Public comment

often focuses on the committee notes, and such comment might prompt the Advisory Committee to revise the note language after publication. But it seems more desirable to put some guidance into the proposed note rather than to provide a Delphic rule with no guidance.

Professor Cooper added that this issue was considered at the Advisory Committee meeting. The practice on committee notes has varied over time. For example, the 1970 committee notes to the discovery-rule amendments would put a treatise to modest shame, and served a good purpose at the time. And courts of appeals have said that committee notes can provide useful guidance for interpreting the rules. The note is subject to polishing, and public reaction may stimulate and help focus that polishing. It is challenging at best to improve on the present text of Rule 26(b)(5)(A)—how does one express in rule text that what may work in one case may not work in another? The note grew to these proportions in order to capture how the parties might try to alleviate problems that have emerged in practice but that are too varied and complex to incorporate into the rule's text.

Judge Bates expressed concern that, even if the note spurs more comments, because this is a contentious issue, the comments would reflect competing views of what the note should contain. Would the Advisory Committee then intend to resolve those competing views in deciding what goes in the committee note in terms of what is or isn't the best practice? Publication could make this process more complex, especially with so many bits of best-practice advice offered on a subject that is important to many litigants and counsel.

A practitioner member thought that the rule text was elegant and salutary and also noted appreciation of the existing rule's cross-reference to Evidence Rule 502. The long committee note would create the attention that the Advisory Committee wants, would focus practitioners on how to make the process work, and would address the existing problem of privilege logs coming late in the discovery process.

A judge member agreed with Judge Bates and stated that his initial reaction had been that the Standing Committee was being asked to approve a committee note, not a rule change. But then, the member said, he perceived a linkage between the rule text and the committee note. Because the rule was intended to be flexible, not one-size-fits-all, that is why it should be on the agenda early in the case. But the committee note could be greatly reduced to something like: "This was not intended to be an inflexible, one-size-fits-all rule. *See* the 1993 committee notes. This issue should be discussed early on in litigation, hence the proposed change." That might more appropriately focus the public comments.

Another practitioner member thought that the proposed amendment to the rule's text was an excellent addition that would treat both plaintiffs and defendants fairly. The committee note serves a purpose and is evenhandedly written. The note would help parties in privilege-log negotiations to push back against a view that all communications must be logged. A short note runs the risk of accomplishing little. This longer note would allow for good discussion between parties in order to alleviate costs and burdens.

A third practitioner member liked the rule change itself but agreed that the committee note was on the long side. The note is evenhanded but reads like something that would be better found in a treatise, not a committee note. There would be some benefit to stripping some examples out

of the note and allowing litigants and courts to develop the practice. Over time, a treatise would capture the best practices.

Professor Coquillette congratulated the Advisory Committee on an excellent rule, but agreed that the notes were too long and contained too much practical advice. The point is often made that lawyers look to treatises for practical advice. But those sources are behind paywalls, and some lawyers do not even read committee notes. So substantive changes should be in the rule text. Professor Coquillette observed that the committee notes could be revised after public comment.

A judge member suggested striking language in the draft committee note to the amendment to Rule 16(b)(3). Specifically, the clause “these amendments permit the court to provide constructive involvement early in the case” (agenda book page 211, lines 265–66) is inaccurate because a court does not need the rule’s permission to be involved in discussions about complying with the privilege-log requirement. Professor Marcus asked the member whether the word “enable” would be better than “permit.” The member thought that “enable” might still carry the implication that the court does not otherwise have the authority to manage the case by talking to counsel about what should be in a privilege log. Another judge member suggested replacing “permit” with “acknowledge the ability of.”

A practitioner member offered suggestions for shortening the committee note to the Rule 26(f) amendment. The initial paragraphs were background. The paragraph starting on page 209 at line 200 recounted privilege-log practice. The next paragraph listed some examples that were probably worth having in the note. The paragraph discussing technology was useful to have in the note. Then there were the paragraphs about timing of privilege logs. The current draft’s ten to twelve paragraphs, this member suggested, could probably be reduced to about four.

Judge Bates asked the representatives of the Advisory Committee whether they wanted to proceed with seeking the Standing Committee’s approval for publication or to return to the Advisory Committee with the Standing Committee’s feedback first. After conferring, Judge Rosenberg announced that she and the reporters would return to the Advisory Committee and the appropriate subcommittee with the Standing Committee’s comments. The Advisory Committee would bring the proposed amendment back to the Standing Committee, with any warranted changes, at its June meeting. **No further action was taken on this item at this time.**

Appeals in Consolidated Cases. Judge Rosenberg reported on this item. This suggestion arose from *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018), in which the Supreme Court observed that if its holding regarding finality of judgments in actions consolidated under Rule 42(a) “were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly.” After extensive discussion and a thorough FJC study by Dr. Emery Lee, a joint subcommittee of the Appellate and Civil Rules Committees found that there was not a sufficient problem to warrant a rule amendment—that is, litigants were not missing the deadline by which to appeal a final judgment in a consolidated action. The item was therefore removed from the joint subcommittee’s and the Civil Rules Committee’s agenda.

Judge Rosenberg recommended that the joint subcommittee be dissolved. The Appellate Rules Committee’s representatives concurred. Judge Bates noted that he was unsure whether the

joint subcommittee had been formed by a vote of the Standing Committee. Hearing no questions or comments about this item from the Standing Committee, Judge Bates asked whether anyone objected to removing the *Hall v. Hall* issue from ongoing review by the joint subcommittee and the Advisory Committees and dissolving the joint subcommittee. **Without objection, the joint subcommittee was dissolved.**

Presumptive Deadline for Electronic Filing. Judge Rosenberg briefly addressed this item, noting that the Advisory Committee had recommended that the proposal be removed from its agenda. But, based on Judge Bates’s comments from earlier in the meeting, the joint subcommittee would reconsider the suggestion. **No further action was taken on this item at this time.**

Information Items

Multidistrict Litigation (“MDL”). Judge Rosenberg introduced this item by remarking that the MDL Subcommittee had first been formed in 2018 in response to comments about how important MDLs had become. No decision has yet been made on whether to recommend a rule change addressing MDLs. The subcommittee has instead focused on the question: if there *were* a rule change, what would the best possible rule be? Every MDL is different, and that has been the guiding principle throughout the iteration of different proposals. The subcommittee has been mindful of the importance of flexibility and of the many factors that bear on MDLs. The subcommittee explored putting MDL provisions into Rules 16 and 26 before ultimately developing the idea for a new Rule 16.1.

There are two versions of the draft rule, currently called Alternatives 1 and 2. The Advisory Committee has not yet considered and discussed the feedback of participants at the transferee judges’ conference. Alternative 1 was well-received at the transferee judges’ conference by many of the same judges who did not support an MDL-specific rule change four years ago.

MDLs make up anywhere from one-third to one-half of the federal docket. There are many new transferee judges who need to be educated about these cases. These judges also appoint new attorneys to leadership in MDLs, and these attorneys need to have proper direction and expertise. The *Manual for Complex Litigation* is being updated, but even if it were already up-to-date, people always begin by looking at the rules. So there needs to be something about MDLs in the rules.

The draft rule is designed to maintain flexibility. It has a series of guiding principles or prompts. Some prompts will apply in a specific MDL, but others may not. A judge need not go through every point listed in the draft rule. The goal is to put these points on the radar of the judges and counsel so that they start active case management early on.

Professor Marcus remarked that input from the Standing Committee would be extremely valuable to the subcommittee, especially as to the list of topics set out in Alternative 1 on page 219 of the agenda book. Judge Rosenberg agreed that the subcommittee would welcome comments on both Alternative 1 and Alternative 2. The goal is to have a more refined version to take to the full Advisory Committee meeting in March and potentially to the Standing Committee for approval for publication in June.

Judge Bates opened the floor for comments and questions.

An academic member noted that the Standing Committee had previously debated whether guidance on MDLs should go in a rule or in some other resource. This member queried whether it might make sense to wait to see the update of the *Manual for Complex Litigation*. The member suggested that Alternative 1's long list looked more like something that would go in the *Manual* than like rule text. Alternative 2 looked more rule-like, but this member would be more comfortable adopting Alternative 2's more spare approach if more detailed guidance could be found elsewhere, such as in the *Manual*. The academic member also noted others' suggestions that the rulemakers address the question of authority for some of the things that judges have done in managing MDLs, and the member questioned whether either alternative draft tackled that issue.

Judge Bates remarked that the next edition of the *Manual* would be a substantial update and would take a long time to complete. Judge Cooke estimated that it would take two to three years, probably closer to three years. Judge Bates noted that, given the three-year timeline for rule changes, it would take about six years for anything like draft Rule 16.1 to come into effect if the committees awaited the new *Manual*.

Judge Rosenberg observed that the *Manual* is not a quick read, and not every judge has or needs to have a desk copy. But as to whether this is a best-practices or a rules issue, she agreed with former chair Judge Dow's emphasis on making sure to put things in the rules—not every lawyer or judge reads the *Manual* or other resources, but everyone looks at the rules.

A judge member stated that a rule along the lines of Rule 16.1 would be helpful to judges and expressed a preference for Alternative 1 because it provides the information a court would need without having to read through a whole manual. It gives the court a lot of ideas and factors to consider in managing the case. Alternative 2 is too broad and vague to be helpful for a first-time MDL judge. Addressing the bracketed items in Alternative 1, such as the reference to a common benefit fund, the member expressed support for including those items in order to spark thought about what needs to be discussed.

Regarding Alternative 1, another judge member asked how the report called for by the rule would address items 6 through 14 if items 1 through 5 had not yet been resolved. If it is unknown who is leadership counsel or what leadership counsel's authority is, who engages in the discussion of items 6 through 14? Judge Rosenberg responded that draft Rule 16.1(b) discusses the designation of coordinating counsel for the preconference meet-and-confer. Coordinating counsel will not necessarily become permanent leadership counsel. Interim coordinating counsel and the judge can identify issues on which the judge needs feedback. These decisions can be changed, perhaps when leadership counsel is appointed or there is a major development in the MDL. This is not uncommon, that decisions made by leadership counsel need to be changed along the way. The rule contemplates that court-appointed coordinating counsel will help with the meet-and-confer and reporting to the court at the first conference on the first 14 issues or any additional issues the court deems necessary. The judge member asked what happens if there is dissension on the plaintiff side. Can coordinating counsel commit to anything in items 6 through 14? What if plaintiffs' counsel is split 50/50 on those issues?

To answer this question, Judge Rosenberg asked a practitioner member to talk about that member's experience with the issue. The member commented that there have been several large MDLs in which the court has appointed interim coordinating counsel to get the lawyers talking to

each other and resolve or narrow the issues. In situations where there is not unanimity on one side on some procedural priority, coordinating counsel presents the differing views to the court in an organized fashion at the initial conference. That doesn't give coordinating counsel absolute authority to make decisions unless there is a consensus. The emphasis is on the organizational and coordinating functions—to let the court see the range of views and make decisions in an orderly way.

Professor Marcus commented that the rule lets the judge direct counsel to report about the topics listed on page 219 of the agenda book. That would help orient the judge to the case and focus the lawyers on things that matter, even if they do not agree. That is better than a free-for-all. And requiring the lawyers to address relevant issues early on could help to avoid situations where the judge makes decisions based on incomplete information and later comes to question them, as Judge Chhabria described concerning his experience with the *Roundup* case. It may also be sensible to soften the language in proposed Rule 16.1(d) on page 220 to make clear that the management order after the initial conference is subject to revision. Overall, the point is to give the judge guidance in overseeing the case.

A judge member expressed continuing skepticism. There is some merit to the question about the court's authority. But the member asked how often transferee courts are reversed for acting without authority. If there is not a problem, perhaps not so much work needs to be done on a solution. This judge noted that the choice between the two alternative drafts only arises if one is first persuaded that a rule is needed at all.

Judge Bates observed that there might have been an authority question in *In re Nat'l Prescription Opiate Litigation*, 976 F.3d 664 (6th Cir. 2020).

A practitioner member stated that he has a bias because his firm litigates many MDLs on the defense side. The member's sense is that the plaintiffs' bar thinks that the MDL system basically works okay, while the defense bar does not think it is working, at least not in the big pharmaceutical MDLs. Rather, the system leads to settlements of meritless cases for billions of dollars. It is difficult for the rulemakers to work in an environment like that, where some people are relatively happy with the system and some are not. Both alternatives, especially the longer Alternative 1, are really about the plaintiffs' side. They may be potentially helpful, but they do not speak to defense concerns. The primary defense concern is that large MDLs are not vehicles for consolidating existing cases so much as encouraging more cases to be filed. The language coming closest to speaking to defense-side concerns is on page 219 of the agenda book, lines 568–69, about creating an avenue for vetting. But the proposed language (“[w]hether the parties should be directed to exchange information about their claims and defenses at an early point in the proceedings”) was too agnostic. The member suggested considering deleting “whether the parties should be directed to” and starting with “exchange of information about”. At least from an efficiency standpoint and from the defense bar's perspective, vetting is important.

The member also commented that, in previous versions, there had been debate about whether the exchange should be of “information” or “information and evidence.” The member agreed that “evidence” seems awkward. But “information” is amorphous and may not be enough to determine whether cases in an MDL are meritorious. One suggestion is “exchange information

about the factual bases of their claims and defenses.” That gets at the “evidence” concept without using the word “evidence.”

Another practitioner member endorsed the idea of separating items 1 through 5 from items 6 through 13 in Alternative 1. This member expressed concern about the application of Alternative 1 before lead counsel is appointed, because then it would become an opportunity for would-be lead counsel to pontificate about the issues in items 6 through 13—that puts the cart before the horse. One of the most important things in an MDL is the appointment of lead counsel. The rules do not limit a judge’s considerations in making that appointment. Does the judge consider the size of the claim? Counsel’s experience level? The member has a bias toward the Private Securities Litigation Reform Act because it sets a process and criteria for appointing lead counsel. The member thought that transferee judges like that they can pick whom they want for lead counsel. The member predicted that this would become a controversy one day in a big MDL because there are no standards for that appointment. Perhaps a future Advisory Committee will add meat to that bone, but many of the topics listed in the current draft rule are obvious things that any competent MDL judge or defense counsel would want to consider.

A judge member thought that Alternative 1 is a particularly good framework to organize an MDL and indeed any complex case. The member suggested two big-picture additions. First, direct the parties in preparing their report and discussing the case to adhere to the principles of Civil Rule 1—just, speedy, and inexpensive dispositions. Counsel are not always aware of that rule. Second, there should be an emphasis on early determination of core factual issues—this might be early vetting—and core legal issues. Not necessarily dispositive legal issues, but core issues like a *Daubert* motion, an early motion in limine, or an early motion for summary judgment that will shape the law applicable to the case. Civil Rule 16(c)(2) concludes its long list of matters for consideration at a pretrial conference with “facilitating . . . the just, speedy, and inexpensive disposition of the action,” thus referencing Rule 1. But because that is so important in a complex case, the reference to Rule 1 should be at the outset of the new rule, followed by a direction to focus on core issues of fact and law.

Judge Bates asked what the Advisory Committee thinks about the issue of settlement. There are questions concerning the court’s role and authority, and settlement is a big issue in MDLs. Transferee judges historically have had different levels of involvement. Some think they have no authority to get involved. That is unlike class actions, where Rule 23 sets forth the judge’s very involved oversight role. For normal civil cases, Rule 16(c)(2) tells the judge to focus on settlement and to use special procedures to assist in settlements. The question is what the proposed rule says about settlements in MDLs. In Alternative 1 on page 219, at lines 557–58, there is a reference to addressing a possible resolution. In Alternative 2 on page 220, line 598, there is also a reference to possible resolution. What is the message being sent to the bar and bench if that is where settlement winds up in the rule, especially compared to the more fulsome requirement in Rule 23? It is important to write these rules for the less-experienced judges and practitioners.

A practitioner member thought that another provision could be added to deal specifically with settlement—assessing whether there is a method for a prompt resolution of the claims. Over the years, more would probably be added to the rule, but something specifically dealing with considerations of early resolution, and settlement generally, would certainly be worth listing. But the problem of attorney jousting before the appointment of leadership counsel will still arise.

Another practitioner member thought that different language could solve the sequencing issue. The language would state that not all the considerations should be considered or decided at one initial conference; rather, they should be addressed in a series of conferences. Experienced MDL judges know that case management is an ongoing, iterative process; a single pretrial order is not enough. This language could avoid some confusion about how many of the considerations in the rule need to be addressed at one time. It would tell the court that this is a menu of items and let the court determine which are the priority items for the first conference and which to address in an ongoing fashion.

The previous practitioner member reiterated that, unless leadership counsel is appointed early, it makes no sense to deal with the other topics. It would be helpful, especially to inexperienced judges, to make clear in the rule that the appointment of leadership counsel should be dealt with up front.

Judge Rosenberg remarked that the subcommittee spent a lot of time on the settlement issue. Transferee judges thought that—unlike class actions, which have unrepresented parties—judges did not and should not manage, oversee, or approve settlements in MDLs. Some lawyers who looked at the draft rule may have had similar reactions. The subcommittee ultimately decided to take out that language. Still, it is important for the MDL process to have integrity and transparency, and so the subcommittee considered how a judge could ensure the process has those qualities without having the authority to approve a settlement. The solution was to give the judge a more proactive role in all aspects of case management, including appointing leadership counsel, determining leadership counsel’s responsibilities, and having a regular reappointment process. Ensuring that the process is fair can promote trust in the outcome.

Judge Bates acknowledged the distinction between managing the process and reviewing the outcome, but suggested that the draft rule did not contain much guidance about what the judge should consider in appointing leadership counsel or about what other parties and counsel should be doing to create a process that will lead to a fair and just resolution of the claims.

Professor Marcus added that, with respect to settling individual claims asserted by claimants represented by other lawyers, appointment of leadership counsel is dicey. The subcommittee has given that scenario a lot of thought and discussion, including whether there could be a process by which a judge could “approve” the negotiation process for any settlements that come about. That is also dicey. On page 219 of the agenda book, in item 13, in brackets, another possibility is mentioned, which is to use a master to assist with possible resolution. Another question is: what happens if leadership counsel’s own cases are settled—must different leadership counsel be appointed? MDLs involve different situations from Rule 23(e), and there is a “third-rail” aspect to this subject, so it is very valuable to have the Standing Committee’s feedback while addressing it.

Judge Bates asked whether special masters have been widely used in managing and reaching settlements in MDLs. A practitioner member said yes, absolutely. In some of the biggest cases, special masters run the whole settlement process. Judge Bates asked if such a master reports to the court. A practitioner member gave an affirmative answer to this question, but remarked that these masters are not typically Rule 53 special masters. They are called “settlement masters” or “court-appointed mediators.” It is an ad hoc appointment in terms of the roles and duties, but those

duties do typically include reporting to the court. The extent to which the master can report to the court on the substance of the negotiations is usually worked out among the parties. In the *Opiate* MDL, there were Rule 53 appointments of special masters who ultimately became involved in mediation and settlement. In the *Volkswagen* MDL, Judge Breyer invented a position called “settlement master,” which was not based on Rule 53 but had many but not all of the same responsibilities and roles. Judge Breyer made the appointments after requesting input from the parties on whether to appoint a master and, if so, whom. The court need not follow the parties’ recommendations, but in the member’s experience, this topic is discussed with the parties and the court’s determinations do not come as a surprise.

Judge Bates thought that judges who appoint masters would communicate with them. Should the master’s reporting duty to the judge be one of the considerations under the rule?

Judge Rosenberg mentioned that the subcommittee had received feedback from some groups that did not like having the words “special master” in the draft rule. It might create a presumption that there should be a special master, even if not everyone wants one. This led to some discussion, and some thought it might be better to have the words “special master” in the rule so that the parties will talk about it, even if they disagree.

Judge Bates asked whether the rulemakers should be careful about referring to the appointment of a “special master.” Might the reference be viewed as authorizing something outside of Rule 53? He intended no criticism of what any judge has done in the MDL process, but he asked whether the rulemakers want to give, through a casual reference in item 13 of a laundry list, an imprimatur to the idea that a judge can say, “I want a settlement master. Rule 53 doesn’t fit, so I’m just going to create this role on my own.”

Judge Rosenberg responded that the subcommittee has discussed this topic but has not yet brought it to the full Advisory Committee. The subcommittee is working on tweaking the language in response to feedback on that issue and others. As another example, in line 570 of the report in the agenda book, there is a reference to a “master complaint.” The rules do not provide for a master complaint, but the Supreme Court has referred to master complaints, and so has the subcommittee. One piece of feedback was that the term should not be used. Does using it somehow give credibility to a form of complaint that the rules otherwise do not mention?

Judge Bates commented that one could go pretty far back in this line of thought. The rules do not authorize the appointment of leadership counsel, for example. There are a lot of things that may not have a specific basis in the existing rules.

A judge member noted that the draft rule does not make any reference to the transferor court. It rarely happens that the case is sent back, but the MDL framework does contemplate that the work of the transferee court ends at some point. An item could be added to suggest that the transferee court and lawyers should consider when a case should be sent back to the transferor court.

Professor Cooper commented that a suggestion had arisen that the rule should address remand. But it was unclear whether the suggestion meant addressing motions to remand to state court, in cases plaintiffs thought improperly removed, or remand to transferor courts.

The judge member thought that it sounds like there is a never-ending list of items that could be considered or called into question. At what point do we return to the concept of “first do no harm”? Is there a need for this rule? What is its usefulness?

Professor Marcus commented that there has been a decades-long debate about whether the transferor court, if a case goes back, can simply start from scratch and throw out what the transferee judge did with the case. Putting a time limit on transferee activities might produce some behaviors that should not be encouraged. Also, as Professor Cooper said, remand means two different things here. Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation (“JPML”) has authority to remand to the transferor court, but the JPML usually awaits a suggestion from the transferee judge that this would be desirable. The transferee judge cannot do this unilaterally.

Judge Bates commented that there are some things, not listed in the draft rules, that might occur later on before the transferee judge, particularly bellwether trials. If the draft rule is viewed as a continuing conference obligation, should it address other items, such as how to manage and sequence any bellwether proceedings?

Judge Rosenberg responded that bellwether management was not included because it is far along in the MDL process and might be outside the realistic scope of what can and should be discussed in the early conferences.

Professor Marcus added that there are also various views about whether bellwethers are useful. It is probably unwise to urge the judge to map out possible use of bellwethers at the start of an MDL. He predicted that any rule will say that, except for extremely simple and small MDLs, one conference is not enough, and the management plan must be revisited as things move forward. So the rule’s focus will probably be on the initial exercise, and the expectation will be that judges continue to oversee other events as they become timely. Bellwethers might be in that latter category.

Judge Rosenberg thanked the Standing Committee for its feedback.

Rule 41(a) (Dismissal of Actions). Judge Rosenberg reported on this item. The Advisory Committee formed a subcommittee to address a conflict about the scope of Rule 41(a)(1)(A), which allows a plaintiff to voluntarily dismiss without prejudice an “action” without obtaining a court order or the defendants’ consent. The subcommittee’s research showed that courts approach Rule 41 dismissals in different ways. The primary disagreement is whether Rule 41(a)(1)(A) requires dismissal of an entire action against all parties or whether it may be used to dismiss only certain claims or only claims against certain parties. The subcommittee has not reached a consensus on whether to pursue an amendment or what amendment to propose. An additional wrinkle is Rule 15, through which a plaintiff can amend a complaint to remove certain claims or defendants. The subcommittee is considering whether Rule 15 should be the vehicle by which a party should dismiss something short of the entire action.

Judge Bates remarked that this is a complex issue, and he solicited comments or feedback from the Standing Committee. Hearing none, Judge Rosenberg turned to the remainder of the report, and invited Professor Cooper to present the next item.

Rule 7.1 (Disclosure Statement). Professor Cooper addressed two suggestions made to the Advisory Committee about recusal disclosures. One suggestion, about “grandparent corporations,” contemplates a company that owns a stake in a second company, which in turn has a stake in a third company. If, say, Orange Julius is a party to an action, then the current rule requires it to disclose that Dairy Queen is its owner. But the rule does not require Orange Julius to disclose that Berkshire Hathaway owns Dairy Queen. So if the judge in the action owns shares of Berkshire Hathaway, that judge may not have notice of a potential financial interest in the case’s outcome. Should something be done to address this in the rule?

The other suggestion proposed a rule directing all parties and their counsel to consult the assigned judge’s publicly available financial disclosures. The parties would either flag any interests that may raise a recusal issue or certify that they have checked and do not know of any. The Advisory Committee has not really dived into this. Rule 7.1 covers only nongovernmental corporate parties. There are all sorts of business organizations with complicated ownership structures that may involve interests a judge is not aware of. Should the Advisory Committee just say it is too complicated to try to go further than corporations?

In response to a question posed by Professor Cooper, Judge Bates suggested that, unless the Appellate or Bankruptcy Rules Committees feel otherwise, it makes sense for the Civil Rules Committee to take the lead in considering proposed amendments to Rule 7.1.

Other Items Considered. At this point, Judge Bates opened the floor for any remaining issues raised in the Civil Rules Committee’s report. He asked a question about service awards for class-action representatives. Does the Advisory Committee view this issue as a matter of procedure or of substantive law? Judge Rosenberg responded that the issue was not a subject of much discussion at the last Advisory Committee meeting. Professor Marcus thought that there was no need to worry about the issue yet. There was a pending certiorari petition on the issue, so there might be more to learn by waiting.

Professor Marcus turned to Rule 45, about which a question had arisen: what does it mean to “deliver” a subpoena? By hand? By email? It may be that, in civil litigation, counsel can work this out. Is it worth trying to devise specifics on a method of delivery?

A judge member drew attention to the information item on standards and procedures for deciding in forma pauperis (“IFP”) status, and suggested that that item warranted action. The member remarked that a *Yale Law Journal* article had described disparate practices on IFP status, which raised important issues of access to justice. The Appellate Rules Committee is looking at a standardized form for IFP status on appeal. The member suggested that someone should review this—if not the rulemakers, then a different committee of the Judicial Conference.

Judge Bates commented that the current view of the Advisory Committee was that it was not going to take any specific action on standards for IFP status. If the Rules Committees are not going to look further at this, should they encourage another Judicial Conference committee to do so? The only other logical Judicial Conference committee is CACM. Judge Rosenberg remarked that there is an Administrative Office pro se working group that may also be appropriate. Judge Bates suggested that perhaps the rulemakers could communicate to these entities that the Advisory Committee is not going to do anything with the topic for now but views it as an important question.

Another judge member informally asked the Advisory Committee to consider whether there is a need to address the Supreme Court decision in *Kemp v. United States*, 142 S. Ct. 1856 (2022), which held that a judge’s error of law is a “mistake” under Rule 60(b).

Items Removed from Agenda. Judge Rosenberg concluded by noting items removed from the Advisory Committee’s agenda. These included proposed amendments to Rule 63 (Successor Judge), Rule 17(a) (Real Party in Interest) and Rule 17(c) (Minor or Incompetent Person). There were no questions or comments from the Standing Committee on these items.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met in Phoenix, Arizona, on October 27, 2022. The Advisory Committee presented two information items and no action items. The Advisory Committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 297.

Information Items

Rule 49.1 (Privacy Protection for Filings Made with the Court). Judge Dever reported on this item. He explained that the Advisory Committee had considered and decided to remove from its agenda a proposal by Judge Furman regarding Rule 49.1. The rule’s committee note refers to 2004 guidance from CACM that certain documents should remain confidential and not be made part of the public record. In *United States v. Avenatti*, 550 F. Supp. 3d 36 (S.D.N.Y. 2021), Judge Furman held that the common law and the First Amendment required appropriate disclosure of a defendant’s CJA Form 23 and accompanying affidavit. Judge Furman suggested amending Rule 49.1(d) and removing the committee note’s reference to the CACM guidance. The Advisory Committee concluded that the original committee note did not produce confusion about the constitutional or common-law rights of access, and it also hesitated to venture into potentially substantive issues through rule amendments.

Rule 17 (Subpoena). Judge Dever reported on this item as well. The Advisory Committee is analyzing a proposal by the New York City Bar to amend Rule 17 to allow defendants to more easily subpoena third parties for documents. As part of this process, the Advisory Committee has appointed a subcommittee, chaired by Judge Nguyen, to gather information about how federal courts apply the rule and how states handle these kinds of subpoenas. The goal is to determine whether there is a problem that warrants a rule change. There have been two Supreme Court cases interpreting the rule, both fairly atypical. The subcommittee has heard from a wide variety of experienced practitioners from the defense bar and the Department of Justice. The process is still in its early stages, and the Advisory Committee will continue to study these issues.

Judge Bates commented that the miniconference on the Rule 17 issue at the most recent Advisory Committee meeting had been very informative and had elicited several different perspectives that should be useful in the committee’s ongoing study.

Judge Bates opened the floor to questions or comments regarding the Advisory Committee’s report. Hearing none, he invited the Evidence Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met in Phoenix, Arizona, on October 28, 2022. The Advisory Committee presented two information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 365.

Information Items

Rule 611 (Juror Questions for Witnesses). Judge Schiltz reported on this item. This proposal would add a new subsection (e) to Rule 611 to create safeguards if jurors are permitted to ask questions at trial. The proposed amendment was presented to the Standing Committee at the June 2022 meeting. Most comments then had been about whether jury questioning is a good thing at all; some members thought that it was not and that putting safeguards in the rule would only encourage judges to allow jurors to ask questions. The proposed amendment was returned to the Advisory Committee for further study on the pros and cons of juror questioning.

The Advisory Committee held a miniconference on the issue at its fall 2022 meeting in Phoenix, Arizona, which was coincidental but fortunate in that Arizona is a pioneer among the states in allowing juror questioning. The panel included federal and state judges and civil and criminal practitioners, all with a great deal of experience with juror questioning. All of them expressed the view that juror questioning was a positive thing with many benefits and few risks. They all supported the proposed rule. It was difficult to find opponents—one whom Professor Capra did find could not attend the miniconference. Afterward, the Advisory Committee thoroughly discussed the proposal. It will continue to discuss the proposal at its spring 2023 meeting and decide whether to pursue it.

Judge Bates thought the miniconference was a helpful exercise. Although it was one-sided—as it necessarily would be in Arizona—it gave the committee many issues to consider.

Professor Capra reiterated that it was difficult to find someone in Arizona who had anything critical to say about the practice. There were a couple of comments—one from a judge at the miniconference who said that juror questioning sometimes took too much time, and another from a prosecutor who said that sometimes there is a risk that questioning can get out of hand because the lawyers cannot control the witness. But there was a swarm of positive factors indicating that juror questioning is not the problem that some think it would be. Most juror questions are only for clarification, not attempts to take over the case or to pick or fill holes in one party's case.

Judge Bates raised a concern about juror questions in criminal cases. The criminal process is not a pure search for the truth—the prosecutor has the burden to prove guilt. He suggested that a juror question may unfairly help the prosecution by revealing a problem in the case that the prosecutor can then address or cure.

A judge member asked whether there was anecdotal information from actual jurors, such as information from a questionnaire asking whether they liked being able to ask questions. Professor Capra said that the judges reported that they generally discuss the process with jurors

and that reviews had been positive. One juror told a judge that he was glad he could ask questions so that he did not have to look up answers on the internet. Another juror said that it was nice to be able to ask questions; even if the juror did not do so, the juror still became more involved in the process. Judge Schiltz also commented that there have been studies showing that jurors give overwhelmingly positive feedback about the ability to ask questions.

A practitioner member asked whether a 50-state (and multidistrict) survey had been done to learn about the prevalence of the practice. Professor Capra responded that there are some data on that question. The state of Washington has a juror-questioning practice. About 15% to 20% of trials in federal courts allow juror questioning. The member commented that it would be a good idea to identify federal district judges who allow the practice and to get their feedback. Judge Bates observed that it is a judge-by-judge question, not a court-by-court question. The practitioner member reiterated that the Advisory Committee should try to determine the frequency of the practice outside of Arizona and to talk with federal judges who have done juror questioning and find out its pros and cons. Judge Schiltz noted that the Advisory Committee had the same questions and had asked Professor Capra to gather more data on them. Professor King commented that the National Center for State Courts has collected and published data about juror questioning in the states.

Judge Bates asked whether the Advisory Committee had considered whether there is a difference between the civil and criminal contexts and whether a rule might address one but not the other. Professor Capra responded that any safeguard that applies in the civil context would have to apply to the criminal context as well. Perhaps criminal cases could have additional safeguards, but no safeguards would apply only to the civil context.

Judge Schiltz commented that there had been a study in the Ninth Circuit that recommended permitting juror questioning in civil cases but not criminal cases. Judge Bates suggested, however, that there was more recent work in the Ninth Circuit that was more positive about juror questions. And Professor Capra noted that the Ninth Circuit pattern criminal instructions now address juror questions.

Rule 611 (Illustrative Aids). Judge Schiltz reported on this item as well. The Advisory Committee held a second miniconference in Phoenix on illustrative aids. Despite the fact that illustrative aids are used in virtually every trial, there is confusion over the difference between demonstrative evidence, which is admitted into evidence, and illustrative aids, which are not admitted into evidence and are used only to help the jury understand evidence that has been admitted. There are variations among judges' practices about notice requirements to opposing counsel, whether illustrative aids can go to the jury room, and whether the aids become part of the record.

This amendment would add a new subsection (d) to govern the use of illustrative aids. It would clarify the distinction between illustrative aids and demonstrative evidence, require notice, prohibit illustrative aids from going to the jury room absent a court ruling and proper instruction, and require they be made part of the record so that they would be available to the appellate court.

The miniconference featured a large panel of judges, professors, and practitioners, most of whom opposed the proposed rule. Since then, the Advisory Committee has also received about 40

comments on the rule. Most opposition is to the notice requirement. Practitioners adamantly opposed having to show their illustrative aids to their opponents, especially aids they wanted to use at closing. There were also practical concerns. The category of illustrative aids spans a wide variety. For example, if an attorney writes something on a chart as a witness is testifying, how does the attorney give prior notice to opposing counsel of that contemporaneously created illustrative aid? The Advisory Committee did receive a comment in support of the rule—including the notice requirement—from the Federal Magistrate Judges Association. At its spring 2023 meeting, the Advisory Committee will review the comments and decide whether to move forward, perhaps after excising the notice requirement.

Judge Bates, noting that this miniconference had also been very helpful to the Advisory Committee, opened the floor for comment.

A practitioner member raised concerns about the notice requirement from the member's colleagues in trial practice. Attorneys persuade juries in two ways: by words and by visuals. When both are aligned, people retain far more information than when only one method is used. An attorney would never show the outline of an opening statement or witness exam to an opponent—it puts the attorney at a strategic disadvantage because opponents can change what they will say in response. Sharing an illustrative aid is similar. And the effect of taking the notice requirement out would be that there is a transcript, an objection, and a discussion—the rule would treat illustrative aids the same as attorneys' oral statements. Requiring notice would put more disclosure obligation on the visual than the oral. Professor Capra responded that he thinks the Advisory Committee was comfortable with deleting the notice requirement, and it is likely that that is what will happen.

The member also commented that, as illustrative aids are defined—helping the factfinder understand admitted evidence—a strict reading would mean that a PowerPoint presentation could not be used in an opening because no evidence will have been admitted yet. Professor Capra responded that the Advisory Committee needs to decide whether the rule applies to openings and closings. If the rule were to apply to openings and closings, one could revise proposed Rule 611(d)(1)'s “understand admitted evidence” to read “understand admitted evidence or argument.”

A judge member mentioned that, as a trial judge, the member would customarily make illustrative aids a part of the record. Now, after 20 years on the court of appeals, the member has had very little occasion to see an illustrative aid that is part of the trial record. The member continues to think that putting aids in the record is the better practice. The appellate courts are so far removed from the trial process that anything that gives them a better feel of what has been before the trier of fact is of great assistance.

A second practitioner member expressed support for rulemaking on this topic and commented on the centrality of slides in modern trials. The member is often concerned that the other side will do something crazy with illustrative aids in openings and closings. The member can sometimes work out an arrangement with the other side to mutually disclose trial materials. But sometimes things like closing slides are made the night before the closing argument—when is it practical to give notice for these aids? Putting aids in the record is an easy decision, as is making it clear that they do not go to jury deliberations. Notice might bother the member less than it does other lawyers because the member has seen people do crazy things at trial, and the damage is done even if the judge says something after the fact. The standard in proposed Rule 611(d)(1)(A)

("[substantially] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time") gives a judge enormous power over what can be done—that might be good or bad. The member does not know what the standard should be; maybe it should be the same as applies to oral advocacy in a closing argument.

A third practitioner member largely agreed with the previous member's comments. The solution is probably not one-size-fits-all, so the member is not sure what to do about a notice requirement. The second practitioner member suggested that you do not want to show aids to opposing counsel so far in advance that they can change what they will do in response, but you do want to make sure that there are not any slides that are so outrageous that the judge should know about them in advance.

Professor Capra asked whether the solution might be to take out the notice requirement from the text but to put in language that summarizes the two previous members' comments—there is no one-size-fits-all notice requirement, but notice is preferred because it allows judges to decide in advance rather than after the fact. But the rule would leave the determination for the judge to make.

The second practitioner member agreed with Professor Capra's suggestion. The "Wild West" view of trials is dangerous, so having some notice is a good idea. But it should not be so much notice that each side can redo its slides in response to the other's.

The third practitioner member noted that it is much harder to unsee than unhear something. That is a qualitative difference between what is said and shown. Judge Bates observed that it would be valuable for the Advisory Committee to consider preserving judges' discretion to deal with the notice issue.

The first practitioner member reiterated opposition to a notice requirement. Leaving the notice requirement out of the rule does not strip a federal judge of inherent authority. Also, some slides' power comes from not disclosing them in advance. If this rule applies to openings and closings, notice disincentivizes parties from using powerful slides during those key parts of trial.

Professor Capra responded that many judges already use Rule 611(a) to control visual demonstrations in openings and closings. It did not make sense to him to exclude openings and closings from a rule specific to illustrative aids because there would then be two rules covering essentially the same thing, one during trial and one during openings and closings.

Updates on Other Rules Published for Public Comment.

Judge Schiltz briefly mentioned that there are several other proposed rules that are published for comment. The Advisory Committee has received almost no comments on those rules.

Judge Bates called for any further comments from the Standing Committee. Hearing none, Judge Bates thanked the Advisory Committees, their members, reporters, and chairs for their hard work.

OTHER COMMITTEE BUSINESS

Action Item

Judiciary Strategic Planning. This was the last item on the meeting’s agenda. Judge Bates explained that the Standing Committee needed to give its recommendations to the Judicial Conference’s Executive Committee about the contents of the strategic plan and what should receive priority attention over the next two years. The recommendations were due within a week after the meeting. Judge Bates requested comment on the priorities in the strategic-planning memorandum beginning on page 402 of the agenda book. No comments were offered.

Judge Bates then sought the Standing Committee’s authorization to work with the Rules Committee Staff to give comments to the Executive Committee, on behalf of the Rules Committees, about the strategies and goals for the next two years. This procedure had been followed in the past, but he wanted to be sure that no one had any problem with it. **Without objection, the Standing Committee gave Judge Bates that authorization.**

New Business

Judge Bates then opened the floor to new business. No member raised new business.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their valuable contributions and insights. The committee will next convene on June 6, 2023, in Washington, D.C.

TAB 2

**SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

This report is submitted for the record and includes the following for the information of the Judicial Conference:

- Federal Rules of Appellate Procedurep. 2
- Federal Rules of Bankruptcy Procedurep. 3
- Federal Rules of Civil Procedure..... pp. 4-5
- Federal Rules of Criminal Procedure..... pp. 5-6
- Federal Rules of Evidence pp. 6-7
- Judiciary Strategic Planningp. 7

NOTICE
**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 4, 2023. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, Chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward H. Cooper, Consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Allison Bruff, Rules Committee Staff Counsel; Christopher I. Pryby, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and

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Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider suggestions to allow expanded access to electronic filing by pro se litigants and an update on a suggestion to change the presumptive deadline for electronic filing.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on October 13, 2022. The Advisory Committee discussed possible amendments to Rule 29 (Brief of an Amicus Curiae), Rule 39 (Costs), and Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis).

The Advisory Committee has been considering potential amendments to Rule 29 for several years and received helpful feedback from the Standing Committee regarding the need for and scope of any potential additional requirements for disclosures by amici curiae, including disclosure requirements related to ownership, control, or funding by the parties or non-parties. In addition, the Advisory Committee is considering possible amendments to Rule 39 in the light of *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), regarding the allocation of costs on appeal, specifically related to supersedeas bonds. The Advisory Committee is also considering possible amendments to Form 4 in response to a suggestion highlighting issues with the current

form, and has consulted clerks and senior staff attorneys in the circuits to determine the most relevant information on the form.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Official Form 410 (Proof of Claim) with a recommendation that it be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee’s recommendation.

Official Form 410 (Proof of Claim)

The proposed amendment eliminates the language on the proof-of-claim form that restricts use of a uniform claim identifier (“UCI”) to electronic payments in chapter 13, and thereby allows the UCI to be used in cases filed under all chapters of the Bankruptcy Code and for all payments whether or not electronic. Use of the UCI is entirely voluntary on the part of the creditor. The amended language allows a creditor to list a UCI on the proof-of-claim form in any case.

Information Items

The Advisory Committee met on September 15, 2022. In addition to the recommendation discussed above, the Advisory Committee continued consideration of proposed amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor’s Principal Residence in a Chapter 13 Case) and related forms. A version of the amended rule published for comment in 2021 received a number of comments on proposed provisions designed to enhance the likelihood that chapter 13 debtors will emerge from bankruptcy current on their home mortgages. In light of the comments, the Advisory Committee is considering changes that would likely require republication in August 2023.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The Advisory Committee on Civil Rules met on October 12, 2022. The Advisory Committee submitted proposed amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) regarding privilege logs with a recommendation that they be published for public comment in August 2023. The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order. During the Standing Committee meeting, members expressed differing views concerning the length of and level of detail in the committee notes that would accompany the proposed amendments. The Advisory Committee was asked to reexamine the notes in light of that discussion, and to present the proposed amendments to the Standing Committee at its June 2023 meeting.

In addition, the Advisory Committee continues to consider a potential new rule concerning judicial management of multidistrict litigation proceedings. The MDL subcommittee has developed a sketch for a new Rule 16.1 directed to MDL proceedings. The new rule would prompt a meet-and-confer session among counsel before the initial case management conference with the transferee court. In two alternatives, the sketch of the rule provides various topics for discussion by counsel. The Advisory Committee continues to discuss the possibility of proposing a new Rule 16.1.

The Advisory Committee also discussed potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible grounds for recusal, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena, and Rule 55 (Default; Default Judgment) regarding the directive that in some circumstances the clerk “must” enter a default or a default judgment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on October 27, 2022. The Advisory Committee removed from its agenda a suggestion regarding Rule 49.1 (Privacy Protection For Filings Made with the Court) and considered a suggestion to amend Rule 17 (Subpoena).

The Advisory Committee considered a suggestion to amend Rule 49.1 by adding the phrase “subject to any applicable right of public access” before Rule 49.1(d)’s authorization permitting the court to order that filings be made under seal. This change had been proposed to address certain language in an earlier committee note that included a reference to the *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files* (March 2004) issued by the Committee on Court Administration and Case Management (CACM). As quoted in the committee note, the CACM guidance provides that certain documents—including “financial affidavits filed in seeking representation pursuant to the Criminal Justice Act”—“shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access.” Several reasons factored into the Advisory Committee’s decision not to pursue the proposed amendment. One was the concern that the amendment would be perceived as taking a position on an issue of substantive law (that is, whether such financial affidavits are judicial documents subject to disclosure under the First Amendment or a common law right of access). Another was the

observation that such an amendment would not remove the earlier committee note’s reference to the CACM guidance.

The Advisory Committee continues to consider a New York City Bar Association suggestion concerning Rule 17. The Advisory Committee formed a subcommittee to study the issue and, to gather more information about Rule 17 in practice, invited a number of experienced attorneys to participate in its fall meeting. The participants included defense lawyers in private practice, federal defenders, and representatives of the Department of Justice. The participants spoke about their experience with Rule 17 subpoena practice, and answered questions regarding the standards for securing third-party subpoenas and the role of judicial oversight in the process.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on October 28, 2022. In connection with the meeting, the Advisory Committee held panel discussions on two suggestions concerning Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence). The first panel discussion related to a possible new Rule 611(e) regarding the practice of allowing jurors to pose questions for witnesses. The Advisory Committee will continue its research into juror questions, including how often the practice is used in federal courts and potential safeguards for the practice. The second panel discussion related to proposed new Rule 611(d) regarding illustrative aids, which was published for public comment in August 2022. Proposed Rule 611(d) would state the permitted uses of illustrative aids and would set procedures for their use. Finally, the Advisory Committee provided updates on other rules published for public comment, including Rule 613(b) (Witness’s Prior Statement) regarding prior inconsistent statements, Rule 801(d)(2) (Definitions That Apply to This Article; Exclusions from Hearsay) related to hearsay statements by predecessors in interest, Rule 804(b)(3) (Exceptions to the Rule Against Hearsay—When the

Declarant Is Unavailable as a Witness) regarding the corroborating circumstances requirement, and Rule 1006 (Summaries to Prove Content) regarding summaries of voluminous records.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide recommendations to the Executive Committee regarding the prioritization of goals and strategies in the 2020 *Strategic Plan for the Federal Judiciary (Plan)* to determine which strategies and goals from the *Plan* should receive priority attention over the next two years. The Committee's views were communicated to Chief Judge L. Scott Coogler, the judiciary planning coordinator, by letter dated January 10, 2023.

Respectfully submitted,



John D. Bates, Chair

Elizabeth J. Cabraser
Robert J. Giuffra, Jr.
William J. Kayatta, Jr.
Carolyn B. Kuhl
Troy A. McKenzie
Patricia Ann Millett

Lisa O. Monaco
Andrew J. Pincus
Gene E.K. Pratter
D. Brooks Smith
Kosta Stojilkovic
Jennifer G. Zips

TAB 3

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective December 1, 2022

Current Step in REA Process:

- Effective December 1, 2022

REA History:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)
- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	BK 8023
BK 3002	The amendment allows an extension of time to file proofs of claim for both domestic and foreign creditors if “the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.”	
BK 5005	The changes allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The amendments add a new Rule 7004(i) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which went into effect February 19, 2020.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition.	

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Rule	Summary of Proposal	Related or Coordinated Amendments
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge.	
CV 7.1	<p>An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021.</p> <p>The amendment to Rule 7.1(a)(1) requires the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change conforms the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The amendment to Rule 7.1(a)(2) creates a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.</p>	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

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REA History:

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- Approved by Standing Committee (June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
CV 6	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of “A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]” would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer	

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Rule	Summary of Proposal	Related or Coordinated Amendments
	motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word “within” with “no later than.”	
CV 72	The proposed amendment would replace the requirement that the magistrate judge’s findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 45	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds “Juneteenth National Independence Day” to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to “(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony.” Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate “an officer or employee” to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that “the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.” In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word “statement” with “certificate”: Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, “a proceeding by an individual debtor to recover tangible personal property under § 542(a).”	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
BK Form 410A	The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for “Principal & Interest”) with two lines, one for “Principal” and one for “Interest.”	

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REA History:

- Approved for publication by Standing Committee (Jan and June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	The amendments would put the burden on the claim holder to identify the elements of its claim.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 611(d)	The proposed new subdivision (d) would provide standards for the use of illustrative aids.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness’s prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant’s principal, hearsay statements made by the declarant or declarant’s principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new subdivision (d) of Rule 611.	EV 611

TAB 4

**Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)**

(Ordered by most recent legislative action; bills with more recent actions first.)

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Write the Laws Act	S. 329 <i>Sponsor:</i> Paul (R-KY)	All	Most Recent Bill Text: https://www.congress.gov/118/bills/s329/BILLS-118s329is.pdf Summary: Would prohibit “delegation of legislative powers” to any entity other than Congress. Definition of “delegation of legislative powers” could be construed to extend to the Rules Enabling Act. Would not nullify previously enacted rules, but anyone aggrieved by a new rule could bring action seeking relief from its application.	<ul style="list-style-type: none"> 02/09/2023: Introduced in Senate; referred to Homeland Security & Government Affairs Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2023	S. 359 <i>Sponsor:</i> Whitehouse (D-RI) <i>Cosponsors:</i> 13 Democratic or Democratic-caucusing cosponsors	AP, CV, CR	Most Recent Bill Text: https://www.congress.gov/118/bills/s359/BILLS-118s359is.pdf Summary: Requires rulemaking (through Rules Enabling Act process) of gifts, income, or reimbursements to justices from parties, amici, and their affiliates, counsel, officers, directors, and employees, as well as lobbying contracts and expenditures of substantial funds by these entities in support of justices’ nomination, confirmation, or appointment. Requires expedited rulemaking (through Rules Enabling Act process) to allow court to prohibit or strike amicus brief resulting in disqualification of justice, judge, or magistrate judge.	<ul style="list-style-type: none"> 02/09/2023: Introduced in Senate; referred to Judiciary Committee
Relating to a National Emergency Declared by the President on March 13, 2020	H. J. Res. 7 <i>Sponsor:</i> Gosar (R-AZ) <i>Cosponsors:</i> 68 Republican cosponsors	CR	Most Recent Bill Text: https://www.congress.gov/118/bills/hjres7/BILLS-118hjres7rfs.pdf Summary: Terminates the national emergency declared March 13, 2020, by President Trump. Would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	<ul style="list-style-type: none"> 02/02/2023: Received in Senate; referred to Finance Committee 02/01/2023: Passed House (229–197) 01/09/2023: Introduced in House

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Federal Police Camera and Accountability Act	<p>H.R. 843 <i>Sponsor:</i> Norton (D-DC)</p> <p><i>Cosponsors:</i> Beyer (D-VA) Torres (D-NY)</p>	EV	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr843/BILLS-118hr843ih.pdf</p> <p>Summary: Among other things, bars use of certain body-cam footage as evidence after 6 months if retained solely for training purposes; creates evidentiary presumption in favor of criminal defendants and civil plaintiffs against the government if recording or retention requirements not followed; bars use of federal body-cam footage from use as evidence if taken in violation of act or other law.</p>	<ul style="list-style-type: none"> 02/06/2023: Introduced in House; referred to Judiciary Committee
Restoring Judicial Separation of Powers Act	<p>H.R. 642 <i>Sponsor:</i> Casten (D-IL)</p> <p><i>Cosponsor:</i> Blumenauer (D-OR)</p>	AP	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr642/BILLS-118hr642ih.pdf</p> <p>Summary: Would give the D.C. Circuit certiorari jurisdiction over cases in the court of appeals and direct appellate jurisdiction over three-district-judge cases. A D.C. Circuit case “in which the United States or a Federal agency is a party” and cases “concerning constitutional interpretation, statutory interpretation of Federal law, or the function or actions of an Executive order” would be assigned to a multicircuit panel of 13 circuit judges, of which a 70% supermajority would need to affirm a decision invalidating an act of Congress. Would likely require new rulemaking for the panel and its interaction with the D.C. Circuit and new appeals structure.</p>	<ul style="list-style-type: none"> 01/31/2023: Introduced in House; referred to Judiciary Committee
Protecting Individuals with Down Syndrome Act	<p>S. 18 <i>Sponsor:</i> Daines (R-MT)</p> <p><i>Cosponsors:</i> 24 Republican cosponsors</p>	CV 5.2; BK 9037; CR 49.1	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/s18/BILLS-118s18is.pdf</p> <p>Summary: Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed.</p>	<ul style="list-style-type: none"> 01/23/2023: Introduced in Senate; referred to Judiciary Committee
Lunar New Year Day Act	<p>H.R. 430 <i>Sponsor:</i> Meng (D-NY)</p> <p><i>Cosponsors:</i> 57 Democratic cosponsors</p>	AP 26, 45; BK 9006; CV 6; CR 45, 56	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf</p> <p>Summary: Would make Lunar New Year Day a federal holiday.</p>	<ul style="list-style-type: none"> 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
<p>Back the Blue Act of 2023</p>	<p>H.R. 355 <i>Sponsor:</i> Bacon (R-NE)</p> <p><i>Cosponsors:</i> 17 Republican cosponsors</p>	<p>§ 2254 Rule 11</p>	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf</p> <p>Summary: Would amend Rule 11 of the Rules Governing Section 2254 Cases to bar application of Civil Rule 60(b)(6) in proceedings under 28 U.S.C. § 2254(j).</p>	<ul style="list-style-type: none"> 01/13/2023: Introduced in House; referred to Judiciary Committee
<p>Rosa Parks Day Act</p>	<p>H.R. 308 <i>Sponsor:</i> Sewell (D-AL)</p> <p><i>Cosponsors:</i> 31 Democratic cosponsors</p>	<p>AP 26, 45; BK 9006; CV 6; CR 45, 56</p>	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf</p> <p>Summary: Would make Rosa Parks Day a federal holiday.</p>	<ul style="list-style-type: none"> 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee
<p>Fourth Amendment Restoration Act</p>	<p>H.R. 237 <i>Sponsor:</i> Biggs (R-AZ)</p>	<p>CR 41; EV</p>	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr237/BILLS-118hr237ih.pdf</p> <p>Summary: Would require warrant under Crim. Rule 41 to electronically surveil U.S. citizen, search premises or property exclusively owned or controlled by a U.S. citizen, use of pen register or trap-and-trace device against U.S. citizen, production of tangible things about U.S. citizen to obtain foreign intelligence information, or to target U.S. citizen for acquiring foreign intelligence information. Would require amendment of 41(c) to add these actions as actions for which warrant may issue.</p> <p>Would bar use of information about U.S. citizen collected under E.O. 12333 in any criminal, civil, or administrative hearing or investigation, as well as information acquired about a U.S. citizen during surveillance of non-U.S. citizen.</p>	<ul style="list-style-type: none"> 01/10/2023: Introduced in House; referred to Judiciary and Intelligence Committees
<p>Limiting Emergency Powers Act of 2023</p>	<p>H.R. 121 <i>Sponsor:</i> Biggs (R-AZ)</p>	<p>CR</p>	<p>Most Recent Bill Text: https://www.congress.gov/118/bills/hr121/BILLS-118hr121ih.pdf</p> <p>Summary: Would limit emergency declarations to 30 days unless affirmed by act of Congress. Current COVID-19 emergency would end no later than 2 years after enactment date; would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.</p>	<ul style="list-style-type: none"> 01/09/2023: Introduced in House; referred to Transportation & Infrastructure, Foreign Affairs, and Rules Committees:

TAB 5

Draft Minutes
Civil Rules Advisory Committee
October 12, 2022

The Civil Rules Advisory Committee met at the Administrative Office on October 12, 2022. Two members participated by remote means. The meeting was open to the public. Participants included Judge Robert Michael Dow, Jr., Committee Chair, and Committee members Judge Cathy Bissoon; Judge Jennifer C. Boal; Hon. Bryan M. Boynton; David J. Burman, Esq.; Judge David C. Godbey; Judge Kent A. Jordan; Judge M. Hannah Lauck; Judge R. David Proctor; Judge Robin L. Rosenberg; Joseph M. Sellers, Esq.; Dean A. Benjamin Spencer (remotely); Ariana Tadler, Esq. (remotely); and Helen E. Witt, Esq. Professor Richard L. Marcus participated as Associate Reporter and Professor Edward H. Cooper participated as Reporter. Judge John D. Bates, Chair; Professor Catherine T. Struve, Reporter; and Professor Daniel R. Coquillette, Consultant (remotely) represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. The Department of Justice was further represented by Joshua E. Gardner, Esq. H. Thomas Byron III, Esq.; Bridget M. Healy, Esq.; S. Scott Myers, Esq.; Allison A. Bruff, Esq; Christopher I. Pryby, Esq.; Brittany Bunting–Eminoglu; and Nicole Y. Teo represented the Administrative Office. Dr. Emery G. Lee and Tim Reagan, Esq. (remotely) represented the Federal Judicial Center.

Members of the public who joined the meeting in person or remotely are identified in the attached attendance list.

Judge Dow opened the meeting with greetings to all observers, both those attending in person and those attending remotely. He noted newcomers. Judge Hannah Lauck, of the Eastern District of Virginia, is a new Committee member. Judge D. Brooks Smith, of the Third Circuit, is the new liaison from the Standing Committee, but was unable to attend today’s meeting. Allison Bruff has joined the Rules Committee Support Office as counsel for the Civil and Criminal Rules Committees, while Christopher Pryby is the new Rules Law Clerk and Nicole Teo is an intern from Smith College. Judge Dow added thanks to the observers, both for their present interest in the Committee’s work and for the great help that many of them and their organizations have provided in the past and can be counted on to provide in the future.

Judge Bates announced further “comings and goings.” Judge Dow is leaving the Committee to become Counselor to the Chief Justice. This position is very demanding and responsible. It involves administration not only in the Supreme Court but throughout the federal judiciary, working as a leader along with the Executive Committee of the Judicial Conference, the Director of the Administrative Office, and others. Judge Dow was present and participating in all the Committee meetings that Judge Bates attended, demonstrating tremendous inspiration for the rulemaking process. Congratulations are due to him, and well wishes for his new role.

Judge Bates also welcomed Judge Rosenberg as the new Committee Chair. She will be another great leader. She has done fantastic work as chair of the Multidistrict Litigation Subcommittee, and will be another creative and inspiring leader.

40 Judge Dow responded with thanks, noting that he became involved in the Rules Enabling
41 Act process in 2010 with his appointment to the Appellate Rules Committee. Professor Struve was
42 Reporter for that Committee; her reappearance as Reporter for the Standing Committee has been
43 a delight. He gave heartfelt thanks to all Committee members and staff for the experiences of his
44 seven years with this Committee.

45 Judge Dow then reported on the Standing Committee meeting last June. The other advisory
46 committees generated a lot of work for the Standing Committee, while this Committee presented
47 relatively less work. The CARES Act emergency rule, Civil Rule 87, was presented in tandem
48 with the parallel proposals for emergency rules in the Appellate, Bankruptcy, and Criminal Rules.
49 All were approved for adoption. Amendments to Civil Rules 15 and 72 also were approved for
50 adoption.

51 The Judicial Conference approved for adoption new Rule 87; amendment to Rule 6 for
52 adoption without publication to add Juneteenth National Independence Day to the list of national
53 holidays; and amendments to Rules 15 and 72. Judge Dow noted that the CARES Act provisions
54 for emergency practices in criminal prosecutions had been very helpful in managing cases during
55 the pandemic, and that some judges are still using them.

56 Rules “in the pipeline” were noted. An amendment of Rule 7.1 requiring diversity
57 disclosure and the new Supplemental Rules for reviewing individual claims for Social Security
58 benefits are on track to take effect this December 1. The Social Security Rules were “a pretty heavy
59 lift.” Amendments of Rules 6, 15, 72, and new Rule 87, are moving toward taking effect on
60 December 1, 2023. Rule 12 is the only rule now on track for taking effect on December 1, 2024.

61 Later in the meeting, Judge Roslynn R. Mauskopf (Director of the Administrative Office)
62 appeared to offer a greeting and welcome. She thanked the committee for all of its hard work. “The
63 work is so important for judges. It is instrumental to ensuring the promise of Rule 1, the search for
64 civil justice.” There are a lot of difficult issues on the agenda.

65 *Legislative Update*

66 The legislation update by Judge Dow and Christopher Pryby was brief. A good number of
67 bills that would affect civil procedure have been introduced in this session of Congress. Some of
68 them would mandate adoption of new rules, or directly affect current rules. None of them have yet
69 passed in either house. In addition to Civil Rules, some bills would affect Bankruptcy, Criminal,
70 and Evidence Rules.

71 *March 2022 Minutes*

72 The draft minutes for the March 29, 2022, Committee meeting were approved without
73 dissent, subject to correction of typographical and similar errors.

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Discovery Subcommittee

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Judge Godbey delivered the report of the Discovery Subcommittee.

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The Subcommittee recommends that amendments of Rules 16(b)(3) and 26(f)(3) be recommended for publication. The drafts are consistent with the drafts discussed at the most recent two Committee meetings. They advance a modest proposal.

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The proposals address practices in preparing the descriptions required by Rule 26(b)(5)(A)(ii) when a party withholds information from discovery by invoking privilege or work-product protection. The rule text directs that the withholding party describe the nature of the things not produced “in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” These words capture the intent of the rule without providing much guidance on how to accomplish the desired description. Efforts to craft rule text that provides better practical guidance, however, have proved fruitless.

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Rather than attempt to revise Rule 26(b)(5) itself, then, the Subcommittee has focused on the advantages to be gained by encouraging the parties to confer about the timing — and the method to be used — for generating what are often called “privilege logs.” Important advantages can be won by early discussions aimed at shaping case-specific methods for generating privilege logs, and at prompting early release of at least a partial privilege log to set the stage for any further discussions that may be needed.

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To this end, the same new words are proposed for both Rule 26(f)(3)(D) and Rule 16(b)(3). The caption of Rule 16(b) also would be revised to include one new word to emphasize the role of case management in general: “(b) Scheduling and Management.” The new language can be illustrated through Rule 26(f)(3)(D):

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A discovery plan must state the parties’ views and proposals on: * * *

- (D) any issues about claims of privilege or of protection as trial-preparation materials, including the timing for and method to be used to comply with Rule 26(b)(5)(A) and — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

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This language has been polished repeatedly by the Reporter, working with the Subcommittee, to achieve a successful synthesis of the many comments that emerged from discussions with lawyer groups.

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The practicing bar has strong interests in this rule. The interests of producing parties often diverge from the interests of requesting parties. But the values of early discussion aimed at case-

109 specific protocols are widely recognized and shared. The values of producing at least a partial
110 privilege log relatively early in the discovery period are also recognized and shared.

111 Judge Dow noted that the Subcommittee process worked very well. Great help was
112 provided by the lawyer members. “We could not do it without them.”

113 Judge Bates suggested that this “is a modest, but a great, proposal.” The Committee Note
114 provides background information, and offers suggestions for implementation. Generally a Note
115 this extensive is prepared for “meaty” amendments, such as the 2015 discovery amendments or
116 Evidence Rule 702. Is there a risk that this Note, prepared to illuminate a modest proposal, will
117 stir the very divisiveness that the Subcommittee fears would be stirred by a more detailed
118 amendment of rule text?

119 The general resistance to using committee notes as practice manuals was noted. But this
120 amendment originated as a proposal to amend Rule 26(b)(5)(A) itself, “to put some meaty things
121 there,” such as describing withheld matters by category. A fulsome note provides what could be
122 useful background. “We spent a lot of time on this.” The bar and judiciary will not be shy about
123 commenting on this Committee Note. “The Note may evolve, but for now it is useful to explain
124 what is intended and why.”

125 Professor Coquillette noted that “this is a historic concern of mine.” If some committee
126 notes include best-practices advice while others do not, questions will be raised about the different
127 approaches.

128 The discussion concluded with the observation that “the bottom line is we will see what
129 the public comments say.” Privilege logs are contentious. The tendency in framing rules
130 amendments is to move toward what can be achieved by consensus.

131 The Committee voted without dissent to recommend that these draft rules be approved for
132 publication. Special thanks were expressed for the work of Judge Godbey and Professor Marcus.

133 *Rule 42 Consolidation - Appeal Finality*
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135 Judge Rosenberg introduced the report of the Rule 42 Subcommittee, a joint subcommittee
136 of Appellate and Civil Rules Committee members. The recommendation is to remove this topic
137 from the Committee agenda.

138 The Supreme Court, in *Hall v. Hall*, 138 S. Ct. 1118 (2018), ruled that complete disposition
139 of all claims among all parties in what began as an independent action is an appealable final
140 judgment, even though further work remains to be done in another action that was consolidated
141 with the now-concluded action. At the same time, the Court suggested that if problems emerge
142 from this approach, improvements could be made through the Rules Enabling Act process.

143 The Subcommittee was formed largely because of fears that this wrinkle on final-judgment
144 appeal doctrine might remain obscure to many lawyers, causing loss of any opportunity for

145 appellate review by failure to take a timely appeal. The Federal Judicial Center was enlisted to
146 study the effects of the rule in actual practice.

147 The FJC study was led by Dr. Emery Lee. The first phase studied all district court filings
148 from 2015 to 2017. The earlier cases provided an opportunity for comparison because the circuits
149 had generated three different approaches to this question, with a modest variation on one of them.
150 The approach adopted by the Court was followed only in a minority of circuits.

151 The first phase of the FJC study examined all actions on the dockets of all the districts,
152 excluding MDL consolidations. After identifying all consolidated actions, a sample was studied
153 for appeal experience. Appeals were taken in only a small fraction of all consolidated cases. And
154 there was no indication that any party had forfeited the opportunity to appeal for ignorance of the
155 newly uniform rule.

156 The second phase of the FJC study examined all appeals filed in 2019 or 2020, identifying
157 appeals in consolidated actions. Once again, there was no evidence that opportunities to appeal
158 had been lost for ignorance of the rule established by *Hall v. Hall*.

159 Dr. Lee observed succinctly that “problems do not arise.”

160 Further discussion noted that the FJC study showed that nearly half of all district court
161 consolidation orders did not identify the purposes of the consolidation. That habit might prove
162 difficult to dislodge by amending Rule 42(a) in an attempt to encourage district courts to think
163 ahead to the possible appeal complications that might arise upon the future complete disposition
164 of one of the originally independent actions embraced by the consolidation. Consolidation is
165 ordered to achieve more efficient and better management of parallel actions. That is the immediate
166 focus. Predicting the twists and turns that may follow in the ensuing proceedings would be
167 difficult. The FJC study shows that what were labeled “original action final judgments” were
168 relatively rare.

169 The uncertainty about the character of many consolidations makes it difficult to consider
170 the possibility that the parties, district court, and appellate court could gain by a rule that brings
171 consolidated actions into the partial final judgment provisions of Rule 54(b). The possible gains
172 are illustrated by a simple example. Two plaintiffs might join in an action against the same two
173 defendants. Complete disposition of all claims between one plaintiff and one defendant is not a
174 final judgment unless the court, considering the many factors that inform Rule 54(b) orders, directs
175 entry of a partial final judgment. Rule 54(b) has worked well in this setting. Why should it be
176 different if the same litigation begins with two separate actions that are then consolidated for all
177 purposes?

178 The problem is that there is no apparent reason to invoke Rule 54(b) when cases are
179 consolidated for fewer than all purposes. Rule 42(a)(1) permits joining cases for hearing or trial.
180 Rule 42(a)(3) authorizes “any other orders to avoid unnecessary cost or delay” when actions before

181 the court involve a common question of law or fact. Combined discovery would be an obvious
182 example.

183 An attempt to integrate Rule 54(b) with Rule 42(a), in short, would have to grapple with
184 the need to address only orders that consolidate two or more cases for all purposes. A satisfactory
185 resolution as a matter of rule text might be within reach, but it would depend on an explicit
186 statement of the purposes of consolidation, either when consolidation is ordered or perhaps when
187 the court comes to believe that complete disposition of an originally independent action is — or is
188 not — a desirable occasion for immediate appeal. The risks of stirring undue complications and
189 confusing appeal doctrine seem too great to be incurred.

190 The Committee concluded without dissent to recommend to the Standing Committee that
191 the joint subcommittee be dissolved without further work.

192 *Multidistrict Litigation Subcommittee*

193 Judge Rosenberg introduced the report of the Multidistrict Litigation Subcommittee. She
194 noted that, at the time of the meeting last March, the Subcommittee had been working on possible
195 amendments that would address multidistrict litigation through Rule 26(f) party discussions and
196 Rule 16(b) case management orders. After that meeting, however, the Subcommittee came to
197 believe that it would be better to address the possibility of MDL-specific rule provisions in a new
198 rule if there are to be any rule provisions. A draft framed as a new Rule 16.1 was presented to the
199 Standing Committee last June, not for discussion but to illustrate the approach that would be
200 considered with the help of interested groups over the summer. An incidental effect of this
201 approach is that it avoids the need to consider coordination of any Rule 26(f) and 16(b)
202 amendments with the proposals recommended this morning to address privilege log practice.

203 The core of the Rule 16.1 approach is to prompt a meet-and-confer of the parties before
204 the initial MDL case management conference. Over the summer the Subcommittee had separate
205 remote meetings with lawyers designated by the American Association for Justice and Lawyers
206 for Civil Justice. The focus was on alternative versions of subdivision (c). Alternative 1 provides
207 a lengthy list of matters the court might direct the parties to discuss as a basis for a report to the
208 court. Alternative 2 provides a much condensed list, at points drawn in more general terms. Both
209 groups preferred Alternative 2, and each provided a “redlined” version that would revise
210 Alternative 2. As might be expected, the redlined versions differed from each other. The
211 Subcommittee discussed the redlined versions, and Professor Marcus undertook to annotate the
212 rule draft with explanations of the issues that have been identified by the Subcommittee and the
213 redline suggestions. This expanded version appears at page 179 in the agenda materials.

214 Further review of the draft will be sought by presenting it to a group of MDL judges at the
215 upcoming conference of MDL judges in early November. It will be quite different from the
216 proposal considered in the same setting four years ago. The proposal then focused on issues, such
217 as expanded opportunities for interlocutory appeals, that now are on the back burner.

218 Discussions of MDL procedure always are complicated by the proposition that not only do
219 the cases consolidated in the many different proceedings comprise a large part of the federal
220 docket; they range across a broad range of case numbers, from only a few to thousands or even
221 tens of thousands. Many of them are readily managed under the general Civil Rules. But the small
222 number of outsized consolidations, perhaps 20 or 25 of them at any one time, present enormous
223 challenges.

224 The potential value of a rule specifically framed for the MDL proceedings that are too
225 complicated for easy management under ordinary practices is enhanced by several factors. The
226 Judicial Panel on Multidistrict Litigation is actively seeking to draw new judges into MDL
227 assignments. New MDL judges need to be educated in MDL management. Education is often
228 provided, and to good effect, by the experienced MDL lawyers who regularly appear in MDL
229 proceedings. But less interested guidance also may be important. MDL judges, moreover, are
230 actively engaged in efforts to draw new lawyers into the MDL world. The new lawyers also will
231 benefit from guidance on the distinctive management needs of the more complex MDL
232 aggregations.

233 One approach can be to resist the temptation to propose any new MDL-specific rule.
234 Reliance might be placed on other sources of best practices, including the Manual for Complex
235 Litigation. The Manual, however, although a great resource, is not keyed solely to MDL
236 proceedings and is no longer up to date. A project to update the Manual has recently been launched,
237 but several years will be required for completion. The Judicial Panel works hard to support MDL
238 judges, including the annual conference at which the Rule 16.1 proposal will be presented in
239 November.

240 The question is whether these alternative sources of support for MDL judges should be
241 bolstered by new provisions in the Civil Rules. The Rule 16.1 proposal reflects the possibility that
242 much can be gained by a rule that prompts lawyers and the court to consider the distinctive and
243 often complex issues that arise in the more challenging MDL consolidations.

244 Rule 16.1(a) provides for an early management conference to develop a management plan
245 for orderly pretrial activity.

246 Rule 16.1(b) provides for designating “coordinating counsel” to act on behalf of the parties
247 — plaintiffs, and perhaps defendants — in the conference provided for by subdivision (c). It further
248 provides that designation as coordinating counsel does not weigh in the future determination of
249 appointments as leadership counsel.

250 Rule 16.1(c) is presented in alternative versions. As noted, Alternative 1 is more extensive
251 and detailed. Alternative 2 is condensed, identifying such core subjects as early exchanges of
252 information; whether to appoint leadership counsel, including the process for appointment and
253 leadership responsibilities and common benefit funds to support leadership work; and schedules
254 for sequencing discovery or deciding disputed legal issues.

255 At many points, the draft offers choices for the words of command. “Must” and “may” are
256 the more common alternatives, but “should” also figures in some alternatives. The Subcommittee
257 has shied away from “must” at many steps, recognizing that lawyers are creative and may develop
258 better ways of doing things than can fit within a mandatory rule text. At the same time, the “must”
259 command may be appropriate at some points.

260 Judge Dow noted that, in addition to the sessions with AAJ and LCJ lawyers, suggestions
261 have been received from other observers. Professors Morrison and Transgrud joined in one, and
262 another provided by John Rabiej offers detailed commentary. More will be learned from MDL
263 judges at the upcoming conference. It seems that judges are more interested than lawyers in having
264 a new rule. In part, that reflects the fact that “not everyone reads the Manual” or other sources of
265 best practices advice. But “everyone reads the Civil Rules.” A good rule could be an important
266 guide that helps utilize the immense staffing required for a big MDL. The Rule 16.1 draft is
267 dramatically different from the drafts considered four years ago. “There will be a lot of eyes on
268 this.” The Subcommittee deserves full compliments for its work.

269 Professor Marcus added two observations. Some participants are wary of using “may” in
270 rule text as a discretionary word that may not seem adequately mandatory. Quite separately, the
271 Rule 16.1(b) provision for coordinating counsel has seemed a “which should come first”
272 conundrum to some observers. Organizing the proceedings will require leadership counsel with
273 authority to engage with the court on behalf of others. How can there be lead counsel to advise on
274 who should become lead counsel? Even if designated as “interim” leadership, how is the court to
275 know whom to designate — does there have to be a coordinated presentation, or can the court
276 solicit applications and perhaps entertain comments on the applicants as a way to sort out
277 coordinating counsel?

278 A committee member provided a reminder of “how we got here.” Many MDL judges and
279 lawyers have said we do not need a rule. No one-size-fits-all procedure can be set for all MDLs.
280 But we also hear that there is a need. We should look for a balance that does not constrain, but
281 points to key topics that should be considered. A rule can be designed to focus attention and prompt
282 discussion.

283 Another member observed that initial proposals for adopting an MDL rule came from
284 groups, one or another, looking for advantage. The proposal to expand opportunities for
285 interlocutory appeals is an example. Proponents looked for rules that would place a thumb on the
286 scales. The discussion with MDL judges in 2018 was on these topics. With this new proposal, “we
287 need to hear from these judges again.” The question about interim coordinating counsel is an
288 example of the competing fears: plaintiff-side counsel fear that however described, an initial
289 designation of interim coordinating counsel will give an advantage that risks ripening into a full
290 leadership designation, and also fear that a rule may give defendants a voice in designating plaintiff
291 leadership. Defendants’ counsel also have partisan views on these issues. “Organizations can be
292 more vociferous.” We need to hear from those on the ground in settings that are not filtered through
293 their organizations.

294 This member continued by suggesting that “today I would favor (c) Alternative 1.” It is a
295 long and helpful list of the things that must be considered to successfully start an MDL. “If you
296 start well, you’re likely to finish successfully.”

297 A different member said that the process of generating successive rules drafts has been
298 informative. “I am not really persuaded there should be a rule.” We need to hear from lawyers who
299 engage in all types of MDLs. And we need to be careful about how many items we include in a
300 rule. Many of the details might better be shifted to the Committee Note.

301 The same member continued to observe that in designating leadership it is important that
302 the judge learn not only who wants to be a leader, but who the leaders really are. Early candidates
303 may be useful members of the final team, but others must be considered as well. Gathering input
304 from the MDL judges at their upcoming meeting will be useful.

305 A judge said that sometimes the initial process is useful because some lawyers shine, while
306 others flop — perhaps because they do not play well with others. The authority conferred on lead
307 counsel limits the role of the other lawyers, but virtual proceedings can enlarge the number of
308 nonlead lawyers who can participate effectively.

309 Another judge expressed worries about “mission creep.” Relying on an extended
310 committee note to guide practice may be a mistake. The note may be too long. And these are rules,
311 not Federal Suggestions for Civil Procedure. A note that suggests thinking about this, thinking
312 about that, thinking about another thing might accomplish nothing more than a rule that advises
313 judges and lawyers to consult the Manual for Complex Litigation. “This doesn’t feel like a rule.”
314 Reliance on “may” provisions illustrates the lack of a need for such rule provisions. “No one doubts
315 the authority to do what we might include in a list of things the court ‘may’ do.” So the
316 organizations that advised the Subcommittee over the summer prefer the shorter list in (c)
317 alternative 2.

318 Another participant suggested a broader context for the concern about reliance on
319 Committee Note discussion in place of more detailed guidance in rule text. The discussion earlier
320 this morning about the Committee Note for the privilege log proposal was a beginning.
321 Historically, the advisory committees have resisted extended checklists, often described as
322 “laundry lists,” in rule text. Earlier explorations of class-action questions included a draft that
323 proceeded through more than a dozen paragraphs of factors to be considered in evaluating a
324 proposed settlement. That approach was abandoned; the general formula that emerged, and that
325 was polished in more recent Rule 23 amendments, seemed better. One of the grounds for resisting
326 multifactor lists in rule text is the fear that lawyers will feel compelled to address every factor in
327 every case, even though only a few — and perhaps none — may be useful or even relevant in a
328 particular case. At the same time, detailed rule text can provide the intended guidance for judges
329 and lawyers, especially those newly come to MDL practice. It will be important to make sure that
330 either alternative of Rule 16.1(c) is drafted to make it clear that the lawyers are directed to consider
331 only the elements that the court selects from the list that follows.

332 A judge noted that the Subcommittee has been hearing from “the high end of the MDL bar
333 and judges.” The choice between a manual and a rule troubles lawyers because a rule passes some
334 control from the lawyers to the judge. That may be why lawyers have resisted the more detailed
335 (c) alternative 1. The lawyers have long had a powerful role in educating new MDL judges in the
336 practices that the concentrated MDL bar has developed across many years of experience in many
337 MDLs, from small to the largest. They do not want to give up this advantage. “We want to give
338 judges what they need.”

339 Another judge noted that lawyers prefer (c) alternative 2 because it is more concise. They
340 assert that it will better enable judges to manage the proceedings.

341 Professor Marcus provided a reminder that the first proposals for MDL rules were made
342 by lawyers involved in defending the small number of very large MDLs. “They did not like the
343 direction of the prevailing winds.”

344 A third judge noted that at one of the conferences arranged for the Subcommittee, Judge
345 Chhabria described his experience as a newcomer to a very large MDL. He and his clerks
346 researched MDL practices extensively. But he believed that he had gone wrong in establishing
347 provisions for a common-benefit fund. He could have done better “if I knew then what I know
348 now.” He has suggested that an explicit Civil Rule for MDL proceedings would help judges. So it
349 will help if we get lawyers involved at the beginning in informing the judge about what needs to
350 be considered in initially organizing the MDL. And “it seems better to make clear that the judge
351 controls what is to be discussed.”

352 A fourth judge observed that “we hear a lot about how different MDLs are” from one
353 another. There is a wide variety. But the federal courts deal with a wide variety of cases, and the
354 Civil Rules address an equally wide range. The Subcommittee process has been great. Subdivision
355 (c) alternative 1 may be safer than alternative 2, because it addresses more elements that may be
356 important in managing one or another variety of MDLs. And there is a visible danger in adopting
357 an extensive Committee Note. There may be a temptation, encountered elsewhere in the
358 rulemaking process, to use a note to address matters that seem too sensitive to address in rule text.
359 An example is settlement. Could a note say simply that settlement plays a very important role in
360 most MDLs? Could it go on to suggest what the judge may and may not do? If it says anything,
361 the risks are saying too much or too little. Another example is the interplay between Rule 23 class
362 actions and MDLs. “There are some real issues there.” Framing the note “will not be an easy
363 process.”

364 Judge Dow echoed this observation. “Settlement has been a difficult question all along.”
365 Academics have proposed adopting for MDLs the settlement review procedures that Rule 23
366 adopts for class actions. But we have come to understand that judges cannot become involved in
367 the merits of settlement proposals in MDLs that are not resolved as class actions. At the same time,
368 judges may have an important role in managing the process of settlement. One example might be
369 a case management order provision that any lawyer who has more than XY cases in the MDL must
370 show up in court to explain the process that led to an impending settlement.

371 Judge Dow concluded the discussion by noting that the Rule 16.1 proposal “needs and will
372 get more attention from all sides.”

373 *Rule 41 Subcommittee*

374 Judge Bissoon delivered the report of the Rule 41 Subcommittee. The first questions
375 presented to the Committee arise from the word “action” in Rule 41(a)(1)(A): “the plaintiff may
376 dismiss an *action*” without court order and without prejudice. Most circuits that have considered
377 one set of questions have ruled that a single plaintiff who dismisses all claims against one of plural
378 defendants has dismissed the action. So if one of two plaintiffs dismisses all claims against all
379 defendants, that dismisses the action. Some circuits, however, have taken different positions. And
380 district courts remain divided on a parallel question: if one plaintiff wants to dismiss fewer than
381 all claims against a single defendant, does that dismiss the action? A majority say it does not,
382 relying on the “plain meaning” of “the action.” That view seems to contradict the meaning
383 attributed to “action” in the cases that address complete dismissal as to only one defendant or
384 plaintiff. But other district courts have ruled that Rule 41 authorizes a plaintiff to dismiss without
385 prejudice a single claim against a single defendant.

386 The Subcommittee has not yet worked its way through to a recommendation. It hopes to
387 be guided by any lessons from experience that can be provided by Committee discussion. Should
388 there be an amendment? Should it aim only to adopt the majority views announced in the cases,
389 without attempting to search out underlying policies that have not been articulated in the opinions?
390 Should it undertake to consider other aspects of Rule 41 that may deserve attention?

391 Professor Marcus suggested that there are too many Rule 41 balls in the air to count.
392 Rule 41 remains largely unchanged since its adoption in 1938. It was intended to move away from
393 the variety of state court practices incorporated through the Conformity Act; some states allowed
394 unilateral dismissal without prejudice at an advanced stage of an action, even into trial. The
395 purpose to require court approval after an early point in the proceedings has been accomplished.
396 It would be possible to go further to require court approval for any voluntary dismissal without
397 prejudice, but that has not been proposed.

398 These themes were expanded upon. Rule 41 could be amended by a simple process that
399 does no more than achieve uniformity by adopting the majority views of what it means to dismiss
400 the action. A somewhat more ambitious approach would look behind the tacitly conflicting views
401 of plain meaning to ask what underlying policies might, for example, distinguish between
402 dismissal of only some claims between a pair of adversary parties and dismissal of all claims
403 between them. Still greater ambition might suggest that if Rule 41 is to be taken on, other nagging
404 questions also might be considered. One prominent question is whether the provision that
405 terminates the plaintiff’s right to dismiss on an answer or a motion for summary judgment should
406 be expanded to include motions under Rule 12(b), (e), or (f), in parallel with the provision in
407 Rule 15(a)(1)(B) that uses those motions to trigger the time limit for amending a pleading once as
408 a matter of course. The provisions in Rule 41(c) that address dismissal of claims by parties other
409 than the plaintiff might also deserve some consideration.

410 Judge Bissoon noted that the materials in the agenda book illustrate a variety of possible
411 alternative rule amendments. Voluntary dismissal questions may be particularly important in
412 complex litigation that involves many parties and claims. She asked what might be learned from
413 Committee group experience?

414 Discussion was opened by a participant who “does not see a problem.” The simplest
415 example is truly minor. Rule 41(a)(1)(B) refers to previous dismissal of an action that includes the
416 same “claim” as the present action. Use of “claim” here is mandated by the context, and does not
417 shed any light on the meaning of “action” in (a)(1)(A). It is simply a shorthand reference to
418 “transaction or occurrence.” So too the reference to dismissing a counterclaim or the like in
419 Rule 41(c) provides no implications for interpreting “action” — a defendant cannot dismiss the
420 action. The questions raised by partial dismissals in the context of multiple claims or parties are a
421 problem for Rule 15(a) — the plaintiff need only amend the complaint to omit whatever claims or
422 parties it wants to dismiss. There is no reason to amend Rule 41 to accomplish what can be done
423 through Rule 15. Rule 41 should be reserved for “calling the whole thing off.” So too, adding
424 Rule 12 motions to the events that cut off the right of voluntary dismissal does not make sense;
425 “some of them may be what gives the understanding of the need to dismiss.” We should leave it
426 to the courts to resolve interpretive disagreements.

427 A judge observed that the circuits “do approach it differently,” and that the title of Rule 41
428 is “Dismissal of Actions.” Further, “we do get motions to dismiss less than the full action, and tend
429 to sign off on them.” The inconsistent circuit decisions are a warning. Clear guidance could be
430 useful for MDL proceedings.

431 In response to a question, Judge Bissoon said that she had never encountered a problem
432 raised by the “without prejudice” element of Rule 41(a).

433 Another participant noted a local district rule that requires court approval for any dismissal
434 without prejudice.

435 Another judge addressed the provision of Rule 41(a)(2) that requires court approval of a
436 dismissal after the Rule 41(a)(1)(A) cutoff. The dismissal is without prejudice “unless the order
437 states otherwise.” “Sometimes I get an objection and approve dismissal only if it is to be with
438 prejudice.” Things become complicated “if you want to do more than the rule says.”

439 The possibility of adding Rule 12 motions to the events that cut off the plaintiff’s unilateral
440 right to dismiss was brought back by an observation coupled with a question. The defendant
441 expends money and effort to make the motion. Is it a fair outcome to allow the plaintiff to respond
442 by dismissing without prejudice, holding open the opportunity to bring the same claims another
443 time?

444 Discussion concluded with the reminder that the Subcommittee “is still at work.”

445

Pro Se e-Filing

446 Professor Struve led discussion of the rules that govern electronic filing by unrepresented
447 parties. Civil Rule 5(d)(3)(B)(i) was adopted in tandem with parallel provisions in the Appellate,
448 Bankruptcy, and Criminal Rules. It provides that a person not represented by an attorney “may file
449 electronically only if allowed by court order or by local rule.” (Rule 5(d)(3)(B)(ii) provides that
450 an unrepresented party “may be required to file electronically only by court order, or by a local
451 rule that includes reasonable exceptions.” That provision is not being reviewed.)

452 A working group of reporters has devoted almost a year to opening study of the question
453 whether the presumption against electronic filing by unrepresented parties should be replaced by
454 a presumption that electronic filing is permitted unless prohibited by order or a local rule. The
455 Federal Judicial Center has conducted an extensive study of practices across all federal courts,
456 culminating in a formal report that is included in the agenda materials.

457 The FJC study shows wide divergence in practices across the country. Five circuits, for
458 example, presumptively permit e-filing by unrepresented parties who are not incarcerated. Other
459 circuits take different approaches. In the district courts, fewer than ten percent of all districts have
460 local rules that presumptively permit e-filing. Others have local rules that unrepresented parties
461 may not file electronically. Bankruptcy practice includes a bankruptcy-specific form of electronic
462 submissions.

463 The difficulties of opening a new case in the CM/ECF system are among the concerns that
464 impede willingness to allow electronic filing by unrepresented parties. Some courts do not allow
465 even attorneys to open a new case. After a case is opened, however, successful electronic filing by
466 unrepresented parties can gain all the advantages the system affords. Transmitting notice and
467 serving registered users are high among them.

468 The meaning of “file electronically” in Rule 5(d)(3) and the parallel rules is not certain.
469 Several courts accept filings that unrepresented parties deliver to the court by electronic means,
470 including email or attachments to email messages. The clerk’s office translates the message into
471 the court’s CM/ECF system. This task may be at least as convenient for the clerk’s offices as the
472 task of entering paper filings. But concerns remain about the risks of computer viruses and
473 malware. Particular concerns arise in bankruptcy courts, which regularly encounter unrepresented
474 parties who seek to upload excessive or inappropriate files, or to file documents under
475 inappropriate names. But expanded access to CM/ECF systems is being considered for bankruptcy
476 courts.

477 A bankruptcy judge observed that “I do a lot of social work with pro se litigants.” Relatives
478 and family members file documents with the wrong names, without a power of attorney, or simply
479 inappropriate things — one person uploaded a picture of a dead body. There are really weird
480 mortgage filings by debtors intended to fake payment in full and discharge. The dangers of
481 electronic filing are more work and expense for creditors and court staff. But “I give sufficient

482 time to make their responses.” On the other hand, “forms may be different.” It might work to adopt
483 a presumption for electronic filing of some forms.

484 Another observation was that the present provision allowing electronic filing by court order
485 invites different practices by different judges on the same court. If the presumption is reversed,
486 will the outcome be much different? Or will judges who now do not enter orders that permit
487 electronic filing simply switch to entering orders that deny it?

488 A committee member asked “who should drive this process?” Is this subject suitable for
489 the rules committees? Or is it better addressed by the Judicial Conference technology committee,
490 or by the Court Administration and Case Management Committee? The FJC study shows
491 substantial concerns in many quarters that electronic filing by unrepresented parties will not work.
492 “Should we get into this at all?” A response observed that these questions affect the interests
493 enshrined in Rule 1, affecting access to the courts. Rule 5 and its analogs do address electronic
494 filing. “The momentum is there.” And the reply expressed agreement, but asked whether now is
495 the time to take these issues up again. “We can say whatever we want, but if it doesn’t work it
496 doesn’t matter. We need better understanding of how things work.” But we can at least begin by
497 thinking about what we would like courts and unrepresented parties to be able to do.

498 Judge Bates observed that “we are gathering information so we can initiate this process
499 with the other institutions that need to be brought in. A coordinated effort by the rules advisory
500 committees to find out what we might aspire to is important.” One factor to be kept in mind is that
501 the CM/ECF system is subject to a process of continual change. One likely outcome is a report to
502 other actors that asks whether we should amend the rules.

503 Another judge reported that the clerk of her court recommends that the rules not be
504 amended. The advice is that most courts are not equipped for CM/ECF access by unrepresented
505 litigants, nor for other means of electronic filing. “We do not have the ability.” And unrepresented
506 parties make more docketing errors. Particular problems arise with prisoners, who are often
507 switched from one prison to another — there are five different facilities in her district. New
508 procedures would have to be devised to deal with electronic filing by unrepresented parties.

509 Another problem was identified. Some troublesome litigants are subject to orders that
510 impose special procedures for permission to file new actions. That would be an added
511 complication. And there are risks that documents that should not be publicly available will be filed
512 in the public record. But there also are real advantages to electronic filing, such as disseminating
513 notice.

514 The advantage of electronic noticing led to a reminder of another current issue. Once a
515 filing by an unrepresented party is added to the court’s CM/ECF system, notice is sent to all
516 registered users. Many courts interpret the present rules to require the party to send a separate
517 paper notice to registered users who already have received notice from the court. That seems to
518 impose an unnecessary and perhaps heavy burden on the unrepresented party. Some local rules
519 address these issues. For that matter, even an approach that would require paper notice only to

520 parties that are not registered users would work better if the unrepresented party can rely on clear
521 identification of which parties are not registered users.

522 Judge Dow expressed the Committee's thanks to Professor Struve for undertaking the
523 heavy work to lead the working group's efforts and for leading the present discussion.

524 *Rule 45(b)(1)*

525 Professor Marcus led the discussion of a Rule 45(b)(1) question that has repeatedly
526 reappeared on the agenda. Rule 45(b)(1) says that: "Serving a subpoena requires delivering a copy
527 to the named person * * * ." Going back at least to 2005, various groups have pointed out that
528 most courts interpret "delivering" to mean in-hand service. Some courts, however, accept mail as
529 a means of delivery. The suggestions have ranged from recognizing mail — including, more
530 recently, commercial carrier — to adopting the means of serving a summons and complaint under
531 Rule 4.

532 This question was considered at some length during the long and careful process that
533 revised Rule 45 to simplify subpoena practice by directing that all subpoenas issue from the court
534 where the action is pending, and authorizing the court where compliance is required to transfer an
535 enforcement proceeding to a different court that issued the subpoena. The question was put aside
536 then, in part from concerns that in-hand service is important as an assured means of actual notice.
537 In-hand service also impresses the importance of the duty to comply, particularly on a nonparty.
538 The importance of understanding the duty is underscored by the severity of contempt, the sanction
539 for noncompliance.

540 So the question is whether we should take up this question once again. Is the present
541 somewhat-muddled practice acceptable, recognizing that delivery by mail is a common practice,
542 particularly among the parties to an action? Or should this question be deferred while the
543 Committee decides whether the time has come to undertake a broad review of the means of serving
544 a summons and complaint under Rule 4?

545 A judge remarked that different judges on the same court may adopt different views. Rule 4
546 service presents many more issues. In bankruptcy practice, service can have serious consequences.

547 Discussion concluded inconclusively, with a judge's observation that judges generally are
548 forgiving when faced with questions of improper service. There is yet no sense of actual experience
549 with potential problems in serving subpoenas.

550 *Rule 7.1*

551 Two suggestions focus on expanding the Rule 7.1 provisions for disclosures designed to
552 flag potential conflicts of interest that may require recusal of the judge assigned to the case.

553 One suggestion would expand disclosure beyond “parent” corporations to include what
554 may be called “grandparent” corporations. A party may identify its parent corporation. But the
555 parent corporation may itself have a parent. Some of these grandparent corporations have many
556 children, and judges may not be aware of the tie between their holdings in the grandparent and the
557 identified parent.

558 A second suggestion is that all parties should be required to review publicly available
559 information about the financial interests of the judge assigned to a case.

560 Discussion began with the observation that “judges are feeling a lot of heat.” Widespread
561 publicity has been given to a study that found well over a hundred cases in which judges failed to
562 recuse themselves, although almost certainly inadvertently, for conflicting interests that were not
563 pointed out to them. Congress has recently enacted added reporting requirements.

564 The question whether parties should be required to review a judge’s stock holdings is not
565 easy. “How much help can we get from them?” Is it appropriate to require a party to make public
566 all financial interests it may have in common with a judge?

567 Professor Marcus elaborated by noting that the Wall Street Journal investigation of judges’
568 stock holdings included holdings by family members. It did find many cases without recusals that
569 should have been made.

570 The grandparent problem was illustrated in the suggestion by pointing to Berkshire
571 Hathaway as an entity that is parent to a great many other corporations that themselves are parents
572 of still other corporations. Judges who made favorable investments in Berkshire Hathaway may
573 be understandably reluctant to divest these assets. Nor, for that matter, is it suitable for a rule of
574 procedure to explore such questions as what sorts of suitably dispersed or blind investments are
575 better suited for judges. The challenges presented by capital gains taxes are even further from
576 rulemaking.

577 The recent proposed addition of diversity disclosure provisions is supported in part by the
578 absolute obligation to ensure the subject-matter jurisdiction of a federal court. It is much better to
579 ensure that the judge has that information at the beginning of the action.

580 The proposal that would require all parties to check publicly available information about
581 an assigned judge’s financial information sets a 14-day deadline. As with diversity jurisdiction, it
582 is better to have recusal information available at the beginning. But is this an undue burden on the
583 parties? Or at least on parties not represented by counsel?

584 These questions “are not going to go away.”

585 Judge Dow noted that this Committee has been nominated to take the lead for the other
586 advisory committees. A first question will be whether we think a joint committee is needed. A
587 related question is whether these issues are best suited for consideration in the Rules Enabling Act

588 process, or whether some other Judicial Conference committee might be a better resource. He also
589 noted that the Seventh Circuit is developing a new plan for financial disclosures by judges. It is
590 not clear what financial information about judges is available now, nor whether parties know where
591 to look for it.

592 Another judge suggested that it would place an extraordinary burden on a party to require
593 it to track down information that may not be readily available, and to reveal information that is not
594 otherwise public.

595 A lawyer member said that with big clients, checks for conflicts of interests are worthwhile.
596 “But for represented litigants in smaller stakes cases, it could be too much work.” Checking for
597 conflicting interests among clients must be done, and it is complex, including “who’s on the other
598 side.” It is further complicated because it is important for SEC purposes to guard against learning
599 insider information. So for the grandparent example used for expanded recusal disclosures, we do
600 look upstream from the corporation that is a party’s parent, but this example “is prominent in
601 corporate databases.” In other settings “it can be very hard.”

602 A judge agreed that there are many corporations whose affiliations are harder to track than
603 Berkshire-Hathaway. “A rule might not accomplish much.”

604 A different lawyer member agreed that conflicts checks can be difficult. “We often
605 represent unsophisticated clients,” and clients with no assets. But the firm has the resources
606 required to do conflicts checks, and has a “whole team” that does them. Information also is
607 collected from the lawyers. Conflicts checks are expensive. Many firms may not have the resources
608 to do that.

609 A judge agreed that resources are an important part of the ability to find the information
610 that’s required now. “Courts are under scrutiny,” but it is difficult to know whether a rule will help.

611 Yet another lawyer confirmed that firm practice asks clients to make sure the firm has
612 complete information.

613 A judge observed that shifting responsibility to the parties could help judges.

614 Discussion turned to the next steps to be taken in considering recusal disclosures. There
615 are issues that need further attention and work. It may be that the Standing Committee should
616 become responsible for directing work by all advisory committees. The proposals should be kept
617 on the Civil Rules agenda.

618 A subcommittee might be appointed for further study. There have been several
619 subcommittees recently, and they have had several meetings. “We can take stock of what resources
620 are available.” It may be useful to appoint a small subcommittee to continue gathering information.

621 A committee member observed that there are many moving parts. The proper approach is
622 not clear.

623 The possibility of a small subcommittee was noted again, with a judge and a lawyer and
624 perhaps only one more member. The committee chair can open discussions with the Financial
625 Disclosures Committee. "I doubt this is something for a Rules answer."

626 Discussion concluded with an analogy to the questions raised by third-party litigation
627 funding. The questions remain on the agenda, but in an inactive status. They will not go away, just
628 as these recusal disclosure questions will not go away. And here, it will be useful to find time to
629 coordinate with other committees.

630 *Rule 55*

631 Professor Marcus introduced the Rule 55 questions that have been carried forward on the
632 agenda. Rule 55 says that court clerks "must," in described circumstances, enter defaults and then
633 default judgments. But practice in many districts does not adhere to this directive. Work is
634 underway to explore the reasons why many districts require that all default judgments be entered
635 by a judge, and why a few seem to require that the initial default also be entered by a judge.

636 Dr. Lee stated that the FJC has begun work to explore actual practices across the districts
637 and to find the concerns that have led some courts to shift to judges responsibilities that Rule 55
638 assigns to clerks. Initial work has shown that clerk's offices find some default questions to be
639 routine, readily handled by the office, while others present real challenges.

640 Brief discussion provided an example of a court that has defaults entered by the clerk, but
641 has judges enter default judgments. Another example noted a court that has judges enter both
642 defaults and default judgments.

643 *Rules 38, 39, 81*

644 Judge Dow noted that questions surrounding the rules that govern demands for jury trial
645 have lingered untended on the agenda for several years. There is a clear potential for further study,
646 but the committee capacity for creating subcommittees has been fully devoted to other projects.

647 Professor Marcus focused on a proposal submitted to the Committee the day after the
648 Standing Committee meeting in June 2016. The discussion in the Standing Committee focused on
649 questions raised by the jury demand provisions for cases removed from state courts. Then-Judge
650 Gorsuch and Judge Graber, Standing Committee members, proposed that the jury demand
651 requirement be dropped. They pointed to Criminal Rule 23, which allows a bench trial only if the
652 government, defendant, and judge agree to proceed without a jury. They were concerned that the
653 demand procedure at times leads to inadvertent forfeiture of the right to a jury trial. They pointed
654 to satisfactory experience in state courts that do not require demands. And they suggested that

655 making jury trials automatically available in all cases with a right to jury trial might increase the
656 number of cases actually tried to juries.

657 The first question is whether the demand procedure actually reduces the number of jury
658 trials. The FJC is conducting a study of jury trials that could inform the answer.

659 Dr. Lee said that the ongoing study of jury trials focuses on factors that may explain the
660 different rates of jury trials in different districts. The study was undertaken in response to a
661 direction from Congress. Good information can be developed from court dockets, because
662 Rule 39(a) provides that an action must be designated on the docket as a jury action when a jury
663 trial has been demanded under Rule 38. The information gathered so far is presented in the tables
664 presented in the agenda materials. The rate of jury trials varies by case types, and is higher when
665 the parties are represented by counsel. Surprisingly, jury trials occur in cases that do not have a
666 jury demand noted in the docket — the rate of actual jury trials in such cases is 2.7%, double the
667 rate in cases with jury demands noted in the docket. Perhaps the mystery can be explained as
668 simple failure to make docket notes of actual demands. It also appears that some judges are eager
669 to grant belated requests for jury trials, waiving the demand requirement, while others look for
670 good reasons to justify waiving the requirement.

671 The agenda history was elaborated upon. Jury-trial-demand practice first came to the
672 current agenda by a suggestion that focused on the 2007 Style Project’s revision of one word in
673 Rule 81(c)(3)(A). Before the revision, this provision established the procedure for demanding a
674 jury trial in an action removed from a state court before a demand was made in the state court. It
675 was framed to address the circumstance that arises if state law “does” not require an express
676 demand. It was restyled to say “did” not require an express demand. The suggestion argued that
677 the change created an ambiguity that led to a different meaning. The question arises in cases
678 removed from state courts that do require a demand, but set a deadline at a point after the time of
679 removal. The report to the Standing Committee was designed only as an information item about
680 this question, including the information that this Committee was considering a possible
681 amendment that would simplify the procedure in removed cases by requiring a jury demand under
682 Rule 38 whenever a jury trial had not been demanded in the state court before removal.

683 These topics remain on the agenda for further consideration after completion of the FJC
684 study.

685 *End of the Day for e-Filing*

686 The Time Project in 2009 amended Rule 6(a)(4)(A) to define the end of the last day for
687 electronic filing as “midnight in the court’s time zone.” The same definition was adopted in the
688 Appellate, Bankruptcy, and Criminal Rules.

689 A suggestion to reconsider this definition was made a few years ago. The concern was that
690 enabling midnight filing was inhumane. Lawyers, often young associates, were required to work
691 late, disrupting personal and family life. A large-scale FJC study was planned, and has been
692 completed with a vast amount of information about actual filing practices. The study had also

693 contemplated searching interview efforts, but they were postponed because of pandemic
694 disruptions and then abandoned because the pandemic encouraged broad changes in practice by
695 remote means.

696 Judge Dow opened the discussion by observing that this inquiry has been going on for
697 some time. The pandemic may have affected practices in important ways. An interesting datum is
698 the recent remark of a big-firm lawyer that the firm has 600 lawyers without an office for them to
699 work from. We have heard from various sources that family life may indeed be improved by the
700 midnight deadline — family dinner and bedtime can be enjoyed before turning to the final
701 polishing of a midnight filing. Work and filing practices may remain in disarray because of the
702 pandemic’s changes in the ways people work. There is a wide disparity in views. It may be time
703 to abandon this question.

704 One example was offered of a phone call to the Rules staff from a lawyer in the New York
705 area who opined that a 5:00 p.m. deadline would worsen his family life.

706 The Department of Justice prefers to leave the rule as it is.

707 It is not certain whether other advisory committees have different views. The Bankruptcy
708 Rules Committee may have distinctive concerns.

709 A lawyer was pleased that the Committee recognizes that the world has changed for
710 lawyers and their clients. “Flexibility in the times that work best for each is important.” It will be
711 good to drop this item from the agenda.

712 The Committee agreed without dissent that this proposal should be dropped from the
713 agenda unless a problem of disuniformity arises from a suggestion by another advisory committee
714 that the deadline should be redefined.

715 *In Forma Pauperis Standards and Procedures*

716 Judge Dow briefly summarized earlier discussions that reflect broad agreement that there
717 are serious problems with addressing requests to proceed in forma pauperis. The standards to
718 qualify vary widely, not only among districts, but also among different judges on the same court.
719 And the practices for applying the standards vary as well, assigning primary responsibility to
720 different actors in different courts. But there are grave reasons to doubt whether the need for
721 improvements can be addressed effectively through the rulemaking process.

722 Another judge noted that “filing fees are handled differently, especially in prisoner cases.”
723 Orders to show cause are sometimes used. The Administrative Office has prepared a memorandum
724 to court clerks on when to close prisoner cases. The Court Administration and Case Management
725 Committee is involved with these questions. They even affect the allocation of pro se law clerks
726 to the districts.

727 Judge Dow noted that the Administrative Office has a working group for i.f.p. cases, and
728 that it remains at work. The Prison Litigation Reform Act requires filing fees; if fees are not
729 waived, the fee becomes the minimum settlement value. “We have to charge a fee, and there is a
730 huge number of these cases.” There is a strong prospect that the Court Administration and Case
731 Management Committee is better able than this Committee to address i.f.p. practice.

732 *Class Representative Awards*

733 A topic not on the agenda was introduced by Judge Proctor. A longstanding and widespread
734 practice has recognized modest awards to class action representatives to compensate for the work
735 they do on behalf of the class. A panel decision in the Eleventh Circuit, however, has recently
736 relied on Supreme Court decisions from the 1880s to rule that such fees cannot be awarded.
737 Rehearing en banc was denied by a 6–5 vote. The dissent offered persuasive reasons to rehear the
738 case, and concluded that Congress or this Committee should restore the practice followed
739 elsewhere. Since the decision, lawyers have observed that if they have a choice, they will file a
740 class action in the Fifth Circuit, not the Eleventh. Denial of representative awards “will add to the
741 feeling that class actions are lawyer-driven, not party-driven.” And in fact class representatives are
742 commonly called upon to do work on behalf of the class — they are consulted on the prosecution
743 of the action, and are involved in responding to discovery. “We need them.” “I move that this topic
744 be added to the agenda.”

745 Judge Dow agreed that a Committee member can recommend that the Committee consider
746 an issue. The Seventh Circuit would have a different view than the Fifth Circuit. In a class action,
747 “I know if a named plaintiff has done work.” And he denies certification if he thinks the named
748 plaintiff will not do work.

749 Professor Marcus suggested that the Committee should consider whether this question can
750 be addressed by Rule 23. It may indeed have an effect on where class actions are filed.

751 A lawyer member noted that a petition for certiorari to the Eleventh Circuit has been filed.
752 “This is an important question.” The Second Circuit has already disagreed with the Eleventh, and
753 approved service awards.

754 Another judge agreed that this is an interesting and important issue that warrants review of
755 the history and where other circuits stand now. The Committee ordinarily does not jump in to
756 correct a single aberrant decision. And it is appropriate to pause to see whether certiorari is granted.

757 A lawyer member suggested that even the terminology is important. The current
758 description of representative fees is “service award.”

759 This topic will be carried forward on the agenda.

760 *Rule 17(a) and (c)*

761 Professor Marcus introduced this proposal as one made by a nonlawyer who wishes to
762 proceed to litigate as a duly appointed guardian on behalf of his ward. He complains that the district
763 court has required that he be represented by an attorney, and urges that Rule 17 should be amended
764 to make it clear that he can proceed without an attorney.

765 Rule 17(a)(1)(C) provides that a guardian is among those who “may sue in their own name
766 without joining the person for whose benefit the action is brought.” Rule 17(c)(1)(A) provides that
767 a general guardian “may sue or defend on behalf of a minor or an incompetent person.”

768 The rule ensures the capacity to sue. There is no reason to amend it simply because this
769 litigant did not get what he wanted.

770 This proposal was removed from the agenda without dissent.

771 *Rule 63*

772 Rule 63 provides that when a judge conducting a hearing or trial is unable to proceed,
773 another judge may proceed on determining that the case may be completed without prejudice to
774 the parties. The second sentence further provides:

775 In a hearing or a nonjury trial, the successor judge must, at a party’s request, recall
776 any witness whose testimony is material and disputed and who is available to testify
777 again without undue burden.

778 A proposal was submitted to suggest that it may be desirable to amend the second sentence
779 to reflect the proposition that the availability of audio- or video-recorded testimony may affect the
780 decision whether to recall a witness. The suggestion was prompted by a nonprecedential decision
781 of the Federal Circuit interpreting the cognate provision in the Court of Federal Claims Rules. The
782 case involved an audio recording, but the decision did not turn on that. Instead, the opinion first
783 noted that the successor judge had erred in deciding not to recall two witnesses without explaining
784 the decision by reference to the factors enumerated in the rule text. But the decision then went on
785 to rule that this error was not prejudicial because the testimony of each of the two witnesses was
786 irrelevant. There was no dispute as to the controlling facts.

787 Discussion of this proposal at the March 2022 meeting expressed some concern that
788 Rule 63 may unduly limit a successor judge’s ability to decide that a witness need not be recalled.
789 Judge Dow recruited Allison O’Neill, a Seventh Circuit law clerk, to do volunteer research into
790 Rule 63’s application in practice. Her thorough and thoughtful memorandum is included in the
791 agenda materials. It does not show any need to amend the rule. There is no apparent reason to
792 amend the rule because of an opinion that says a successor judge should explain a determination
793 not to recall a witness.

794 Committee members were asked whether there is any experience that suggests a need to
795 examine Rule 63 further. No one offered any reason to go further.

796 This proposal was dropped from the agenda without dissent.

797 *Mandatory Initial Discovery Pilot Programs*

798 Dr. Lee noted that the FJC has been studying the mandatory initial discovery pilot programs
799 in the District of Arizona and the Northern District of Illinois since 2016. “It’s not over yet” for
800 him or for his partner, Jason Cantone. But the report is almost done. The current draft runs to 130
801 pages. The plan for distributing the completed report will be developed in consultation with this
802 Committee. Until it is completed, however, it is better not to attempt to summarize the findings.

803 Judge Dow noted that this was the only pilot project considered by the Committee that
804 found willing participants, and only two districts took on this one. In the Northern District of
805 Illinois, about two-thirds of the judges participated, offering an opportunity for comparisons within
806 the same court that may support more robust findings.

807 The model for the pilot projects is described as discovery, but it is an “all cards on the
808 table” version of initial disclosure. It was readily accepted by the judges and lawyers in Arizona,
809 where state practice has adhered to a highly similar model for many years. It met resistance in
810 Illinois from defense lawyers who protested that it requires a great deal of work that may be wasted
811 if a motion to dismiss is later granted. The model was revised in midstream in Illinois to provide
812 that an answer must state whether the defendant plans to make a motion to dismiss. That addition
813 enables the judge to decide whether to suspend the mandatory initial discovery. “It’s not for every
814 case.” Some lawyers resisted, and it seems likely that in some cases the lawyers for all parties
815 tacitly agreed to act as if they had exchanged mandatory initial discovery without actually doing
816 it.

817 Dr. Lee noted that “cases in the program do terminate earlier.” But he could not yet say
818 how much earlier.

819 Closed-case attorney surveys continue. The responses include many open-ended
820 comments. “There is a lot of information there.” These are big districts, with lots of cases. There
821 is “a ton of data.” The third part of the report provides a sampling of what the pilot cases looked
822 like, including whether there was a lot of satellite litigation over discovery (there does not seem to
823 have been a lot).

824 A member noted the three somewhat similar information-exchange protocols developed
825 with IAALS support. Each was hammered out in intense discussions between plaintiff-side and
826 defense-side lawyers. The first was for individual employment actions. The next two were for Fair
827 Labor Standards Act cases and first-party property insurance disputes that arose from a hurricane.
828 They have been adopted in several districts, and gained favorable reviews.

829 Experience with the first version of Rule 26(a)(1) mandatory initial disclosure also was
830 noted. The effects in the first years were studied by the RAND Institute. Although the analysis fell
831 a fraction of a point short of the 95% confidence level required to show statistical confidence, there
832 were strong indications of favorable effects.

833 Added background was provided for new members. The pilot projects grew out of the
834 subcommittees that proposed the 2015 discovery rules amendments in the wake of the 2010
835 conference at Duke Law School. The next step was to ask whether still more ambitious revisions
836 should be considered. Pilot projects are attractive because they can provide a controlled
837 environment that supports rigorous analysis of the results. It was good to enroll two districts; it
838 would have been better yet if more volunteers could be found.

839 Dr. Lee noted that his FJC colleague, Tim Reagan, did great work in preparing training
840 videos for the pilot projects. Judge Dow agreed, observing that the training was so good that only
841 one judge dropped out of the pilot.

842 The next meeting is scheduled for March 28, 2023.

843 Judge Dow thanked all participants for their interest and hard work.

844 Judge Bates thanked Judge Dow for his many years of service on rules committees,
845 inspiring a wave of applause.

846 Respectfully submitted,

847 Edward H. Cooper
848 Reporter

TAB 6

1 **6. Rule 12(a) – Proposal to recommend adoption after public comment**

2 In August 2022, a preliminary draft of a proposed amendment to Rule 12(a) was
3 published for public comment. The stimulus was principally that some litigants encountered
4 difficulties obtaining summonses in FOIA cases that called for responsive pleadings within the
5 statutory 30-day deadline because it was not clear that a federal statute prescribing a different
6 time would apply to the United States under Rules 12(a)(2) and 12(a)(3). To avoid unintended
7 preemption of such statutory time directives, the invocation of federal statutes was moved up to
8 apply to the whole of Rule 12(a), as follows:

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

12 **(a) Time to Serve a Responsive Pleading.**

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

15 (1) *In General.*

16 (A) A defendant must serve an answer:

17 * * * * *

18 **Committee Note**

19 Rule 12 is amended to make it clear that a federal statute that specifies another time
20 supersedes the times to serve a responsive pleading set by paragraphs (a)(2) and (3). Paragraph
21 (a)(1) incorporates this provision, but the structure of subdivision (a) does not seem to extend it
22 to paragraphs (2) and (3). There is no reason to supersede an inconsistent statute by any part of
23 Rule 12(a). The amended structure recognizes the priority of any statute for all of paragraphs (1),
24 (2), and (3).

25 * * * * *

26 Only three comments were received, and they are summarized below. One supports the
27 proposed amendment, citing the potential problem in FOIA cases. Another is from Andrew
28 Straw, who also has submitted a proposal to amend Rule 11 (discussed below), seemingly
29 objecting to something that happened in a case between him and the state of Indiana.

30 The third comment is from the Federal Magistrate Judges Association. The FMJA
31 recognizes that the amendment clarifies that the response times specified in the rule may be
32 superseded by a federal statute even in cases in which the United States is a party.

33 The FMJA suggests, however, that there should be some recognition that other federal
34 rules, including various Supplemental Rules, may have response provisions inconsistent with

35 Rule 12(a). It therefore proposes that the amendment “restore” language stricken in the published
36 preliminary draft as follows:

37 Unless another time is specified by these rules or a federal statute, the time for serving a
38 responsive pleading is as follows:

39 This addition might do no harm, but does not seem to serve an important purpose. The
40 FMJA submission does not cite any such rule, but instead says some such rules “might also”
41 contain divergent response times, and that they are “potentially conflicting” rules. Yet no such
42 rule has been called to our attention, though some little-known federal statutes (in addition to the
43 FOIA) were mentioned when the rule change was under discussion.

44 Moreover, this change would go beyond “restoring” the stricken language, which referred
45 only to a different time specified by “this rule.”

46 Under these circumstances, it seems that the published preliminary draft should be
47 recommended for adoption.

48

Summary of Comments on Rule 12(a) Amendment

49 Andrew Straw (CV-2022-0003-0003): “Rule 12 has been disregarded to favor the State of
50 Indiana and its Attorney General. A deputy AG ask for more time to file a motion to
51 dismiss on day 29 after service and the trial judge allowed it even with the lie that 29
52 days was still timely. When I objected to the 7th Circuit, I was slapped with a \$500 fine
53 and a ban on using any federal court for 2 years. This represents a COURT CLOSURE to
54 hide and protect violations of Rule 12(a). Straw v. Indiana Supreme Court, 18-2878 (7th
55 Cir. 2018).”

56 Federal Magistrate Judges Association (CV-2022-0003-0006): The amendment clarifies that the
57 response times fixed by Rule 12 may be superseded by statute even in cases where the
58 United States is a party. The current rule does not recognize that possibility. But other
59 rules may contain response provisions that are inconsistent with Rule 12, so the rule
60 could be amended to read: “Unless another time is specified by these rules or a federal
61 statute, the time for serving a responsive pleading is as follows:”

62 Anonymous (CV-2022-0003-0007): I support the proposed amendment. The FOIA gives federal
63 agencies 30 days to respond, which should supersede the 60 days provided in Rule
64 12(a)(2). I have had a court clerk issue a 60-day summons even though the statute
65 provides a 30-day time limit. Part of the problem may be the standard A.O. form used by
66 courts to issue a summons. That form says the U.S. has 60 days to respond, but does not
67 note that there may be a different time limit.

TAB 6A

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE¹**

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

5 **(a) Time to Serve a Responsive Pleading.**

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

9 **(1) *In General.***

10 **(A)** A defendant must serve an answer:

11 * * * * *

Committee Note

Rule 12 is amended to make it clear that a federal statute that specifies another time supersedes the times to serve a responsive pleading set by paragraphs (a)(2) and (3). Paragraph (a)(1) incorporates this provision, but the structure of subdivision (a) does not seem to extend it to paragraphs (2) and (3). There is no reason to supersede an inconsistent statute by any part of Rule 12(a). The amended structure recognizes the priority of any statute for all of paragraphs (1), (2), and (3).

¹ New material is underlined in red; matter to be omitted is lined through.

TAB 7

68 **7. Proposed Amendments to Rules 16(b)(3) and 26(f)(3) (privilege logs) –**
69 **recommendation to publish for public comment**

70 At its October 2022 meeting, the Advisory Committee approved a Discovery
71 Subcommittee recommendation to the Standing Committee that it publish proposals to amend
72 Rule 26(f)(3)(D) and Rule 16(b)(3)(B). The proposed amendments would add about nine words
73 to each of those rules, calling for the parties to discuss and report to the court on their intended
74 method for complying with Rule 26(b)(5)(A), the “privilege log” provision added in 1993.

75 At its January 2023 meeting, the Standing Committee had no problems with the rule
76 amendments, but several members of that committee found the Committee Note unduly long for
77 such a small rule change. Some also worried that the Note might partly be made up of “practice
78 pointers” rather than explanatory material on how the rule amendment should be applied.

79 Since the Standing Committee meeting, the Note has been considerably shortened and
80 approved by the Discovery Subcommittee in this shortened version. The Subcommittee
81 recommends submitting the amendment proposal and shortened Note to the Standing Committee
82 during its June 2023 meeting with a recommendation that it be published for public comment in
83 August 2023.

84 In addition, since the Standing Committee meeting, Judge Facciola and Mr. Redgrave
85 have submitted 23-CV-A, urging that an amendment to Rule 26(b)(5)(A) be proposed as well.
86 This proposal will be addressed below, but the Discovery Subcommittee is not endorsing adding
87 this rule change to the amendment package.

88 **Rule 26. Duty to Disclose; General Provisions Regarding Discovery**

89 * * * * *

90 **(f) Conference of the Parties; Planning for Discovery.**

91 * * * * *

92 **(3) *Discovery Plan.*** A discovery plan must state the parties’ views and proposals on:

93 * * * * *

94 **(D)** any issues about claims of privilege or of protection as trial-preparation
95 materials, including the timing and method for complying with Rule
96 26(b)(5)(A) and – if the parties agree on a procedure to assert these claims
97 after production – whether to ask the court to include their agreement in an
98 order under Federal Rule of Evidence 502.

100 Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in
101 Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as
102 trial-preparation materials. Compliance with Rule 26(b)(5)(A) can involve very large costs, often
103 including a document-by-document “privilege log.”

104 Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the
105 need for flexibility. Nevertheless, the rule has not been consistently applied in a flexible manner,
106 sometimes imposing undue burdens.

107 This amendment directs the parties to address the question how they will comply with
108 Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion
109 amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about
110 complying with Rule 26(b)(5)(A) in scheduling or case management orders.

111 Requiring this discussion at the outset of litigation is important to avoid problems later
112 on, particularly if objections to a party’s compliance with Rule 26(b)(5)(A) might otherwise
113 emerge only at the end of the discovery period.

114 This amendment also seeks to grant the parties maximum flexibility in designing an
115 appropriate method for identifying the grounds for withholding materials. Depending on the
116 nature of the litigation, the nature of the materials sought through discovery, and the nature of the
117 privilege or protection involved, what is needed in one case may not be necessary in another. No
118 one-size-fits-all approach would actually be suitable in all cases.

119 In some cases, it may be suitable to have the producing party deliver a document-by-
120 document listing with explanations of the grounds for withholding the listed materials.

121 In some cases some sort of categorical approach might be effective to relieve the
122 producing party of the need to list many withheld documents. For example, it may be that
123 communications between a party and outside litigation counsel could be excluded from the
124 listing, and in some cases a date range might be a suitable method of excluding some materials
125 from the listing requirement. These or other methods may enable counsel to reduce the burden
126 and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories
127 calls for careful drafting and application keyed to the specifics of the action.

128 Requiring that discussion of this topic begin at the outset of the litigation and that the
129 court be advised of the parties’ plans or disagreements in this regard is a key purpose of this
130 amendment. Production of a privilege log near the close of the discovery period can create
131 serious problems. Often it will be valuable to provide for “rolling” production of materials and
132 an appropriate description of the nature of the withheld material. In that way, areas of potential
133 dispute may be identified and, if the parties cannot resolve them, presented to the court for
134 resolution.

135 Early design of methods to comply with Rule 26(b)(5)(A) may also reduce the frequency
136 of claims that producing parties have over-designated responsive materials. Such concerns may
137 arise, in part, due to failure of the parties to communicate meaningfully about the nature of the

138 privileges and materials involved in the given case. It can be difficult to determine whether
139 certain materials are subject to privilege protection, and candid early communication about the
140 difficulties to be encountered in making and evaluating such determinations can avoid later
141 disputes.

142 **Rule 16. Pretrial Conferences; Scheduling; Management**

143 * * * * *

144 **(b) Scheduling and Management.**

145 * * * * *

146 **(3) *Contents of the Order.***

147 * * * * *

148 **(B) *Permitted contents***

149 * * * * *

150 **(iv)** include the timing and method for complying with Rule
151 26(b)(5)(A) and any agreements the parties reach for asserting
152 claims of privilege or of protection as trial-preparation material
153 after information is produced, including agreements reached under
154 Federal Rule of Evidence 502;

155 * * * * *

156 DRAFT COMMITTEE NOTE

157 Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition,
158 two words – “and management” – are added to the title of this rule in recognition that it
159 contemplates that the court will in many instances do more than establish a schedule in its Rule
160 16(b) order; the focus of this amendment is an illustration of such activity.

161 The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their
162 discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs
163 that the discovery plan address the timing for compliance with this requirement, in order to avoid
164 problems that can arise if issues about compliance emerge only at the end of the discovery
165 period.

166 Early attention to the particulars on this subject can avoid problems later in the litigation
167 by establishing case-specific procedures up front. It may be desirable for the Rule 16(b) order to
168 provide for “rolling” production that may identify possible disputes about whether certain
169 withheld materials are indeed protected. If the parties are unable to resolve those disputes
170 between themselves, it is often desirable to have them resolved at an early stage by the court, in

171 part so that the parties can apply the court’s resolution of the issues in further discovery in the
172 case.

173 Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the
174 specifics of a given case there is no overarching standard for all cases. In the first instance, the
175 parties themselves should discuss these specifics during their Rule 26(f) conference; these
176 amendments to Rule 16(b) recognize that the court can provide direction early in the case.
177 Though the court ordinarily will give much weight to the parties’ preferences, the court’s order
178 prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party
179 agreement.

180 Possible addition of
181 cross-reference in Rule 26(b)(5)

182 The original proposal the Advisory Committee received was to amend Rule 26(b)(5)(A)
183 to endorse “categorical” listing in the rule. The Discovery Subcommittee studied that idea and
184 concluded it was not promising. Instead, the Subcommittee came to focus on the rules we
185 proposed be amended.

186 At the end of January, Judge Facciola and Mr. Redgrave submitted 23-CV-A, which is in
187 this agenda book. One thing they discuss is addressing “materiality” in the Notes. That was not
188 in the Notes the Standing Committee asked us to shorten. Since we are to reconsider the Notes, it
189 could be added. But adding things to the Notes was not the seeming objective of the Standing
190 Committee in remanding to us. And it’s worth noting that the word “materiality” has produced
191 tensions in related areas before. With regard to Fed. R. Evid. 401, it was studiously avoided. And
192 on occasion, in regard to the approach to relevance in Rule 26(b)(1) it was urged by some that
193 saying “materiality” would tighten up the rule’s standards, but that suggestion was not pursued.

194 This submission also urges that there be an amendment to Rule 26(b)(5)(A) itself on p. 3
195 of the submission. Something like that could be added, along the following lines:

- 196 **(A)** *Information Withheld.* When a party withholds information otherwise
197 discoverable by claiming that the information is privileged or subject to protection
198 as trial-preparation material, the party must:
- 199 **(i)** expressly make the claim; and
- 200 **(ii)** describe the nature of the documents, communications, or tangible things
201 not produced or disclosed – and do so in a manner that, without revealing
202 information itself privileged or protected, will enable other parties to
203 assess the claim. Under Rule 26(f)(3)(D), the parties must include the
204 intended method for complying with this rule in their discovery plan.

205 It is not clear what that change would add to what the Subcommittee proposed, which is
206 to be added to Rule 26(f), the pertinent rule. The goal is to get parties to address these issues
207 during their Rule 26(f) conference, and that rule seems the right place to tell them what to do
208 during that conference. Putting the same thing into Rule 26(b)(5)(A) does not seem to add much.
209 And one might also ask why this change was not proposed originally and instead appears now.
210 The Standing Committee “remanded” the matter to shorten the Notes, not to add new
211 amendment proposals. The Discovery Subcommittee does not recommend adding this
212 amendment proposal to the package.

TAB 7A

Hon. John M. Facciola (ret.)
Jonathan M. Redgrave

January 31, 2023

VIA EMAIL

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: Facciola – Redgrave Supplemental Personal Submission to Advisory Committee
on Civil Rules Regarding Potential Rulemaking Regarding Privilege Logs

Dear Mr. Byron:

We have reviewed the most recent Civil Rules Advisory Committee’s proposed amendments to Fed. R. Civ. P. 16(b)(3)(B)(iv) and 26(f)(3)(D) to address what we have previously noted is a persistent problem in civil litigation: the identification and logging of documents withheld on the basis of attorney-client privilege or attorney work-product protections. We also understand from discussions with observers of the January 4, 2023, Standing Committee Meeting that concern was expressed about the length and content of the proposed accompanying Advisory Committee Notes. We write to provide the Advisory Committee with our views with respect to the current draft Rules and Advisory Committee Notes in hopes that our thoughts will assist the Advisory Committee in its additional deliberations regarding the path forward for the proposed rules changes.

As the Advisory Committee is aware, our most recent submission on this subject included our personal reflections on a two-day virtual symposium on the current state of the modern privilege log that we hosted in September of 2021.¹ In that letter, we summarized our conclusion that we perceived a broad (but not universal) consensus that amendments to the privilege rule, Fed. R. Civ. P. 26(b)(5)(A)(ii), and the meet and confer rule, Fed. R. Civ. P. 26(f)(3)(D) could be beneficial and, as such, we recommended they be explored further.

¹ Available at https://www.uscourts.gov/sites/default/files/21-cv-z_suggestion_from_john_facciola_and_jonathan_redgrave_-_privilege_logs_0.pdf.

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The current proposal addresses the issues raised via proposed rule changes that do not include any amendment to the privilege rule, Fed. R. Civ. P. 26(b)(5)(A)(ii). We surmise that consternation over proposed language changes to that rule resulted in a “package” of changes to the meet and confer rule (and the parallel Rule 16 provisions) with an extended discussion of the issue in proposed Advisory Committee Notes to achieve the objective of guiding litigants and courts on improving privilege logging practices while honoring the language and intent of the 1993 amendment.

With this context, we respectfully note three observations for the Advisory Committee.

First, the omission of any proposed amendments to Fed. R. Civ. P. 26(b)(5)(A)(ii) itself in the rules package unfortunately fails to address directly the progeny of cases that misapply this rule and axiomatically insist that the rule requires that a party must log each privileged document individually, including courts holding that the rule rigidly requires a separate log entry for each email in a chain of emails, regardless of circumstances. As we noted previously, such positions are incorrect as well as inconsistent with the 1993 amendment (as clearly stated in the 1993 Advisory Committee Note).

To put a finer point on this observation, we note that the proposed amendments to Rules 16(b) and 26(f) address “the timing and method of complying with Rule 26(b)(5)(A).” Rule 26(b)(5)(A) as it has been put into practice over the last three decades, however, does not fully harmonize with the intended purpose of those provisions to promote flexibility in formulating a method of compliance that meets the scale of discovery and the needs of the case. The framing of Rule 26(b)(5)(A)(i) and the standard set forth in subpart (ii) continue to support a *de facto* default to the traditional, document-by-document privilege logs.² That default hinders the parties and the courts from careful and full consideration of alternative methods of compliance.³ Furthermore, Rule 26(b)(5), as currently written, does not link the Rule to the proposed amendments to Rules 16(b) and 26(f), which could contribute to procedural confusion on the part of both parties and courts and lead to treating those amendments as a *pro forma* box to be checked, not a serious deliberation of the method of compliance.

In short, without addressing Fed. R. Civ. P. 26(b)(5)(A)(ii), we are concerned that changes to the other Rule components (even with extended proposed Advisory Committee Notes) will not achieve the intended objective of improving practice. To this end, we respectfully suggest that

² Courts to this day continue to insist on “document by document” logging notwithstanding the language of the Rule and the Advisory Committee Note to the 1993 Amendments to 26(b)(5). *See, e.g., Metz Culinary Management, Inc. v. OAS, LLC*, 2022 WL 17978793, at *2-3 (M.D. Pa. Dec. 28, 2022) (ordering party “to provide a privilege log asserting any of its objections to each request and as applying to each document, rather than as a general, blanket assertions” and citing multiple third circuit cases for the proposition that “claims of privilege ‘**must be asserted document by document**, rather than as a single, blanket assertion.’”) (citations omitted; emphasis added).

³ The authors again recognize that the Advisory Committee Note to the 1993 addition of Rule 26(b)(5) indicate that one size does not fit all cases and alternatives, such as categorical logs, might be considered. Experience has taught, and the Advisory Committee’s current proposed amendments reflect, that the intent of the 1993 Notes has not been consistently realized in practice.

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the Advisory Committee revisit the package and include a modest, neutral addition to Fed. R. Civ. P. 26(b)(5)(A)(ii). Specifically, we believe that an addition of a single sentence after 26(b)(5)(A)(ii) would clarify the intent of the amendments to Rules 16(b) and 26(f) and bring together a holistic and more effective package of rules changes:

The manner of compliance with subdivisions (A)(i) and (ii) shall be determined in each case by the parties and the court in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

An Advisory Committee Note to Rule 26(b)(5) need only state that the amendment clarifies that the Rule does not specify the method of compliance for each case which is subject to deliberations of the parties supervised by the court as set forth in Rules 16(b) and 26(f).

As the Advisory Committee will observe, our proposed language above differs from language we previously submitted. In coming to our suggested language in this letter, we revisited concerns raised in various submissions that proposed changes to this rule could negatively impact the discovery process in employment cases and other circumstances. With these perspectives in mind, we crafted language that we submit is neutral and should address the concerns previously raised.⁴

⁴ We commend the Advisory Committee to consider how the Southern District of New York joins the issue of Rule 26(b)(5)(A) compliance with Local Civil Rule 26.2(c) (echoing the proposed amendments and notes to Rules 16(b) and 26(f)), which provides:

Efficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end. For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form.

S.D.N.Y. Local Civ. R. 26.2(c). The Committee Note to the Local Rule expands on purpose as follows:

With the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court. There is a growing literature in decisions, law reviews, and other publications about the need to handle privilege claims in new and more efficient ways. The Committee wishes to encourage parties to cooperate with each other in developing efficient ways to communicate the information required by Local Civil Rule 26.2 without the need for a traditional privilege log. Because the appropriate approach may differ depending on the size of the case, the volume of privileged documents, the use of electronic search techniques, and other factors, the purpose of Local Civil Rule 26.2(c) is to encourage the parties to explore methods appropriate to each case. The guiding principles should be cooperation and the “just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. *See also* The Sedona Cooperation Proclamation, available at www.TheSedonaConference.org, whose principles the Committee endorses.

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We also respectfully submit that if the Advisory Committee proposes a change to Fed. R. Civ. P. 26(b)(5)(A)(ii) (with a short Advisory Committee Note), then it is likely that proposed Advisory Committee Notes accompanying the proposed amendments to Fed. R. Civ. P. 16(b)(3)(B)(iv) and 26(f)(3)(D) can be reduced.

Second, if the Advisory Committee concludes that it should not propose amending Fed. R. Civ. P. 26(b)(5)(A)(ii), we are concerned that any significant truncation of the proposed Advisory Committee Notes accompanying the present set of proposed rules changes will eviscerate the intended effect of the changes to improve practice. As such, we urge caution with reducing the proposed Advisory Committee Notes simply for the sake of reduction, although we also believe some of the language should be eliminated to reduce the potential for unintended consequences as noted below.

Third, we believe that the proposed Advisory Committee Notes to the Rules 16(b) and 26(f) amendments should be modified slightly as they relate to four specific subjects:

a. Timing of the 26(f) Conference Privilege Log Deliberation and 16(b) Case Scheduling and Management Order

The authors agree that the parties should address the method of compliance with Rule 26(b)(5)(A) early, in part, to mitigate disputes later in the case. Early court involvement similarly can put the court on notice of current and potential disputes that can be resolved more expeditiously by early supervision than subsequent disputes that often are encumbered by disagreements concerning the record pertaining to agreed-upon compliance methods or the parties' differing expectations. The parties, however, may have limited knowledge at the time of the Rule 26(f) discovery conference regarding the full scope of discovery and the probable number of claims of privilege and protection that may be asserted. The assumption that producing parties "know" the size, scope, and the precise character of likely privilege and protection claims also is unwarranted, particularly in complex, document intensive litigation. We therefore recommend that the Advisory Committee Notes indicate that the parties address the method of compliance based upon currently known information and the reasonably anticipated number and type of claims that may be asserted as well the means of communicating protected material.⁵ In addition, because the parties might not have sufficient information to propose meaningful methods at the Rule 26(f) conference, the Advisory Committee Note should acknowledge that the parties (and court) can defer deliberations on the privilege issues until later in the case within a time period specified in the Case Scheduling and Management Order.

Id., Committee Note; *see also* Sedona Elec. Doc. Prod. Principles, Comment 10.h. ("Logging large volumes of withheld ESI is often costly, burdensome, time-consuming, and disproportionate to the needs of the case." (citing 1993 Advisory Comm. Note to Rule 26(b)(5)).

⁵ Some communication platforms, e.g., emails and email strings and threads, present difficult logging issues which should be addressed and resolved to reduce the prospect of later disputes.

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b. Continuous Monitoring and Disclosures

Discovery evolves in the course of litigation, and producing parties may find that there are particular fact-intensive and legally difficult claims of privilege and protection, about which reasonable minds could differ, that were not initially anticipated. The authors recommend that Advisory Committee Notes reflect that the parties and the court re-visit the compliance method in a timely manner as discovery proceeds and modify the method if the needs of the case so require. Effective monitoring will require the producing claimant to disclose unanticipated compliance problems and privilege issues and receiving parties to identify with particularity issues they may have encountered. We concur with the emphasis in the proposed Advisory Committee Notes that re-enforces the intent that the parties cooperate and resolve compliance method issues without unnecessary disputes and seek the court’s assistance and guidance when unable to do so.

c. Limiting Practice Guidance in Committee Notes to Rule 26(f)(3)(D)

The currently proposed Committee Notes to the Rule 26(f)(3)(D) amendment include various alternatives to the traditional document-by-document log. The authors recommend limiting those references because the suggestions may constrain the parties and the court in devising compliance methods that meet the needs of the case. The parties and the court may invent methods that exclude some categories of documents from the log or altogether exclude the need for a privilege log. Furthermore, the pace of advances in technology, including privilege artificial intelligence and privilege classifier tools, also makes anticipating alternative compliance methods speculative.

d. Addressing Materiality in the Committee Notes to Rule 26(f)(3)(D)

In our experience, the vast majority of items withheld as privileged or trial-preparation materials are immaterial to the resolution of a claim or issue in the case. Challenges to claims are thus often a waste of the time, effort, and resources of the parties and the court as they do not move the matter closer to resolution. The authors recommend that the Advisory Committee consider including in the Committee Notes language that the parties and court address possible methods to focus compliance on the documents or information that have the highest likelihood of being material to the underlying dispute. An example is tiered discovery that places priority on initially producing documents from sources that are more likely to be material to the claims and defenses. Withheld documents in this subgroup, or a sample, could be subject to a more detailed method of compliance to assess whether claims are properly asserted and increase the prospects of employing more efficient and effective compliance methods for less important discovery tiers.

* * *

In short, we believe that the proposed amendments and Advisory Committee Notes are meaningful steps to advance the purposes of Rule 26(b)(5)(A) and can help reduce the burdens and delays imposed by traditional privilege logs, as well as reduce unnecessary and largely

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fruitless challenges to the method of compliance and broad challenges to claims. We also respectfully submit, based on our judicial and legal practice experience, that the additional minor amendment to Rule 26(b)(5)(A) we propose herein, and additions and modifications we suggest with respect to the proposed Advisory Committee Notes accompanying the changes to Fed. R. Civ. P. 16(b)(3)(B)(iv) and 26(f)(3)(D), can further enhance the likelihood that the amendments will achieve these worthy objectives.

Thank you for considering our personal observations and suggested amendments. And, finally, we would be remiss if we did not thank you again for the continued dedication of time and attention to these proposed rule amendments.

/s/

John M. Facciola

/s/

Jonathan M. Redgrave

TAB 8

213 **8. Proposed New Rule 16.1 on MDL proceedings – recommendation to publish for**
214 **public comment**

215 The MDL Subcommittee was originally appointed in 2017. It has had three chairs (two of
216 whom went on to become Chairs of the Advisory Committee). It has now reached a consensus
217 on the appropriate way to address MDL proceedings in the Civil Rules – adoption of new Rule
218 16.1, addressed particularly to those proceedings.

219 Because the process of development involved consideration of a wide variety of issues
220 and took a long time, it seems useful to introduce the current proposal with some background on
221 the evolution of the Subcommittee’s work. The initial submissions to the Committee raised a
222 wide variety of issues. At the Committee’s April 2018 meeting, the MDL Subcommittee made its
223 first report to the full Committee, listing ten discussion issues:

- 224 (1) The scope of any rule;
- 225 (2) The handling of master complaints and answers;
- 226 (3) Use of plaintiff fact sheets or requiring particularized pleading or requiring immediate
227 submission of evidence by plaintiffs;
- 228 (4) Requiring each plaintiff to pay a full filing fee, with possible effect on Rule 20
229 joinder;
- 230 (5) Sequencing discovery;
- 231 (6) Requiring disclosure of third party litigation funding;
- 232 (7) Handling of bellwether trials, and requiring consent to holding such trials;
- 233 (8) Expanding interlocutory review of certain decisions in certain MDL proceedings;
- 234 (9) Coordinating MDL proceedings with parallel proceedings in state courts or other
235 federal courts; and
- 236 (10) Formation of leadership counsel for plaintiffs and common fund arrangements.

237 A great deal of effort was spent examining the proposal to require disclosure of third
238 party litigation funding. Eventually, the conclusion was that this topic, while perhaps very
239 important, was not particularly salient in MDL proceedings. So TPLF remains on the
240 Committee’s agenda, and disclosure of such arrangements has been endorsed in some bills
241 introduced in Congress, but it is no longer a feature of the MDL Subcommittee’s work.

242 Even more effort was spent examining the possibility of expanded interlocutory review.
243 As it developed, the proposal was to emulate Rule 23(f) on immediate review of class
244 certification decisions. Very helpful submissions favoring and opposing such a rule change were
245 submitted, and Subcommittee members participated in a large number of conferences and
246 meetings with bar groups about this possibility. Eventually the decision was made that there was

247 not such a need for expanded review in light of existing methods (including certification under
248 28 U.S.C. § 1292(b)), and that idea was put aside.

249 Attention focused, instead, on adding provisions specifically calibrated to MDL
250 proceedings to Rule 26(f) and Rule 16(b), which were included in the agenda book for the full
251 Committee’s March 2022 meeting. By the time that meeting occurred, however, further outreach
252 by the Subcommittee (including a conference involving transferee judges, plaintiff attorneys and
253 defense attorneys organized by the Emory University’s Institute for Complex Litigation and
254 Mass Claims) had pointed out some difficulties with relying on Rule 26(f) as a vehicle for
255 managing MDL proceedings. In particular:

256 (1) It might often happen that a Rule 26(f) conference had already occurred in some
257 actions before a Panel transfer order centralizing them in the transferee court, and perhaps
258 that a schedule for activity in those actions had already been adopted in the transferor
259 court. There would ordinarily be no occasion under Rule 26(f) for a second planning
260 conference or report to the court. And after transfer by the Panel, there might not be any
261 Rule 26(f) conferences in actions in which they had not already occurred before transfer.

262 (2) It increasingly seemed valuable to provide the transferee court in MDL proceedings
263 with the opportunity to appoint “coordinating counsel” to oversee the initial organization
264 of the proceedings and assist the court in making its initial management order to guide
265 the future course of the MDL proceedings.

266 These issues prompted the idea of a new Rule 16.1 to address MDL proceedings. Such a
267 rule could assist the transferee court in addressing a variety of matters that often proved
268 important in MDL proceedings. It could also provide a substitute for MDL proceedings for the
269 Rule 26(f) meeting that is to occur in ordinary litigation. Initial sketches of such a rule, including
270 alternative versions, were appended to the agenda book for the Standing Committee’s June 2022
271 meeting.

272 After that Standing Committee meeting, these Rule 16.1 sketches were the focus of
273 several further conferences. Both the American Association for Justice and the Lawyers for Civil
274 Justice arranged for representatives of the Subcommittee to participate in conferences with
275 members of their organizations about the Rule 16.1 ideas. Importantly, three judicial
276 representatives of the Subcommittee also attended the transferee judges conference, put on by the
277 Judicial Panel. At that conference there was a special session with the transferee judges to
278 receive feedback about the Rule 16.1 sketches, including the question which alternative approach
279 seemed most suitable.

280 With this extensive information base, the Subcommittee went to work refining the Rule
281 16.1 proposal. This work included multiple meetings via Zoom and many more exchanges of
282 email about evolving drafts. Eventually, the Subcommittee reached consensus on a proposal to
283 recommend for public comment, which is presented below.

284 **Rule 16.1. Multidistrict Litigation Management**

285 (a) **Initial MDL Management Conference.** After the Judicial Panel on Multidistrict
286 Litigation orders the transfer of actions to a transferee court, the transferee court
287 should schedule an initial management conference to develop a management plan
288 for orderly pretrial activity in the MDL proceedings.

289 (b) **Designation Of Coordinating Counsel For Initial MDL Management**
290 **Conference.** The transferee court may designate coordinating counsel to assist the
291 court with the initial management MDL conference under Rule 16.1(a) and to
292 work with plaintiffs or defendants to prepare for any conference and to prepare
293 any report ordered pursuant to Rule 16.1(c).

294 (c) **Preparation Of Report For Initial MDL Management Conference.** The
295 transferee court should order the parties to meet and confer to prepare and submit
296 a report to the court prior to the initial MDL management conference. The report
297 must address any matter designated by the court, which may include any matter
298 addressed in Rule 16.1(c)(1)-(12) or in Rule 16. The report may also address any
299 other matter the parties desire to bring to the court's attention.

300 (1) Whether leadership counsel should be appointed, and if appointed:

301 (A) The procedure for selecting leadership counsel, and whether the
302 appointment should be reviewed periodically during the MDL
303 proceedings;

304 (B) The structure of leadership counsel, including the responsibilities
305 and authority of leadership counsel in conducting pretrial
306 activities;

307 (C) The role of leadership counsel regarding any settlement activities;

308 (D) Proposed methods for leadership counsel to communicate with and
309 report regularly to the court and non-leadership counsel;

310 (E) Any limits on activity by non-leadership counsel; and

311 (F) Whether, and if so when, to establish a means for compensating
312 leadership counsel;

313 (2) Identification of any previously entered scheduling or other orders and
314 whether they should be vacated or modified;

315 (3) Identification of the principal factual and legal issues likely to be
316 presented in the MDL proceedings;

317 (4) How and when the parties will exchange information about the factual
318 bases for their claims and defenses;

- 319 (5) Whether consolidated pleadings should be prepared to account for
320 multiple actions filed in the MDL proceedings;
- 321 (6) A proposed plan for discovery, including methods to handle discovery
322 efficiently in the MDL proceedings;
- 323 (7) Any likely pretrial motions, and a plan for addressing them;
- 324 (8) A schedule for additional management conferences with the court;
- 325 (9) Whether the court should consider measures to facilitate settlement by the
326 parties of some or all actions before the court, including measures
327 identified in Rule 16(c)(2)(I);
- 328 (10) How to manage the filing of new actions in the MDL proceedings;
- 329 (11) Whether related actions have been filed or are anticipated to be filed in
330 other courts, and whether to consider possible methods for coordinating
331 with any related actions; and
- 332 (12) Whether matters should be referred to a magistrate judge or a master.
- 333 (d) **Initial MDL Management Order.** After the initial MDL management
334 conference under Rule 16.1(a), the court should enter an initial MDL management
335 order addressing the matters designated under Rule 16.1(c), and any other matters
336 in the court’s discretion. This order controls the course of the MDL proceedings
337 until the court modifies it.

338 DRAFT COMMITTEE NOTE

339 The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the
340 Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or
341 consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The
342 number of civil actions subject to transfer orders from the Panel has increased significantly since
343 the statute was enacted. In recent years, these actions have accounted for a substantial portion of
344 the federal civil docket. There previously was no reference to multidistrict litigation in the Civil
345 Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial
346 management of MDL proceedings.

347 Not all MDL proceedings present the type of management challenges this rule addresses.
348 On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer
349 order may present similar management challenges. For example, multiple actions in a single
350 district (sometimes called related cases and assigned by local rule to a single judge) may exhibit
351 characteristics similar to MDL proceedings. In such situations, courts may find it useful to
352 employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling
353 of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the
354 Manual for Complex Litigation also may be a source of guidance.

355 **Rule 16.1(a).** Rule 16.1(a) recognizes that the transferee judge regularly schedules an
356 initial MDL management conference soon after the Judicial Panel transfer occurs to develop a
357 management plan for the MDL proceedings. That initial MDL management conference
358 ordinarily would not be the only management conference held during the MDL proceedings.
359 Although holding an initial MDL management conference in MDL proceedings is not mandatory
360 under Rule 16.1(a), early attention to the matters identified in Rule 16.1(c) may be of great value
361 to the transferee judge and the parties.

362 **Rule 16.1(b).** Rule 16.1(b) recognizes the court may designate coordinating counsel –
363 perhaps more often on the plaintiff than the defendant side – to ensure effective and coordinated
364 discussion during the Rule 16.1(c) conference and to provide an informative report for the court
365 to use during the initial MDL management conference under Rule 16.1(a).

366 While there is no requirement that the court designate coordinating counsel, the court
367 should consider whether such a designation could facilitate the organization and management of
368 the action at the initial MDL management conference. The court may designate coordinating
369 counsel to assist the court before appointing leadership counsel. In some MDL proceedings,
370 counsel may be able to organize themselves prior to the initial MDL management conference
371 such that the designation of coordinating counsel may not be necessary.

372 **Rule 16.1(c).** The court ordinarily should order the parties to meet and confer to provide
373 a report to the court about the matters designated in the court’s Rule 16.1(c) order prior to the
374 initial MDL management conference under Rule 16.1(a). This should be a single report, but it
375 may reflect the parties’ divergent views on these matters. The court may select which matters
376 listed in Rule 16.1(c) or Rule 16 should be included in the report submitted to the court, and may
377 also include any other matter, whether or not listed in those rules. Rules 16.1(c) and 16 provide a
378 series of prompts for the court and do not constitute a mandatory checklist for the transferee
379 judge to follow. Experience has shown, however, that the matters identified in Rule 16.1(c)(1)-
380 (12) are often important to the management of MDL proceedings. In addition to the matters the
381 court has directed counsel to address, the parties may choose to discuss and report about other
382 matters that they believe the transferee judge should address at the initial MDL management
383 conference.

384 **Rule 16.1(c)(1).** Appointment of leadership counsel is not universally needed in MDL
385 proceedings. But, to manage the MDL proceedings, the court may decide to appoint leadership
386 counsel. This provision calls attention to a number of topics the court might consider if
387 appointment of leadership counsel seems warranted.

388 The first is the procedure for selecting such leadership counsel, addressed in
389 subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee
390 judge has a responsibility in the selection process to ensure that the lawyers appointed to
391 leadership positions are capable and experienced and that they will responsibly and fairly
392 represent all plaintiffs, keeping in mind the benefits of different experiences, skill, knowledge,
393 geographical distributions, and backgrounds. Courts have considered the nature of the actions
394 and parties, the qualifications of each individual applicant, litigation needs, access to resources,
395 the different skills and experience each lawyer will bring to the role, and how the lawyers will
396 complement one another and work collectively.

397 MDL proceedings do not have the same commonality requirements as class actions, so
398 substantially different categories of claims or parties may be included in the same MDL
399 proceeding and leadership may be comprised of attorneys who represent parties asserting a range
400 of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims
401 by individuals who suffered injuries, and also claims by third-party payors who paid for medical
402 treatment. The court may sometimes need to take these differences into account in making
403 leadership appointments.

404 Courts have selected leadership counsel through combinations of formal applications,
405 interviews, and recommendations from other counsel and judges who have experience with
406 MDL proceedings. If the court has appointed coordinating counsel under Rule 16.1(b),
407 experience with coordinating counsel’s performance in that role may support consideration of
408 coordinating counsel for a leadership position, but appointment under Rule 16(b) is primarily
409 focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the
410 court for use at the initial MDL management conference under Rule 16.1(a).

411 The rule also calls for a report to the court on whether appointment to leadership should
412 be reviewed periodically. Periodic review can be an important method for the court to manage
413 the MDL proceeding.

414 In some MDL proceedings it may be important that leadership counsel be organized into
415 committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore
416 prompts counsel to provide the court with specifics on the leadership structure that should be
417 employed.

418 Subparagraph (C) recognizes that, in addition to managing pretrial proceedings, another
419 important role for leadership counsel in some MDL proceedings is to facilitate possible
420 settlement. Even in large MDL proceedings, the question whether the parties choose to settle a
421 claim is just that – a decision to be made by those particular parties. Nevertheless, leadership
422 counsel ordinarily play a key role in communicating with opposing counsel and the court about
423 settlement and facilitating discussions about resolution. It is often important that the court be
424 regularly apprised of developments regarding potential settlement of some or all actions in the
425 MDL proceeding. In its supervision of leadership counsel, the court should make every effort to
426 ensure that any settlement process is fair.

427 One of the important tasks of leadership counsel is to communicate with the court and
428 with non-leadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report
429 how leadership counsel will communicate with the court and non-leadership counsel. In some
430 instances, the court or leadership counsel have created websites that permit non-leadership
431 counsel to monitor the MDL proceedings, and sometimes online access to court hearings
432 provides a method for monitoring the proceedings.

433 Another responsibility of leadership counsel is to organize the MDL proceedings in
434 accord with the court’s management order under Rule 16.1(d). In some MDLs, there may be
435 tension between the approach that leadership counsel takes in handling pretrial matters and the
436 preferences of individual parties and non-leadership counsel. As subparagraph (E) recognizes, it
437 may be necessary for the court to give priority to leadership counsel’s pretrial plans when they

438 conflict with initiatives sought by non-leadership counsel. The court should, however, ensure
439 that non-leadership counsel have suitable opportunities to express their views to the court, and
440 take care not to interfere with the responsibilities non-leadership counsel owe their clients.

441 Finally, subparagraph (F) addresses whether and when to establish a means to
442 compensate leadership counsel for their added responsibilities. Courts have entered orders
443 pursuant to the common benefit doctrine establishing specific protocols for common benefit
444 work and expenses. But it may be best to defer entering a specific order until well into the
445 proceedings, when the court is more familiar with the proceedings.

446 **Rule 16.1(c)(2).** When multiple actions are transferred to a single district pursuant to 28
447 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts
448 from which cases were transferred (“transferor district courts”). In some, Rule 26(f) conferences
449 may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling
450 orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may
451 warrant vacating or modifying scheduling orders or other orders entered in the transferor district
452 courts, as well as any scheduling orders previously entered by the transferee judge.

453 **Rule 16.1(c)(3).** Orderly and efficient pretrial activity in MDL proceedings can be
454 facilitated by early identification of the principal factual and legal issues likely to be presented.
455 Depending on the issues presented, the court may conclude that certain factual issues should be
456 pursued through early discovery, and certain legal issues should be addressed through early
457 motion practice.

458 **Rule 16.1(c)(4).** Experience has shown that in certain MDL proceedings early exchange
459 of information about the factual bases for claims and defenses can facilitate the efficient
460 management of the MDL proceedings. Some courts have utilized “fact sheets” or a “census” as
461 methods to take a survey of the claims and defenses presented, largely as a management method
462 for planning and organizing the proceedings.

463 The level of detail called for by such methods should be carefully considered to meet the
464 purpose to be served and avoid undue burdens. Whether early exchanges should occur may
465 depend on a number of factors, including the types of cases before the court. For example, it is
466 widely agreed that discovery from individual class members is often inappropriate in class
467 actions, but with regard to individual claims in MDL proceedings exchange of individual
468 particulars may be warranted. And the timing of these exchanges may depend on other factors,
469 such as whether motions to dismiss or other early matters might render the effort needed to
470 exchange information unwarranted. Other factors might include whether there are legal issues
471 that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in
472 the MDL proceeding.

473 **Rule 16.1(c)(5).** For case management purposes, some courts have required consolidated
474 pleadings, such as master complaints and answers in addition to short form complaints. Such
475 consolidated pleadings may be useful for determining the scope of discovery and may also be
476 employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The
477 relationship between the consolidated pleadings and individual pleadings filed in or transferred
478 to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL

479 proceedings. Decisions regarding whether to use master pleadings can have significant
480 implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America*
481 *Corp.*, 574 U.S. 405, 413 n.3 (2015).

482 **Rule 16.1(c)(6).** A major task for the MDL transferee judge is to supervise discovery in
483 an efficient manner. The principal issues in the MDL proceedings may help guide the discovery
484 plan and avoid inefficiencies and unnecessary duplication, addressed in Rule 16.1(c)(11).

485 **Rule 16.1(c)(7).** Early attention to likely pretrial motions can be important to facilitate
486 progress and efficiently manage the MDL proceedings. The manner and timing in which certain
487 legal and factual issues are to be addressed by the court can be important in determining the most
488 efficient method for discovery.

489 **Rule 16.1(c)(8).** The Rule 16.1(a) conference is the initial MDL management conference.
490 Although there is no requirement that there be further management conferences, courts generally
491 conduct management conferences throughout the duration of the MDL proceedings to effectively
492 manage the litigation and promote clear, orderly, and open channels of communication between
493 the parties and the court on a regular basis.

494 **Rule 16.1(c)(9).** Even if the court has not appointed leadership counsel, it may be that
495 judicial assistance could facilitate the settlement of some or all actions before the transferee
496 judge. Ultimately, the question whether parties reach a settlement is just that – a decision to be
497 made by the parties. But as recognized in Rule 16(a)(5) and 16(c)(2)(I), the court may assist the
498 parties in settlement efforts. In MDL proceedings, in addition to mediation and other dispute
499 resolution alternatives, the court’s use of a magistrate judge or a master, focused discovery
500 orders, timely adjudication of principal legal issues, selection of representative bellwether trials,
501 and coordination with state courts may facilitate settlement. Should the court be called upon to
502 approve a settlement, as in any class actions filed within the MDL, or when the court is asked to
503 appoint a settlement administrator, the court should ensure that all parties have reasonable notice
504 of the process that will be used to determine the division of the proceeds, that the process of
505 allocation has integrity, and that monies be held safely and distributed appropriately.

506 **Rule 16.1(c)(10).** Actions that are filed in or removed to federal court after the Judicial
507 Panel has created the MDL proceedings are treated as “tagalong” actions and transferred from
508 the district where they were filed to the transferee court.

509 When large numbers of tagalong actions are anticipated, some parties have stipulated to
510 “direct filing” orders entered by the court to provide a method to avoid the transferee judge
511 receiving numerous cases through transfer rather than direct filing. If a direct filing order is
512 entered, it is important to address matters that can arise later, such as properly handling any
513 jurisdictional or venue issues that might be presented, identifying the appropriate transferor
514 district court for transfer at the end of the pretrial phase, how time limits such as statutes of
515 limitations should be handled, and how choice of law issues should be addressed.

516 **Rule 16.1(c)(11).** On occasion there are actions in other courts that are related to the
517 MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey)
518 have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may

519 sometimes happen that a party to an MDL proceeding may become a party to another action that
520 presents issues related to or bearing on issues in the MDL proceeding.

521 The existence of such actions can have important consequences for the management of
522 the MDL proceedings. For example, avoiding overlapping discovery is often important. If the
523 court is considering adopting a common benefit fund order, consideration of the relative
524 importance of the various proceedings may be important to ensure a fair arrangement. It is
525 important that the MDL transferee judge be aware of whether such proceedings in other courts
526 have been filed or are anticipated.

527 **Rule 16.1(c)(12).** MDL transferee judges may refer matters to a magistrate judge or a
528 master to expedite the pretrial process or to play a part in settlement negotiations. It can be
529 valuable for the court to know the parties' positions about the possible appointment of a master
530 before considering whether such an appointment should be made. Rule 53 prescribes procedures
531 for appointment of a master.

532 **Rule 16.1(d).** Effective and efficient management of MDL proceedings benefits from a
533 comprehensive management order. A management order need not address all matters designated
534 under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings
535 or would better be addressed at a subsequent conference. There is no requirement under Rule
536 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation
537 under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be
538 flexible, the court should be open to modifying its initial management order in light of
539 subsequent developments in the MDL proceedings. Such modification may be particularly
540 appropriate if leadership counsel were appointed after the initial management conference under
541 Rule 16.1(a).

TAB 9

542 **9. Rule 41 Subcommittee**

543 The Rule 41 subcommittee has continued its work on a conflict among courts about the
544 availability of Rule 41(a)(1)(A) unilateral dismissal by plaintiffs. The issue was initially raised
545 in June 2021 by Judge Furman (21-CV-O) and then again by Messrs. Wenthold and Reynolds,
546 former law clerks in the W.D. Ky., in July 2022 (22-CV-J). Possible changes to the Rule were
547 first considered briefly at the Committee’s March 2022 meeting, after which a subcommittee,
548 chaired by Judge Bissoon, was appointed. Discussion continued at the October 2022 Committee
549 meeting, which left all options open. The issues surrounding Rule 41 were also included in the agenda
550 book and presented at the January 2023 Standing Committee meeting but did not elicit a response. This
551 lack of response is likely best explained by the focus of the Standing Committee on other matters
552 presented that are further along in their development (such as the work on privilege logs and multidistrict
553 litigation).

554 The rule, which remains substantially the same as when it was promulgated in 1938,
555 provides that “the plaintiff may dismiss an action without a court order” by filing a notice of
556 dismissal “before the defendant serves either an answer or a motion for summary judgment” or a
557 “stipulation of dismissal signed by all parties who have appeared.” In brief, the disagreement is
558 about whether a unilateral dismissal by a plaintiff must be of the entire action or may be
559 something less, like the dismissal of only some of the asserted claims, leaving the remaining
560 claims pending in the district court. For instance, in a multi-defendant case, must a plaintiff
561 dismiss all claims against all defendants to dismiss without a court order, or may a plaintiff
562 dismiss only the claims against only one or more defendants, while the others remain live? Or,
563 in a multi-plaintiff case, must all plaintiffs dismiss all of the claims asserted, or may only one
564 plaintiff achieve a unilateral dismissal while the others continue the litigation? An array of other
565 configurations is possible.

566 Research by Rules Law Clerk Burton DeWitt revealed the most common issue that
567 turned up in the reported cases arose when plaintiffs in multi-defendant cases sought to dismiss
568 as to some but not all defendants, as to which the circuits are split. Similar issues have arisen in
569 multi-plaintiff actions in which some but not all plaintiffs wish to dismiss. As to dismissal of
570 some but not all claims against a given defendant, no circuit has explicitly permitted Rule 41(a)
571 to be used to effect such a dismissal, though intra-circuit splits have developed at the district-
572 court level. Mr. DeWitt also suggested that there might soon be a split among the circuits on
573 whether the rule can be used to dismiss some but not all claims against a given defendant.

574 One could imagine the rule being amended to clarify that unilateral dismissal without a
575 court order is only available if all plaintiffs dismiss the “entire action,” meaning all claims
576 against all defendants. At the opposite end of the spectrum, one could also imagine the rule
577 being amended to make clear that any plaintiff may unilaterally dismiss any claim against any
578 defendant without a court order prior to service of an answer or motion for summary judgment
579 (or some other cutoff point). Between those two poles, there are a number of other possibilities.
580 Several such proposals from the October 2022 agenda book are included here again as an
581 appendix to this memo.

582 The subcommittee has met online three times, on June 28, 2022, September 7, 2022, and,
583 most recently, on February 9, 2023. The subcommittee has not yet reached a consensus on
584 whether an amendment should be pursued, or what amendment should be considered if there is

585 to be an amendment proposal. Moreover, the subcommittee has not come to a consensus on
586 whether any amendment proposal should be narrowly focused only on Rule 41(a)(1), or whether
587 it should also address other rules related to amendments and dismissals of claims, such as Rule
588 41(c), which deals with dismissal of counterclaims, crossclaims, and third-party claims, or Rule
589 15(a), regarding amendments to pleadings.

590 At its most recent meeting, on February 9, 2023, the Subcommittee was unanimous in its
591 conclusion that it should seek feedback from practitioners to get a better sense of their
592 experiences with the rule. Although courts are split on the meaning of the rule, it may be that
593 judges and litigants are nevertheless able to use it (and other tools provided by the rules) to
594 effectively focus the litigation without much dispute. Moreover, although there may be
595 circumstances that pose questions currently unanswered by the rule—such as its application to
596 “master pleadings” in MDL proceedings—any lack of clarity in the rule may not create many
597 real-world difficulties, while changing the rule may create new unforeseen problems.
598 Ultimately, the subcommittee’s view was that it should attempt to determine whether lawyers
599 believe there is a need for change to resolve an apparent lack of clarity in the rule’s meaning, or
600 whether, despite that lack of clarity, it is best left alone.

601 As an initial effort at outreach, the subcommittee has sought feedback from the Lawyers
602 for Civil Justice (via Mr. Alex Dahl), the American Association for Justice (via Ms. Susan
603 Steinman), and the National Employment Lawyers Association (via Mr. Joseph Garrison). Each
604 reviewed the publicly available materials from the October 2022 agenda book and expressed
605 eagerness to help. That said, each contact expressed that it might be more challenging than usual
606 to find the relevant information from their members. Unlike earlier projects on, say, class
607 actions or MDLs, there is not a specialized group of lawyers in their ranks that would be best
608 equipped to provide a reaction. None of those we reached out to stated that this was a problem
609 that they had previously considered, but they all expressed willingness to contribute to our
610 efforts, perhaps at a “Zoom mini-conference” or some other such meeting. Going forward, the
611 question is whether to convene such a meeting, and with whom. One could imagine other groups
612 to whom we could reach out for their reactions, and that outreach could be combined with
613 requests for feedback on other matters before the Committee.

614

Appendix

615 Below are several possibilities for amending Rule 41(a) that would address the issues
616 noted above. Again, the subcommittee has not yet come to a consensus that any such
617 amendment is appropriate, or what course it would follow.

618 1. Adopting the minority “literal” view

619 Burton DeWitt’s memo reports that three circuits read the rule literally to require dismissal as
620 to all defendants. That could be made clear relatively easily:

621 **(a) Voluntary Dismissal.**

622 **(1) *By the Plaintiff.***

623 **(A) *Without a Court Order.*** Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any
624 federal statute, the plaintiff [or plaintiffs]¹ may dismiss an entire action
625 without a court order by filing:

626 **(i)** a notice of dismissal before the opposing party serves either an
627 answer or a motion for summary judgment; or

628 **(ii)** a stipulation of dismissal signed by all parties who have appeared.

629 The multi-plaintiff problem would be partly addressed by the bracketed language but would
630 still exist as to multiple defendants unless the Subcommittee ultimately lands on all or nothing (“an
631 entire action”) as the right solution. No. 4 below takes a more global approach to the multi-party
632 problem.

633 2. Adopting the majority view

634 The Rules Law Clerk’s original memo says that the majority approach is that a single
635 plaintiff may dismiss all claims against some but not all defendants.

636 **(a) Voluntary Dismissal.**

637 **(1) *By the Plaintiff.***

638 **(A) *Without a Court Order.*** Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any
639 federal statute, the plaintiff [or plaintiffs] may dismiss an action as to [any]
640 {a} defendant² without a court order by filing:

¹ An alternative would be: “all the plaintiffs may dismiss an entire action”

² Under current style conventions, “a” is regarded as including “any,” but given the purpose of this possible amendment it may be preferable to use “any.”

641 (i) a notice of dismissal before the opposing party serves either an
642 answer or a motion for summary judgment; or

643 (ii) a stipulation of dismissal signed by all parties who have appeared.

644 Of course, a rule amendment is not bound by the courts' interpretation of the current rule,
645 since by definition it's amending the rule. A suggestion in the March 2022 agenda book went further
646 – “the plaintiff may dismiss an action or a claim or party from the action by filing * * *” That has
647 more moving parts, and it seems that the majority view is expressed in terms of one plaintiff and
648 multiple defendants, with plaintiff wanting to drop some defendants but continue to pursue the others.
649 A more expansive effort is presented in no. 6 below.

650 3. Adding some Rule 12 motion cutoffs

651 Another moving part is the handling of the cutoff. One might try to borrow from Rule
652 15(a)(1)(B), which cuts off the right to amend once 21 days after service of some Rule 12 motions:

653 (a) Voluntary Dismissal.

654 (1) *By the Plaintiff.*

655 (A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any
656 federal statute, the plaintiff may dismiss an action without a court order by
657 filing:

658 (i) a notice of dismissal before the opposing party serves ~~either a~~ a
659 motion under Rule 12(b), (e), or (f), an answer, or a motion for
660 summary judgment; or

661 (ii) a stipulation of dismissal signed by all parties who have appeared.

662 This approach seems potentially out of step with Rule 15(a)(1)(B), for that rule permits filing
663 an amended complaint within 21 days of service of one of those Rule 12 motions.

664 4. Addressing the multi-party case

665 (a) Voluntary Dismissal.

666 (1) *By the Plaintiffs.*

667 (A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any
668 federal statute, [any] {a} the plaintiff may dismiss an action as to [any] {a}
669 defendant without a court order by filing:

670 (i) a notice of dismissal before [any defendant] {the defendant to be
671 dismissed} ~~the opposing party~~ serves either an answer or a motion
672 for summary judgment; or

673 (ii) a stipulation of dismissal signed by all parties who have appeared.

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5. Addressing the dismissal of fewer than all claims³

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any federal statute, the plaintiff may dismiss any claim ~~an action~~ without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

A Committee Note could mention Rule 18, and also that this rule says nothing about whether claim preclusion or issue preclusion might limit the plaintiff's pursuit of dismissed claims after entry of a final judgment in this action.

6. Combining multiple plaintiffs and multiple claims

This variation builds on something included in the March 2022 agenda book:

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66, and any federal statute, [any] {a} ~~the~~ plaintiff may dismiss any claim or party from the action ~~an action~~ without a court order by filing:

(i) a notice of dismissal [of such claim or claims] before the [defendant or defendants to be dismissed] {any defendant} ~~opposing party~~ serve[s] either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

This may be the most plaintiff-friendly version. Whether that is a good idea may be debated.

³ The variety of uses of the word “claim” in the rules counsels caution here.

TAB 9A

From: Jesse Furman
Sent: Monday, June 21, 2021 9:36 AM
To: Robert Dow; Edward Cooper; Richard Marcus
Cc: John Bates
Subject: Suggestion for the Civil Rules Advisory Committee: Rule 41(a)

21-CV-O

Dear Bob et al.,

With my S.D.N.Y. colleague, District Judge Philip Halpern, I have a suggestion for consideration by the Civil Rules Advisory Committee: whether Rule 41(a) should be amended to make clear whether it does or does not permit dismissal of some, but not all claims in an action. At present, courts appear to be divided on the question. *Compare, e.g., CBX Res., L.L.C. v. ACE Am. Ins. Co.*, 959 F.3d 175, 177 (5th Cir. 2020) (“Rule 41(a) should not be available to dismiss only some claims a plaintiff has against a defendant.”), and *Taylor v. Brown*, 787 F.3d 851, 857 (7th Cir. 2015) (“Since we give the Federal Rules of Civil Procedure their plain meaning, Rule 41(a) should be limited to dismissal of an entire action.” (internal quotation marks, citation, and alterations omitted)), with *Azkour v. Haouzi*, No. 11-CV-5780 (RJS) (KNF), 2013 WL 3972462, at *3 (S.D.N.Y. Aug. 1, 2013) (Sullivan, J.) (joining “other courts in [the Second] Circuit in interpreting Rule 41(a)(1)(A) as permitting the withdrawal of individual claims” (citing cases)). In case you are interested, the issue is discussed in my opinion in *Alix v. McKinsey & Co.*, 470 F. Supp. 3d 310, 315 (S.D.N.Y. 2020), although I ultimately avoided the issue on which courts are split by concluding that the notice of dismissal there was with respect to the whole action as the only other claim (a federal RICO claim) had already been dismissed. If the Committee takes up the issue, it may also want to consider whether the Rule permits dismissal of an action as to one defendant in a multi-defendant case. My impression is that most, if not all, courts have held that it does - in which case there may be no need for amendment - but it might make sense to do a more comprehensive survey of the case law than I’ve done.

Please let me know if I should submit this suggestion through more formal channels and/or if you need anything else from me.

Many thanks,
 Jesse Furman



Jesse M. Furman
 United States District Judge
 United States District Court
 Southern District of New York
 40 Centre Street
 New York, NY 10007
 Office: 212-805-0282

*****PLEASE CONSIDER THE ENVIRONMENT BEFORE PRINTING THIS E-MAIL*****

TAB 9B

July 24, 2022

Committee on Rules of Practice and Procedure
c/o Rules Committee Staff
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

We write to bring to the Committee’s attention a deficiency in Rule 41 of the Federal Rules of Civil Procedure. In regularly recurring circumstances, courts lack express authorization to dismiss one of several defendants at the plaintiff’s behest and without objection from the remaining parties. We identified this issue while clerking for Judge Benjamin Beaton¹ and decided to bring it to the Committee’s attention after seeing it repeatedly during our time with the court. And we’re not alone. As the Committee is aware, federal judges throughout the county have wrestled with and requested resolution of this issue.²

Federal Rule of Civil Procedure 41(a) allows a plaintiff to voluntarily dismiss an action (in some circumstances) or ask the court to do so (in other circumstances).³

But what happens when a plaintiff, without objection from the defendants, wishes to dismiss one (or fewer than all) of several defendants? By its plain language, Rule 41 doesn’t apply because it allows parties to dismiss only an “action”—a term that, read literally, “refers to the whole of the lawsuit.”⁴ There remain only two avenues under the Rules for a plaintiff seeking to dismiss against fewer than all defendants. First, she could amend her complaint under Federal Rule of Civil Procedure 15. Or second, in the case of misjoinder, a plaintiff could move for dismissal under Federal Rule of Civil Procedure 21.

¹ Judge Beaton sits on the United States District Court for the Western District of Kentucky.

² See Letter from Hon. Jesse Furman & Hon. Philip Halpern (21-CV-0), released on June 21, 2021, available at <https://www.uscourts.gov/rules-policies/archives/suggestions/hon-jesse-furman-and-hon-philip-halpern-21-cv-o>.

³ See Fed. R. Civ. P. 41(a).

⁴ *Brownback v. King*, 141 S. Ct. 740, 751 (2021) (Sotomayor, J., concurring). In full, Justice Sotomayor stated:

An “action” refers to the whole of the lawsuit. See Black’s Law Dictionary, at 37 (defining “action” as a “civil or criminal judicial proceeding”); Black’s Law Dictionary 43 (3d ed. 1933) (“The terms ‘action’ and ‘suit’ are now nearly, if not entirely, synonymous”). Individual demands for relief within a lawsuit, by contrast, are “claims.” See Black’s Law Dictionary, at 311 (2019) (defining a “claim” as “the part of a complaint in a civil action specifying what relief the plaintiff asks for”); Black’s Law Dictionary, at 333 (1933) (defining a “claim” as “any demand held or asserted as of right” or “cause of action”).

Id. (Sotomayor, J., concurring); see also *Columbia Gas Transmission, LLC v. Raven Co., Inc.*, No. 12-72-ART, 2014 WL 12650688, at *1 (E.D. Ky. March 6, 2014) (Thapar, J.) (“Rule 41(a)(1)(A) only permits voluntary dismissal of an “action,” which according to the Sixth Circuit means the *entire* controversy—all claims against all defendants, not individual claims or parties.”).

Somewhere along the line, however, the courts blurred any Rules-based distinctions in this context by using Rules 15, 21, and 41(a) interchangeably, though inconsistently, in cases where a plaintiff sought to dismiss one of several defendants in a case.⁵ According to Wright & Miller's *Federal Practice and Procedure*, "the net result is that there is a certain amount of inconsistency in the cases."⁶ An understatement, to be sure. In reality, there are inter- and intra-circuit splits leaving litigants without clear guidance on this issue.⁷ Another regrettable result of the widespread discrepancies is that district courts are left to do the best they can to muddle through "to secure the just, speedy, and inexpensive determination of every action and proceeding."⁸

With an eye toward practicality and judicial economy, we agree with Wright & Miller's assessment that it would "seem[] undesirable and unnecessary to invoke inherent power to avoid an artificial limit on Rule 41(a) that results from a highly literal reading of one word in that Rule."⁹ But fortunately, stretching the Rules beyond their plain meaning to cover these common circumstances isn't the only answer. The Committee can amend the Rules to resolve this inconsistency.

We ask the Committee to step in and help clear the confusion. We also propose an amendment to Rule 41(a)(1)(A)—simply adding the words "or a claim." The relevant part of the rule would then read: "Without a Court Order. Subject to Rules 23(e), 23.1(c), and 66 and any applicable federal statute, the plaintiff may dismiss an action or a claim without a court order"¹⁰ The addition of these three words would simply and efficiently resolve what has become an unnecessarily murky issue by allowing a plaintiff to dismiss her cause(s) of action against individual defendants.

A potential (and perhaps obvious) objection to this revision comes to mind. One might argue that the proposed revisions miss the mark because Rule 41 is titled "Dismissal of Actions," not "Dismissal of Actions and Claims." True. But the title misrepresents the Rule as it currently

⁵ 9 Fed. Prac. & Proc. Civ. § 2362 (4th ed.) (collecting cases that run the gamut).

⁶ *Id.*

⁷ See, e.g., *id.* (collecting cases from around the nation that take different approaches to this issue); *United States ex rel. Doe v. Preferred Care, Inc.*, 326 F.R.D. 462, 464 (E.D. Ky. 2018) (noting the inconsistency *within the Sixth Circuit* on this issue).

⁸ Fed. R. Civ. P. 1. In the Western District of Kentucky, for example, Judge Beaton settled on the following text order: "Plaintiff and Defendant Experian Information Solutions, Inc. have filed and signed a proposed agreed order of dismissal with prejudice (DN 11). The Court therefore acknowledges the dismissal of Experian Information Solutions, Inc. only from this case in accordance with Fed. R. Civ. P. 41, or, in the alternative, dismisses Experian Information Solutions, Inc. in accordance with Fed. R. Civ. P. 21." *Jones v. Edfinancial, et al.*, 3:21-cv-721, ECF No. 13. A game of legal twister if there ever were one.

⁹ 9 Fed. Prac. & Proc. Civ. § 2362 (4th ed.).

¹⁰ (emphasis added to suggested addition).

exists; Rule 41 already allows the dismissal of claims in some instances.¹¹ And if the Committee is concerned with this inconsistency, it can always amend the title accordingly.

On behalf of litigants, law clerks, and judges everywhere, we thank the Committee for its attention to this matter.

Sincerely,

David J. Wenthold & Zachary T. Reynolds.

¹¹ See Fed. R. Civ. P. 41(b) (allowing a defendant to “move to dismiss the action *or any claim* against it” where a “plaintiff fails to prosecute or to comply with these rules or a court order”) (emphasis added).

TAB 10

700 **10. Discovery Subcommittee**

701 In addition to shortening the Committee Note to the recommended amendments to
702 address the “privilege log” issues included in the action items section of this agenda book, the
703 Discovery Subcommittee has additional issues before it. This report summarizes these issues, on
704 which no recommendation is presently made.

705 Method of serving a subpoena

706 The Committee has discussed the concern that Rule 45(b)(1) is ambiguous about exactly
707 how one should go about “delivering” a subpoena to a witness (probably most importantly to a
708 nonparty witness). The issue was first raised by a bar group in 2005, and was discussed during
709 the Rule 45 project about five years later. It was addressed at the last Advisory Committee
710 meeting, and also presented to the Standing Committee.

711 Thus far, it has not seemed that there are strong concerns about what the rule currently
712 says. It is unnerving that courts seem to interpret it differently. A similar sort of issue has arisen
713 in relation to Rule 41(a)(1), on whether unilateral dismissal by a plaintiff must drop the whole
714 “action” or may be limited to one claim or one defendant or one plaintiff, etc. There have been
715 divergent judicial approaches to Rule 41(a)(1) also, and similar uncertainty about whether those
716 divergent interpretations have created real problems in cases.

717 Members of the Subcommittee regard it as important to examine this issue further.
718 Recent events point up the sort of issues that may emerge. For example, during February 2023,
719 Judge Rakoff (S.D.N.Y.) entered an order authorizing service of a subpoena by certified mail on
720 a witness sought in regard to a suit against JPMorgan Chase Bank alleging it had facilitated
721 Jeffrey Epstein’s sexual abuse. In a suit by the Virgin Islands against the bank, the plaintiff had
722 made seven unsuccessful efforts to serve the subpoena on a billionaire former associate of
723 Epstein. Among other things, process servers were twice turned away by security guards at the
724 Ohio home of the witness and a lawyer for him refused to accept service. See Ava Benny-
725 Morrison, Leslie Wexner Can Be Mailed Subpoena in Epstein Suit, Bloomberg Law News, Feb.
726 21, 2023.

727 In re Three Arrows Capital, Ltd., 647 B.R. 440 (Bankr. S.D.N.Y., Dec. 29, 2022),
728 involved service of subpoenas on persons who could not be served inside the United States. The
729 court did not focus primarily on the issue of “delivering” the subpoena under Rule 45(b)(1), but
730 instead the application of Rule 45(b)(3) on serving a United States national in a foreign country,
731 which it found to be governed by 28 U.S.C. § 1783. Regarding manner of service, the court said
732 Rule 45(b)(1) “only expressly endorses personal service,” but that district courts in the Second
733 Circuit “routinely authorize service via other means” so long as it is reasonably calculated to
734 give actual notice.

735 With regard to Rule 45, if amendment is in order one important question is what the rule
736 should say instead. One possibility is “delivering in hand” or “delivering personally.” That might
737 be important with nonparties subpoenaed to testify in court or in a deposition scheduled on short
738 notice; during the Rule 45 project there was some concern about making it absolutely clear to the
739 nonparty witness what was required. And since the rule requires not only “delivering” a copy of

740 the subpoena to the witness, but also “tendering the fees for 1 day’s attendance and the mileage
741 allowed by law,” that might seem to depend on a face-to-face interaction (though fees could
742 presumably be tendered in other ways, given the variety of methods of payment now available
743 for many things – Venmo, etc.).

744 The specific proposal made by Judge McEwen, our liaison from the Bankruptcy Rules
745 Committee, is to say delivery by “overnight courier” be allowed. On that score, one might note
746 that Rule 29.3 of the Supreme Court rules says that anything those rules require be served may
747 be served “personally, by mail, or by third-party commercial carrier for delivery within 3
748 calendar days on each party to the proceeding.” But the setting for that rule is surely very
749 different from the service of a subpoena on a nonparty witness.

750 So a clearly desirable solution does not seem yet to have emerged, but within the rules
751 committees it seems that there is no strong feeling how to proceed either. Instead, two ideas for
752 making progress might have been suggested:

753 1. Rules Law Clerk research on state rules for service of subpoenas might either show
754 that they are all are pretty much the same as Rule 45, or that some states have identified
755 simplified methods, which could permit the Subcommittee to try to gather information
756 about how those are working.

757 2. Outreach to bar groups might provide insight on whether the uncertainty about
758 interpretation of the rule is a real problem, and whether there are solutions these bar
759 groups favor. As noted above, a bar group sent us a 17-page memo more than 15 years
760 ago urging that this rule be changed. And at least one additional bar group has urged a
761 rule change more recently. The Rule 41(a) Subcommittee is also trying to gauge whether
762 in practice that rule produces problems that warrant taking on a rule change. Perhaps
763 something along that line would be useful on this front as well.

764 Filing under seal

765 This topic was raised originally in 2021 by Prof. Volokh, who submitted a very elaborate
766 proposal for a rule seemingly calling for distinctive requirements for motions to seal that would
767 not apply to other motions, such as posting outside the case file for the given case, forbidding
768 decision on such a motion in fewer than seven days after it was posted, and requiring somebody
769 (the Clerk’s Office) to unseal after the “final decision” in the case, which presumably might be
770 on appeal, something the Clerk’s Office might not even hear about.

771 There have been quite a few additional submissions. At least one (from LCJ) opposed
772 adopting any rule change. Others provided a large amount of information about sealing practices
773 in many district courts, and urged national controls. There is also a 54-page Sedona Conference
774 “Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal.”
775 In addition, section 12 of H.R. 7706, the Judicial Ethics and Anti-Corruption Act of 2022, would
776 add a new section 1660 to Title 28 entitled “Restrictions on Protective Orders and Sealing of
777 Cases and Settlements.”

778 In short, there is a lot of attention directed toward at least the general topic. But when
779 Susan Soong, then our Clerk Liaison, reported in 2021 that the A.O. had embarked on a larger

780 project on sealed court filings, the decision was to await the results of that project. Sealing issues
781 did not seem to deal solely with civil cases; criminal cases, bankruptcy cases, and even appellate
782 cases might involve such issues. It has recently emerged, however, that this A.O. effort seems to
783 be focusing on other sealed filings topics, so this project is being revived.

784 Recent discussions have also identified an additional wrinkle. To date, the Subcommittee
785 has focused (as invited by the original submission) on “sealed” filings. But it appears that, in at
786 least some districts, there may be another category called “restricted” filings that are not
787 accessible to the public, but only to the court and the parties. Whether this wrinkle calls for
788 attention is not presently certain.

789 To re-introduce the prior discussion, below is the agenda book report on this topic for the
790 October 2021 meeting. We are returning to these issues because we were told in January of this
791 year that the A.O. project that prompted us to defer action in 2021 actually seemed unlikely to
792 address the same issues, so there was no further reason to defer attention to the issues. But as the
793 material below shows, neither is there a clear way forward at present. Since no further action has
794 been taken since the October 2021 meeting, it is likely that the report for that meeting could be
795 used for the upcoming one also, as the issues may have faded from memory for some, and may
796 be new to others.

797 * * * * *

798 [From agenda book for
799 October 2021 meeting]

800 Several parties – Prof. Volokh, the Reporters’ Committee for Freedom of the Press, and
801 the Electronic Frontier Foundation – submitted a proposal to adopt a new Rule 5.3, setting forth a
802 fairly elaborate set of requirements for motions seeking permission to seal materials filed in
803 court.

804 The submission asserted that it is universally, or almost universally, recognized that the
805 showing required to justify filing under seal is very different from the standard that supports
806 issuing a Rule 26(c) protective order regarding materials exchanged through discovery. Research
807 done by the Rules Law Clerk confirms that report. Filings may be made under seal (unless that is
808 required by statute or court rule) only on a showing that sufficiently addresses the common law
809 and First Amendment rights of public access to court files.

810 Proposed Rule 5.3 also had a number of features that do not apply to most, or any other,
811 motion practice. It seemed to propose that motions to seal be posted on the court’s web site or
812 perhaps on a shared website for many courts, rather than only in the file for the case in which the
813 motion was filed. It provided that, unlike other motions, motions to seal could not be decided
814 until at least seven days had passed since such posting had occurred.

815 The proposal also asserted that local practices on motions to seal diverged from district to
816 district. That led to research about a “sample” of local rules – the ones applying in the nine
817 districts “represented” on the Advisory Committee. There is no claim that these local rules are
818 “representative” of local rules on sealing in other districts. But it is clear that the local rules in
819 these nine districts differ from one another. It is also clear that many features of proposed Rule

820 5.3 differ from provisions in the local rules of at least some of these districts, and that if the
821 proposed rule were adopted portions of the local rules in each of those districts would become
822 invalid under Rule 83(a)(1).

823 As with the privilege log issues, a recent development suggests that this report can only
824 introduce pending issues rather than presenting the Subcommittee's views. The Subcommittee
825 has learned that the Administrative Office has begun a study of sealed filings, but it does not
826 have details on that study. It is hoped that by the time the Advisory Committee meets on Oct. 5
827 there will be more information available.

828 There may be reason to defer thought of adopting a new Civil Rule if the A.O. is
829 addressing sealing issues more broadly. Considering that one of the proponents of a new rule is
830 the Reporters' Committee, one might suggest that media interest in filings in criminal cases
831 might be stronger than the interest in civil cases. And sealing of matters related to criminal cases
832 may be more pervasive. For example, an FJC study of "sealed cases" about 15 years ago showed
833 that a great many of those were miscellaneous matters opened for search warrant applications
834 that did not lead to a prosecution. Though technically they should not have remained sealed after
835 the warrant was executed, they were not unsealed.

836 In addition – particularly to the extent sealing issues depend on the internal operations of
837 clerks' offices – it may be more appropriate for somebody other than the rules committees to
838 take the lead on those issues. The Court Administration and Case Management (CACM)
839 Committee comes to mind.

840 Thus, it seems that the matter now before this Committee might be divided into two
841 somewhat discrete subparts – (a) adopting rule amendments recognizing in the rules the
842 distinctive requirements for sealed filings in civil cases and distinguishing those requirements
843 from the more general protective order practice, and (b) adopting nationally uniform procedures
844 for handling motions for leave to file under seal.

845 Before turning to those two issues, it is useful to add some information provided by Judge
846 Boal, who consulted informally with other members of the Federal Magistrate Judges
847 Association rules committee, of which she is a member (and former co-chair), and from Susan
848 Soong (our clerk liaison) based on some inquiry among court clerks. Both these reports were
849 based on informal inquiries, but they may shed light on the issues presented here.

850 Judge Boal reported that the magistrate judges she consulted saw frequent motions to
851 seal, but did not think they had seen notable increases in the frequency of such motions, though
852 they also thought that there are too many of these motions. It appears that the various circuits
853 have developed their own bodies of case law applying the common law and First Amendment
854 standards in different sealing contexts. So circuit law is the source of guidance on the standards
855 for deciding whether to grant a motion to seal. Though these circuit standards are not identical,
856 they all differ from the "good cause" standard for a Rule 26(c) protective order. But there
857 seemed no reason for rules to address these distinctive circuit approaches to the standards for
858 sealing under the common law and First Amendment rights of public access. There was,
859 however, some support for considering a uniform set of procedures for handling motions to seal.
860 Those procedures vary widely under the local rules of different courts. The most productive

861 rulemaking goal might be to focus on procedures for presenting sealing requests, notifying
862 parties and non-parties, and providing a mechanism for objection to proposed filing under seal
863 and for unsealing previously sealed materials. Though these reactions were informal (compared
864 to the formal comments about privilege issues submitted by the FMJA), they were instructive for
865 the Subcommittee.

866 Susan Soong made informal inquiries of other court clerks, and found that the general
867 view seemed to be that there is nothing about motions to seal that calls for any distinctive
868 treatment of those motions. Indeed, it might be that singling out such motions for additional
869 handling in the clerk’s office would potentially burden court clerks. For example, these motions
870 – like all motions – can be made available on PACER. That would not require any distinctive
871 treatment in the clerk’s office. Her inquiries also confirmed what others have said – that practices
872 on motions to seal (and probably on other motions) vary among districts. It is not easy to say for
873 certain why these differences exist; they may be a result of judge preferences, historical
874 practices, the fact that different courts have caseloads of different types, and the different
875 approaches of various courts to managing discovery. As with the informal reactions from
876 magistrate judges, these views were instructive for the Subcommittee in regard to possible
877 rulemaking addressing the procedures for motions to seal.

878 (a) Recognizing the different standards

879 A relatively simple pair of rule changes could confirm in the rules what we have been
880 told about actual practice:

881 **Rule 26. Duty to Disclose; General Provisions Governing Discovery**

882 * * * * *

883 (c) **Protective Orders.**

884 * * * * *

885 **(4) Filing Under Seal.** Filings may be made under seal only under Rule 5(d)(5).

886 The Committee Note to such a rule could simply state that the standard for sealing
887 materials filed in court is different from the standard for issuing protective orders under Rule
888 26(c)(1).

889 **Rule 5. Serving and Filing Pleadings and Other Papers**

890 (d) **Filing.**

891 * * * * *

892 **(5) Filing Under Seal.** Unless filing under seal is directed by a federal statute or by
893 these rules, no paper [or other material] may be filed under seal unless [the court
894 determines that] filing under seal is justified despite the common law and First
895 Amendment right of public access to court filings.

896 The idea is to use a generalized statement that encompasses the stated standards for filing
897 under seal that prevail in all the circuits. The Committee Note could say that the goal is not to
898 displace any circuit’s standard nor to express an opinion about whether they really differ from
899 one another. Instead, the goal is to reinforce the point in proposed Rule 26(c)(4) that the standard
900 is different from the standard for granting a protective order. On that, it seems, all agree.

901 There are statutes (the False Claims Act, for example) that direct filing under seal, so the
902 introductory phrase recognizes such directives. The additional phrase “or these rules” might
903 seem to create a potential problem – it might seem to be circular – if a protective order entered in
904 accordance with these rules were sufficient to fit within the exception. But that would seem to
905 violate proposed Rule 26(c)(4). And there are other rules that do explicitly authorize or direct
906 filing under seal. See Rules 5.2(d) (filing under seal to protect privacy); 26(b)(5)(B) (party that
907 received information through discovery the other side belatedly claims to be privileged may
908 “promptly present the information to the court under seal for a determination of the claim”).

909 Making changes such as these likely would not conflict with whatever the A.O. is doing
910 or may be doing about filing under seal more generally. To the extent that filing under seal is
911 limited by the common law or the First Amendment, it may be difficult for an A.O. policy to
912 make it easier. Perhaps for policy reasons, an A.O. policy might make filing under seal more
913 difficult to justify. But if it could do that presently, it likely could do so if the Civil Rules were so
914 amended.

915 Another consideration here might be to proclaim by rule a nationally uniform standard
916 for applying the common law and First amendment rights of public access to court filings. A rule
917 could, for example, declare that the party seeking sealing bear the burden of justifying it in the
918 face of common law and First Amendment limitations. (That would be somewhat consistent with
919 the approach to deciding motions for a protective order – the moving party bears the burden of
920 establishing good cause with a fairly specific showing.) Under Rule 26(c), there is no specific
921 rule provision about burdens of proof, and it is likely that if this seemed a suitable topic to
922 address it could be addressed in a Committee Note. This is not to say that sealing must always be
923 granted if not forbidden on common law or First Amendment grounds. Those preclude the entry
924 of a sealing order; a court may well decide that even if sealing is not forbidden in a given case, it
925 is not warranted.

926 But there may be a distinct limitation on the extent to which a rule can, or should attempt
927 to, regulate these matters. The First Amendment, for example, applies as it applies without
928 regard to what the rules say.

929 The basic question on this point is whether there is any real value in this sort of rule
930 change. If it adopts what the courts are already doing, it might be regarded as somewhat
931 “cosmetic.”

932 (b) Uniform procedures on motions to seal

933 The FMJA suggestions were that the standard for sealing remain as directed by the
934 various circuits but that rulemaking attention should focus on adopting more uniform procedures
935 for doing deciding motions to seal. It is relatively apparent that the procedures are not uniform

936 now. Indeed, the N.D. Cal. has had an entirely new local rule changing its procedures out for
937 comment during August.

938 More generally, it's likely that there are differences among districts on how to handle
939 other sorts of motions. In the N.D. Cal., for example, 35 days' notice is required to make a
940 pretrial motion in a civil case, absent an order shortening time. The local rules also limit motion
941 papers to 25 pages in length, and provide specifics on what motion papers should include.
942 Oppositions are due 14 days after motions are filed and also subject to length limitations. There
943 is also a local rule about seeking orders regarding "miscellaneous administrative matters,"
944 perhaps including filing under seal, which have briefer time limitations and stricter page limits.

945 In all likelihood, most or all districts have local rules of this sort. In all likelihood, they
946 are not identical to the ones in the N.D. Cal. An initial question might be whether motions to seal
947 should be handled uniformly nationwide if other sorts of motions are not.

948 One reason for singling those motions out is that common law and constitutional
949 protections of public access to court files bear on those motions in ways they do not normally
950 bear on other motions. Indeed, in our adversary litigation system it is likely that if one party files
951 a motion for something the other side will oppose it. But it may sometimes happen not only that
952 neither side cares much about the public right of access to court files, but that both sides would
953 rather defeat or elude that right. So there may be reason to single out these motions, though it
954 may be more difficult to see why notice periods, page limits, etc. should be of special interest in
955 regard to these motions as compared with other motions.

956 A different set of considerations flows from the reality at present that local rules diverge
957 on the handling of motions to seal. At least sometimes, districts chafe at "directives from
958 Washington." There have been times when rule changes insisting on uniformity provoked that
959 reaction. Though this committee might favor one method of processing motions over another, it
960 is not clear that this preference is strong enough to justify making all districts conform to the
961 same procedure for this sort of motion.

962 Without meaning to be exhaustive, below are some examples of issues that might be
963 included in a national rule designed to establish a uniform procedure:

964 Procedures for motion to seal: The submission proposes that all such motions be posted
965 on the court's website, or perhaps on a "central" website for all district courts. Ordinarily,
966 motions are filed in the case file for the case, not otherwise on the court's website. The
967 proposal also says that no ruling on such a motion may be made for seven days after this
968 posting of the motion. A waiting period could impede prompt action by the court. Such a
969 waiting period may also become a constraint on counsel seeking to file a motion or to file
970 opposing memoranda that rely on confidential materials. The local rules surveyed for this
971 report are not uniform on such matters.

972 Joint or unopposed motions: Some local rules appear to view such motions with approval,
973 while others do not. The question of stipulated protective orders has been nettlesome in
974 the past. Would this new rule invalidate a protective order that directed that
975 "confidential" materials be filed under seal? In at least some instances, such orders may

976 be entered early in a case and before much discovery has occurred, permitting parties to
977 designated materials they produce “confidential” and subject to the terms of the
978 protective order. It is frequently asserted that stipulated protective orders facilitate
979 speedier discovery and forestall wasteful individualized motion practice.

980 Provisional filing under seal: Some local rules permit filing under seal pending a ruling
981 on the motion to seal. Others do not. Forbidding provisional filing under seal might
982 present logistical difficulties for parties uncertain what they want to file in support of or
983 opposition to motions, particularly if they must first consult with the other parties about
984 sealing before moving to seal. This could connect up with the question whether there is a
985 required waiting period between the filing of the motion to seal and a ruling on it.

986 Duration of seal: There appears to be considerable variety in local rules on this subject. A
987 related question might be whether the party that filed the sealed items may retrieve them
988 after the conclusion of the case. A rule might also provide that the clerk is to destroy the
989 sealed materials at the expiration of a stated period. The submission we received called
990 for mandatory unsealing

991 Procedures for a motion to unseal: The method by which a nonparty may challenge a
992 sealing order may relate to the question whether there is a waiting period between the
993 filing of the motion and the court’s ruling on it. A possibly related question is whether
994 there must be a separate motion for each such document. Perhaps there could be an
995 “omnibus” motion to unseal all sealed filings in a given case.

996 Requirement that redacted document be available for public inspection: The procedure
997 might require such filing of a redacted document unless doing so was not feasible due to
998 the nature of the document.

999 Nonparty interests: The rule proposal authorizes any “member of the public” to oppose a
1000 sealing motion or seek an order unsealing without intervening. Some local rules appear to
1001 have similar provisions. But the proposal does not appear to afford nonparties any route
1002 to protect their own confidentiality interests. Perhaps a procedure would be necessary for
1003 a nonparty to seek sealing for something filed by a party without the seal, or at least a
1004 procedure for notifying nonparties of the pendency of a motion to seal or to unseal.

1005 Findings requirement: The rules do not normally require findings for disposition of
1006 motions. See Rule 52(a)(3) (excusing findings with regard to motions under Rule 12 or
1007 Rule 56). There are some examples of rules that include something like a findings
1008 requirement. See Rule 52(a)(2) (grant or denial of a motion for a preliminary injunction).
1009 The rule proposal calls for “particularized findings supporting its decision [to authorize
1010 filing under seal].” Adding a findings requirement might mean that filing under seal
1011 pursuant to court order is later held to be invalid because of the lack of required findings.

1012 Treating “non-merits” motions differently: The circuits seem to say different things about
1013 whether the stringent limitations on sealing filings apply to material filed in connection
1014 with all motions, or only some of them. (This issue might bear more directly on the
1015 standard for sealing.) The Eleventh Circuit refers to “pretrial motions of a nondiscovery

1016 nature.” The Ninth Circuit seems to attempt a similar distinction regarding non-
1017 dispositive motions. The Seventh Circuit refers to information “that affects the
1018 disposition of the litigation.” The Fourth Circuit seems to view the right of access to
1019 apply to “all judicial documents and records.” And another question is how to treat
1020 matters “lodged” with the court.

1021 No doubt there are others. For the present, the basic question is whether the
1022 Subcommittee should attempt to devise a set of procedural features applicable to motions to seal.
1023 One thing to be kept in mind on this subject is that doing these things could require more
1024 aggressive surgery on the current rules than the simple changes noted in section (a) above.
1025 Depending on what they are, these sorts of procedures might have to be housed in a new rule on
1026 “Motions to Seal.” Perhaps that could be added to Rule 7(b). There might also be some difficulty
1027 defining motions to seal in a rule.

1028 As should be apparent, the Subcommittee remains near the beginning of its process of
1029 examining these proposals. But it has already made considerable progress in clarifying issues and
1030 working through them. It looks forward to hearing the views of the full Committee on the
1031 matters before it.

1032 * * * * *

1033 Rule 28

1034 Rule 28 is not a rule that most lawyers or judges use very often. Judge Michael Baylson
1035 (E.D.Pa.) (a former member of the Advisory Committee) submitted 23-CV-B on Feb. 3, 2023,
1036 and 23-CV-G on March 1, 2023. They are included in this agenda book.

1037 The appropriate method of addressing privacy concerns and other concerns about
1038 American discovery with regard to information located outside this country can be delicate. The
1039 Sedona Conference some time ago undertook a major project on this topic. Judge Baylson
1040 reports that this should be on the agenda for the March meeting.

TAB 10A

23-CV-B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
3810 United States Courthouse
Sixth and Market Streets
Philadelphia, Pennsylvania 19106-1741
Email: Chambers_of_Judge_Michael_Baylson@pacd.uscourts.gov

Chambers of
Michael M. Baylson
United States District Judge

Telephone: (267) 299-7520
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February 3, 2023

The Honorable Robin L. Rosenberg
Chair, Advisory Committee on Civil Rules
United States District Court for the
Southern District of Florida

Re: Proposed Amendment to Civil Rule 28

Dear Robin,

As you know from our prior discussions, I have been working on a proposal to include the general topic of “cross border discovery” into the Federal Rules.

This letter will enclose my first draft of a revised Rule 28. I had originally thought it would be best to amend or supplement Rule 44.1. However, after discussion with Professor Steven Gensler, Professor at the University of Oklahoma Law School, author of an excellent treatise on civil procedure, and also a former member of the Civil Rules Committee, he suggested approaching this by an Amendment to Rule 28, which already provides for depositions in foreign countries.

I have forwarded to you Steve’s email today, which makes some excellent suggestions for moving forward.

The approach I am proposing here would be to amend and supplement a Rule 28 to basically incorporate the principles behind Rule 34 into discovery of overseas information, subject to certain limitations.

I assume you will list this topic on the agenda for the next Committee meeting, as we have discussed. Professor Gensler has advised me that he plans to attend at least part of that meeting.

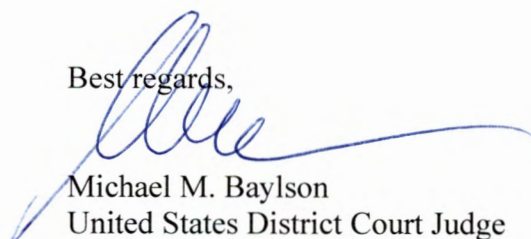
I emphasize that this is very much a first draft and a “working draft” that I hope your committee will consider and perhaps you will appoint a subcommittee to specifically concern themselves with this proposal.

As Steve suggests, prior to the next committee meeting, we plan to send you an updated draft and also some background explanation of our extensive involvement in this topic.

Also, I mention that the Sedona Conference WG6, which had its most recent meeting in London, attended by Steve Gensler and me, has long considered cross border discovery and has developed principles for use on this important topic for lawyers involved in litigation with clients and concerning valuable information overseas. These Sedona principles and background will be of great value to your committee.

Best personal regards.

Best regards,

A handwritten signature in blue ink, appearing to read 'Mike', with a long horizontal flourish extending to the right.

Michael M. Baylson
United States District Court Judge

CC: Professor Steven Gensler

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Proposed Amendment to Rule 28(b) (Baylson Draft 2/2/23)

(1.) A deposition may be taken in a foreign country, and may include a request for documents, electronically stored information, and tangible things, or entering onto land for inspection and other purposes.

(2.) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both may be issued and may include a request for documents, electronically stored information, and tangible things, or entering onto land for inspection and other purposes.

[The definitions and procedures set forth in Rule 34 may be incorporated by reference].

New (3.) This Rule may be invoked by a party seeking documents, electronically stored information, or other data, relevant to the dispute, located in a foreign country. In considering the notice of deposition, request, and any objection, a court shall take into account the existence of any treaty or foreign law, and principles of comity.

New (4.) This rule may be invoked by noticing the deposition, or issuing a letter of request, or other document, to the custodian(s) of the documents or electronically stored information, located in a foreign country.

New (5.) The Court may require redaction of information protected by principles of personal privacy, either in the laws of the country in which the information is located, or for other good cause.

New (6.) The principles underlying the provisions of 28 U.S.C. § 1782 (“Assistance to foreign and international tribunals and to litigants before such tribunals”) shall be considered in making the request.

New (7.) A court may allocate the costs of providing the information depending on burden, relevance, and other material factors.

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TAB 10B

23-CV-G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
3810 United States Courthouse
Sixth and Market Streets
Philadelphia, Pennsylvania 19106-1741
Email: Chambers_of_Judge_Michael_Baylson@paed.uscourts.gov

Chambers of
Michael M. Baylson
United States District Judge

Telephone: (267) 299-7520
Fax: (267) 299-5078

March 1, 2023

The Honorable Robin L. Rosenberg
Chair, Advisory Committee on Civil Rules
United States District Court for the
Southern District of Florida

Re: Proposed Amendment, Federal Rules of Civil Procedure, for Cross-Border Discovery

Dear Judge Rosenberg,

This letter is a supplement to my previous letter, dated February 3, 2023, which enclosed a proposed amendment to Rule 28 to allow for “cross-border discovery”. (Exhibit A).

I have now added, as an alternative, a brand-new rule devoted to cross-border discovery only. (Exhibit B). There are obvious overlaps.

As you may be aware, in 2015 the Federal Judicial Center published a booklet titled “Discovery in International Civil Litigation – A Guide for Judges,” which discussed procedural aspects, as well as the laws of different countries, concerning cross-border discovery. I am attaching a copy of the table of contents for your information. (Exhibit C). I was also privileged to provide a draft of a Rule 16 Pretrial Order to initiate international civil discovery, a copy of which is attached, as Exhibit D.

By way of brief personal background, I have been involved in these issues over the course of my legal career as a private attorney representing clients with international law

exposure, in my capacity as the United States Attorney in this district, and during the twenty years I have served on this Court. In 2015, I was invited to speak at Georgetown University Law School on the 50th anniversary of the Hague Convention, co-sponsored by the Hague Conference on Private International Law, the American Branch of the International Law Association, the American Society of International Law, the ABA Section of International Law and the International Law Institute (a summary of this program is attached as Exhibit E).¹

My recent decision in Behrens v. Arconic, which arose out of the tragic 2017 London high-rise apartment fire in which 72 persons lost their lives and hundreds were injured, dealt with many of these issues. Behrens v. Arconic, Inc., 502 F. Supp. 3d 931 (E.D. Pa. 2020), affirmed in part, reversed in part, 2022 WL 2593520 (3d Cir. July 8, 2022). A petition for certiorari was recently denied. No. 22-630, 2023 WL 2123819 (Feb. 21, 2023).

In this case, I allowed extensive cross-border discovery, some of which took place pursuant to the Hague Convention, because one product which allegedly caused the fire had been manufactured in France. Eventually, I decided to transfer the case under the doctrine of forum non conveniens to England.

In this case I benefitted from the participation of the Honorable Noelle Lenoir, a former judge of the French Constitutional Court, now in private practice in Paris, as a special master in reviewing the requested documents and recommending protection for privilege communications. Judge Lenoir has substantial expertise on these topics and is acting in this capacity in other cases.

¹ I have authored or coauthored two articles in *Judicature Magazine*, published by Duke University School of Law, which discuss this issue. See Michael M. Baylson, *Cross-Border Discovery at a Crossroads*, JUDICATURE, Vol. 100, No. 4 Winter 2016 at 56; Michael M. Baylson and Sandra Jeskie, *Overseas Obligations: An Update on Cross Border Discovery*, JUDICATURE, Vol. 103, No.1, Spring 2019. (I can supply copies upon request).

As is well known, no other country has pretrial discovery practices as broad as the United States. Thus, there can be substantial conflicts which arise between the efforts of U.S. based parties and their counsel to get information from individuals, entities or governmental agencies located overseas.

In recent years, there has been increasing attention to this topic, because of the overall increase in international commerce and related litigation. I believe the bar and bench of the United States, as well as many U.S. based business interests, would be well served by the Advisory Committee on Civil Rules proposing a rule to guide the procedural aspects of this issue for consideration under the Rules Enabling Act, leading to a decision by the U.S. Supreme Court.

Assuming the Committee undertakes this issue, it should also review Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., 138 S. Ct. 1865 (2018) (commonly referred to as the “Vitamin C” case, for the name of the product involved), giving important guidance to lower federal courts on the interpretation and application of Rule 44.1, Federal Rules of Civil Procedure, concerning “Determining Foreign Law”.

The Sedona Conference, a highly respected continuing legal education organization, based in Phoenix, Arizona, has sponsored programs, and drafted principles, on the topic of cross-border discovery, for guidance by judges and lawyers. I’ve been an invited speaker at these programs and, following my communication with Sedona officers about my proposal, they will forward a letter to you expressing their interest in this project and their support.

As I mentioned in my prior letter, Professor Steven Gensler, of the University of Oklahoma Law School and also a member of the Advisory Committee on Civil Rules at the same time as I, is very interested and supportive of this proposal. Assuming this topic is on your

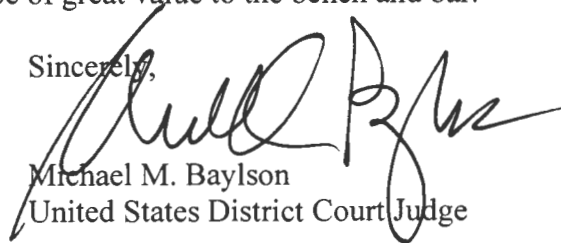
agenda for your March 2023 meeting, Professor Gensler expects to be in Miami at that time and would like to attend as an observer.

There are many recent decisions about cross-border discovery by U.S. Courts, and also important regulations adopted within the European Union and by other countries. I won't go into any details about these in this letter, but they are easily accessible, and I would be happy to contribute to this project if you undertake a consideration of a proposed rule.

I have added several other possible provisions to my proposals. Among these is special consideration of Electronically Stored Information ("ESI"), which is a frequent topic of cross-border discovery. Prior to the existence of ESI, when discovery was limited to "paper documents," restrictive overseas rules about discovery prohibited the transfer of paper documents to the United States. Now, with the widespread use of ESI, the Committee should consider recommending procedures to transfer ESI without physical transfer of paper documents.

I respectfully suggest that you appoint a subcommittee, to look into this in some detail, as I think that any resulting amendment will be of great value to the bench and bar.

Sincerely,



Michael M. Baylson
United States District Court Judge

CC: Craig Weinlein, Esq., Sedona Conference
Professor Richard Marcus, Reporter
Professor Steven Gensler
Hon. Noelle Lenoir
Mira Gur-Arie, Esq., Federal Judicial Center

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Proposed Amendment to Rule 28(b) (Baylson Draft 3/1/23)

(1.) A deposition may be taken in a foreign country, and may include a request for documents, electronically stored information, and tangible things, or entering onto land for inspection and other purposes.

(2.) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both, may be issued and may include a request for documents, electronically stored information, and tangible things, or entering onto land for inspection and other purposes.

[The definitions and procedures set forth in Rule 34 may be incorporated by reference].

New (3.) This Rule may be invoked by a party seeking documents, electronically stored information, or other data, relevant to the dispute, located in a foreign country. In considering the notice of deposition, request, and any objection, a court shall take into account the existence of any treaty or foreign law, and principles of comity.

New (4.) This rule may be invoked by noticing the deposition, or issuing a letter of request, or other document, to the custodian(s) of the documents or electronically stored information, located in a foreign country.

New (5.) The Court may require redaction of information protected by principles of personal privacy, either by the laws of the country in which the information is located, or for other good cause.

New (6.) The principles underlying the provisions of 28 U.S.C. § 1782 (“Assistance to foreign and international tribunals and to litigants before such tribunals”) shall be considered in making the request.

New (7.) A court may allocate the costs of providing the information depending on burden, relevance, and other material factors.

Exhibit “A”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
3810 United States Courthouse
Sixth and Market Streets
Philadelphia, Pennsylvania 19106-1741
Email: Chambers_of_Judge_Michael_Baylson@paed.uscourts.gov

Chambers of
Michael M. Baylson
United States District Judge

Telephone: (267) 299-7520
Fax: (267) 299-5078

(Draft – 3/1/23) Proposed New Rule of Civil Procedure Re: Cross Border Discovery

If a case warrants discovery of facts, documents, or other matters, which took place, or are located, in a foreign country, (commonly referred to as “cross-border discovery”), the Court may first consider whether the Hague Convention, or any other treaty or law, can or must be followed by the parties.

The Court may also allow the parties to conduct discovery in another country, under Rule 28(b), or otherwise. In any event the court should consider:

- A. Comity, under the principles as stated in 28 U.S.C. § 1782;
- B. Proportionality;
- C. Whether expenses should be shared by parties other than the requesting party;
- D. Whether electronically stored information (“ESI”) can be produced without violating the laws of the country in which the information originated or is stored.

If depositions will take place in a foreign country, under Rule 28(b), the court may also consider whether to require the production of documents, ESI, and other matters, as allowed under Rule 34.

The Court may also consider whether any other provision under Rule 26 should be followed.

Exhibit “B”

O:\Letters - USDC matters\Draft Possible New Rule of Civil Procedure Re Cross Border Discovery.docx

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Appendix E: Sample Rule 16 Pretrial Order Addressing International Discovery Issues²⁰⁹

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

JOHN DOE	CIVIL ACTION
v.	NO. _____
[LIST]	

PRETRIAL ORDER RE INTERNATIONAL DISCOVERY

AND NOW, this ____ day of _____, 2015:

Pursuant to the Court's authority under Rule 16, F.R.Civ.P., the parties having advised the Court [the Court determining from review of the pleadings and any other initial papers in the case] that international discovery may be involved, which may result in substantial delays in concluding discovery, the Court sets special procedures for expediting international discovery.

The provisions of this Order are intended to facilitate the parties taking of discovery outside the United States and/or pursuant to the laws of other countries, and will enable the Court to promptly rule on any disputes that arise concerning international discovery.

It is therefore **ORDERED**:

1. Within ____ days, any party which intends to initiate discovery outside of the United States shall file and serve a statement making disclosure of its intention as of this time, including, but not limited to, the following:

(a) Whether applications will be made under the Hague Convention or any other treaty.

209. We thank U.S. District Judge Michael M. Baylson (E.D. Pa.) for providing a sample Rule 16 Pretrial Order addressing international discovery issues for inclusion in this guide.

Discovery in International Civil Litigation

- (b) Whether Letters Rogatory will be used.
 - (c) Whether parties abroad are likely to be deponents in this case.
 - (d) Whether documents located outside the United States will be sought for production, including, but not limited to, electronically stored information (“ESI”).
 - (e) Whether a party is aware of any blocking statutes or data protection laws that may apply to a request for discovery in a particular country, and if so, identify the country and if possible cite the laws which may be applicable.
2. Within ____ days, other parties shall respond to this initial disclosure of foreign discovery, by commenting:
- (a) To what extent it will or will not oppose such discovery.
 - (b) If there will be opposition, state concisely the nature of the opposition and the reasons.
3. Within ____ days after the response, the parties shall meet and confer to discuss reaching agreement, or narrowing disputes concerning:
- (a) Conducting discovery outside of the United States, pursuant to the Federal Rules of Civil Procedure or otherwise.
 - (b) What date shall be set to complete international discovery.
 - (c) Whether any objections will be presented to this Court and, if so, when.
 - (d) Whether any protective order will be sought and the extent to which disputes remain as to the contents of a protective order.
4. The Court set a deadline for the initiation of any discovery to take place outside the United States as _____ [date].
5. Motions that may be necessary or appropriate on international discovery issues will be filed no later than _____ [date]. Responses will be due within fourteen (14) days, and a reply brief should be filed within fourteen (14) days thereafter.

Appendix E: Sample Rule 16 Pretrial Order Addressing International Discovery Issues

6. In most countries with blocking statutes and/or data protection rules, an authorized official or judge within that country may be permitted to negotiate, hear, and/or authorize disclosure of information for use in litigation, even though it is arguable that a blocking statute or data protection law may be construed otherwise. In each party's pretrial disclosures on international discovery, the Court requires each party relying on any such statute or rule to state:

(a) Its knowledge of this practice as applied to this case;

(b) Its position on this issue;

(c) The contact information for the official or judge in each country who is likely to be knowledgeable or authorized to act within that country.

7. The Court anticipates having pretrial conferences with counsel to discuss the course, progress and any problems in international discovery. The first conference will take place on _____ [date]. Subsequent conferences will be scheduled on a need basis. If problems and issues arise frequently, the Court may schedule conferences on a regular basis.

8. Counsel who do not practice regularly in this District may appear by telephone by notifying Chambers at least 48 hours prior to any pretrial conference.

9. Counsel appearing at these conferences, whether in person or by telephone, shall be authorized to speak on behalf of their client, and shall discuss with their client issues as they are arising so that they can accurately inform the Court of their position.

10. If it appears that certain discovery is relevant in this case, but cannot be secured by normal means of discovery through the Federal Rules of Civil Procedure, or any convention or other recognized international procedure, the Court may undertake itself initiation of communications with any data protection officer of a foreign country or court of a foreign country to determine if such discovery can be authorized, facilitated and completed on a prompt basis.

11. The obligations stated above apply throughout this litigation, and apply to any initiation of international discovery.

Discovery in International Civil Litigation

12. The Court encourages the parties to adopt, in this case, the Sedona Conference Principles of International Discovery, Disclosure and Data Protection as follows:

(a) With regard to data that are subject to preservation, disclosure, or discovery, courts and parties should demonstrate due respect to the Data Protection Laws of any foreign sovereign and the interests of any person who is subject to or benefits from such laws.

(b) Where full compliance with both Data Protection Laws and preservation disclosure and discovery obligations presents a conflict, a party's conduct should be judged by a court or data protection authority under a standard of good faith and reasonableness.

(c) Preservation or discovery of Protected Data should be limited in scope to that which is relevant and necessary to support any party's claim or defense in order to minimize conflicts of law and impact on the Data Subject.

(d) Where a conflict exists between Data Protection Laws and preservation, disclosure, or discovery obligations, a stipulation or court order should be employed to protect Protected Data and minimize the conflict.

(e) A Data Controller subject to preservation, disclosure, or discovery obligations should be prepared to demonstrate that data protection obligations have been addressed and that appropriate data protection safeguards have been instituted.

(f) Data Controllers should retain Protected Data only as long as necessary to satisfy legal or business needs. While a legal action is pending or remains reasonably anticipated, Data Controllers should preserve relevant information, including relevant Protected Data, with appropriate data safeguards.

BY THE COURT:

, U.S.D.J.

50th anniversary of the Hague Convention of 15 November 1965 on the Service of Documents Abroad

The UIHJ participated on 2 November 2015 at the Law Center of Georgetown University in Washington (USA) at the 50th Anniversary of the Hague Convention of 15 November 1965 on the Service of Documents Abroad and the 45th Anniversary of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad.



Christophe Bernasconi, Secretary General of The Hague Conference on Private International Law

The conference was co-sponsored by the Hague Conference on Private International Law, the American Branch of the International Law association, the American Society of International Law, the ABA Section of International Law and the International Law Institute.

About eighty people from a dozen countries participated in this international conference on the theme: "The Service of Process and Taking of Evidence Abroad: The Impact of "Electronic Means" on the Operation of the Hague Conventions". The UIHJ was represented by Sue Collins, member of the board, and Mathieu Chardon, Secretary General. The National Association of Professional Process Servers (NAPPS), member of the UIHJ was represented by Gary Crowe and Celeste Ingalls.

Patrick P. Stewart, Professor from practice at the Georgetown Law Center and William Treanor, Dean of the Georgetown Law Center welcomed in turn the participants.

Christophe Bernasconi, Secretary General of the Hague Advisory Committee on Civil Rules | March 28, 2023 E-1



Christophe Bernasconi, Secretary General of The Hague Conference on Private International Law



Patrick P. Stewart, Professor from Practice at the Georgetown Law Center



William Treanor, Dean of the Georgetown Law Center



Panel 1, from L. to R.: Mathieu Chardon, Theodore J. Folkman, Peter Trooboff, Alejandro Manevich.



Panel 2, from L. to R.: Jeanne E. Davidson, Barbara Fontaine, Glenn P. Hendrix, Louise Ellen Teitz

Conference on Private International Law presented his organization as well as the two celebrated conventions. He recalled that 79 countries as well as the European Union are members of the Hague Conference and that 146 countries are connected by at least one Hague Convention. With regard to The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Mr. Bernasconi welcomed the delegation of the UIHJ. He recalled that the UIHJ was at the origin of this convention and, by the play of Article 10 b), the documents could be transmitted directly between the judicial officers of the signatory countries, enabling extremely fast service (forty-eight hours). The Secretary General of the Hague Conference said that over 40,000 requests for service are issued and that the duration of the whole process does not exceed two months in 75% of cases.

Christophe Bernasconi finally mentioned the work in the pipeline of the Hague Conference on Private International Law: judgments Project, private international law issues surrounding the status of children, recognition and enforcement of foreign civil protection orders, recognition and enforcement of voluntary cross-border agreements, co-operation in respect of protection of tourist and visitors abroad, use of video-link and other modern technologies in the taking of evidence abroad. He also announced that the new Practical Handbook on the Operation of the Service Convention and a Handbook on the Operation of the Evidence Convention will be available in December 2015.

The day was divided into four panels.

The first panel was entitled "How We Got Where We Are: The Conventions in Theory and Practice." The moderator was Peter Trooboff, Senior Counsel in the Washington office of Covington & Burling LLP (USA). The three speakers were Theodore J. Folkman, lawyer at Murphy & King in Boston (USA), Mathieu Chardon, and Alejandro Manevich, Counsel with the Toronto boutique firm Ricketts Harris LLP (Canada).

Mathieu Chardon presented the UIHJ, the profession of judicial officer and the Global Code of enforcement. He traced the close links between the UIHJ and the Hague Conference. Regarding the 1965 Convention, he emphasized its importance and the fact that this text is an inspiration at global level, as evidenced by Regulation (EC) No 1393/2007 of 13 November 2007 on Service of documents in the Member States of the European Union,

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Rimsky Yuen Kwok-Keung



Panel 3, From L. to R.: Roland Portmann, David W. Bowker, Mark N. Bravin, Alexander B. Blumrosen



Panel 4, from L. to R.: Michael M. Baylson, Charles T. Kotuby, Christophe Bernasconi, Noelle Lenoir, Nurzhan Kosbayev



From L. to R.: Gary Crowe, Sue Collins, Christophe Bernasconi, Mathieu Chardon

some of which comes from whole sections of the 1965 Convention. Then the Secretary General of the UIHJ explained the promotion by the UIHJ for the implementation of this convention. He referred to the numerous interventions of The Hague Conference during the events organized by the UIHJ for over fifteen years. Mathieu Chardon stressed the importance for countries to join the Convention. In Africa, judicial officers of the member countries of the Organization for the Harmonization of Business Law in Africa (Ohada) would be able to directly receive documents to be served through Article 10 b). So instead of many months and all the problems linked to the complexity of transmission he stressed out, the documents could be sent, served and returned very quickly - even in one day -. "The 1965 Hague Convention is safe, secure, efficient, and inexpensive," said Mathieu Chardon, indicating that the UIHJ strongly recommended the implementation of the Convention in all countries.

The theme of Panel 2 was: "The Central Authorities: What's Working and What's Not". It was chaired by Glenn P. Hendrix, managing partner of Arnall Golden Gregory LLP in Atlanta (USA). The three speakers were Louise Ellen Teitz, Professor of Law at Roger Williams School of Law, Rhode Island (USA), Barbara Fontaine, Senior Master, Queen's Bench Division, Judiciary of England and Wales, Central Authority for England and Wales, and Jeanne E. Davidson, Director of the Commercial Branch of the Civil Division of the US Department of Justice (USA).

Panel 3: "Civilians and Common Lawyers Deal with the Conventions" was chaired by Mark N. Bravin, Global Co-Chair of Winston & Strawn's international arbitration practice (USA). The speakers were Alexander B. Blumrosen, partner with the French law firm Bernard-Hertz-Béjot (France), Roland Portmann, Legal Advisor at the Embassy of Switzerland in the USA, and David W. Bowker, Chair of WilmerHale's international litigation group (USA).

Panel 4 on "What's coming Next? Critical Challenges Facing the Conventions", was chaired by Christophe Bernasconi. The speakers were Nurzhan Kosbayev, head of Office on expertise of Draft Multilateral Treaties Department of International Law and Cooperation at the Ministry of Justice of the Republic of Kazakhstan, Charles T. Kotuby, partner in Jones Day in Washington DC (USA), Noelle Lenoir, partner with Kramer Levin Naftalis & Frankel LLP in Paris (France), and Michael M. Baylson, judge at the Eastern District Court of Pennsylvania (USA).

During lunch, Rimsky Yuen Kwok-keung, Secretary for Justice of the Hong Kong Special Administrative Region of the People's Republic of China described the relations between the Hong Kong Special Administrative Region and the Hague Conference on Private International Law and the latest developments as regards The Hague Conventions in the region.

The quality of interventions and the high level of the debates turned these two anniversaries into one of the highlights of the judicial year.

TAB 11

1041 **11. Rule 7.1**

1042 Recusal issues involving judicial ownership of stock in companies that are involved in
1043 litigation continue to receive a great deal of attention, including from the Congress. For instance,
1044 the Courthouse Ethics and Transparency Act (Pub. L. 117-125, May 13, 2022) provided for “a
1045 searchable internet database to enable public access to any report required to be filed under this
1046 title by a judicial officer, bankruptcy judge, or magistrate judge.” This database came online on
1047 November 9, 2022, and is now available to search.⁴

1048 Another proposed bill, sponsored by Senator Warren and introduced on December 20,
1049 2022, the Anti-Corruption and Public Integrity Act (S.5315), also contains various provisions
1050 dealing with judicial conflicts of interest. Section 404(a) of the bill would amend 28 U.S.C.
1051 § 455 to require judges to “maintain and submit to the Judicial Conference a list of each
1052 association or interest that would require the justice, judge, or magistrate to recuse under
1053 subsection (b)(4),”⁵ and for the Judicial Conference to set up and maintain a searchable database
1054 of such lists. The bill has been referred to the Committee on Finance, and no other action has yet
1055 been taken. Whether this bill will advance is uncertain, but ongoing legislative attention to the
1056 general issues seems likely.

1057 Two recent submissions to the Advisory Committee have addressed related concerns.
1058 22-CV-H, from Judge Ralph Erickson (8th Cir.), addresses concerns that a number of judges
1059 have raised about holdings in companies such as Berkshire Hathaway. One issue arises from the
1060 holding company’s wide ownership of other companies. The illustrative example given involves
1061 Orange Julius, which, if a party to a suit, would have to disclose that it is wholly owned by
1062 International Dairy Queen. But current Rule 7.1 would likely not require the further disclosure
1063 that International Dairy Queen is wholly owned by Berkshire Hathaway, and the judge in the
1064 case would therefore not be alerted to any problems if she happened to have Berkshire Hathaway
1065 holdings. Berkshire Hathaway is, of course, only one example of the general problem. As Judge
1066 Erickson notes, CitiGroup has a controlling interest in some 300 companies, so a judge who
1067 owns CitiGroup shares may face similar problems if a CitiGroup-owned company owns an entity
1068 that is a party to a lawsuit. Judge Erickson therefore suggests amending Rule 7.1 to require
1069 disclosure of companies that hold the parent companies of parties to a case.

1070 This problem might be informally called the “grandparent problem.” That is, in the
1071 example noted above, International Dairy Queen is the parent corporation of Orange Julius, and
1072 Berkshire Hathaway might be termed the “grandparent” because it owns International Dairy
1073 Queen. Because Rule 7.1 requires that nongovernmental corporate parties only “any parent
1074 corporation and any publicly held corporation owning 10% or more of its stock,” a
1075 “grandparent” might never be disclosed, and the judge would not be informed of the potential

⁴ The database may be found and searched at: <https://www.uscourts.gov/judges-judgeships/judiciary-financial-disclosure-reports>.

⁵ 28 U.S.C. §455(b)(4) provides that a judge “shall disqualify himself [if] [h]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other financial interest that could be substantially affected by the outcome of the proceeding.”

1076 issue. Some courts have required disclosure of a “grandparent,” but it is not clear how far that
1077 requirement might go or if it will be more broadly adopted.⁶ Given the endless permutations of
1078 corporate relationships, there may be many examples of such interests that go undisclosed.

1079 Separately, Magistrate Judge Barksdale (M.D. Fla.) proposed that Rule 7.1 be amended
1080 to add a certification requirement that appears to make use of the newly created database on
1081 judges’ stock holdings (22-CV-F). This amendment would require a disclosure statement by a
1082 party that “certifies that the party has checked the assigned judge or judges’ publicly available
1083 financial disclosures and, if a conflict or possible conflict exists, will file a motion to recuse or a
1084 notice of a possible conflict within 14 days of filing the disclosure.” This proposal does not
1085 appear to address the “grandparent” issue directly, though such investigation might have the
1086 effect of revealing such a relationship in some cases.

1087 The Committee discussed both of these proposals at its October 2022 meeting. The
1088 discussion noted the increased attention to issues of judicial financial conflicts and a recent Wall
1089 Street Journal investigation that identified several examples of apparent conflicts where judges
1090 did not recuse themselves. Participants in the discussion also noted the complexities of the
1091 issues for judges who may be understandably reluctant to divest themselves of some assets.
1092 Moreover, whether the complex matters surrounding such investments—and what sort of
1093 investments may be acceptable in various circumstances—are appropriate and feasible for
1094 rulemaking presents a significant challenge. Whether the grandparent issue, in all its
1095 permutations, can be effectively dealt with by rulemaking is questionable, as is whether it is
1096 reasonable to place a duty on parties and firms to notify judges of potential issues. With respect
1097 to both proposals, in some cases compliance will be feasible and easy, while in others it will be
1098 costly and very difficult, particularly for litigants with lesser resources.

1099 Nevertheless, at the October meeting, Judge Dow noted that this Committee has been
1100 nominated to take the lead for the other advisory committees, something Judge Bates reaffirmed
1101 at the January 2023 Standing Committee meeting.⁷ One question that remains on the table is
1102 whether this Committee, or the rulemaking process generally, is best suited to address these
1103 issues, or whether another Judicial Conference Committee might be better situated. Although
1104 the general sentiment continues to be that “these issues are not going away,” whether a
1105 subcommittee should be appointed, and what its mandate would be, are difficult questions. At
1106 the October 2022 meeting of this Committee, formation of a small subcommittee (comprised
1107 perhaps only of a judge, a lawyer, and one other member) was suggested, largely for the purpose
1108 of information gathering and coordination with other committees. Whether this would be a
1109 worthwhile use of resources is a subject for further discussion. Either way, there was support for
1110 these issues remaining on the Committee’s agenda, even if they are in an inactive status while
1111 the situation further develops in the Congress and other venues. Along these lines, it may be
1112 appropriate to wait to get experience with the now-live database mandated by the Courthouse

⁶ See A. Benjamin Spencer, *Federal Practice & Procedure* § 1197 n.5 (4th ed. 2022 update) (citing *Faraj v. 6th and Island Investments LLC*, 2017 WL 385741, *4 (S.D. Cal. 2017); *Harris v. Wells Fargo Bank, N.A.*, 2016 WL 11486587, *2 (C.D. Cal. 2016)).

⁷ Discussion of the issue at the Standing Committee was otherwise minimal, likely due to the extensive discussion of other Committee matters that are further along in their development, such as privilege logs and multidistrict litigation.

1113 Ethics and Transparency Act before considering a rule that requires litigants to consult it.

1114 In any event, this memo is intended only to remind the Committee of the issues presented
1115 and apprise it of developments since the October meeting. Further work will be needed before
1116 any specific action is proposed.

TAB 11A

From: Ralph Erickson <[REDACTED]>
Sent: Thursday, June 30, 2022 11:43 AM
To: Robert Dow <[REDACTED]>; Jennifer Elrod <[REDACTED]>
Cc: Roslynn R Mauskopf <[REDACTED]>
Subject: Problems Associated with Berkshire Hathaway holdings by judges

Good Morning,

I just wanted to pass on a couple of recurring issues that I'm being contacted about by judges around our circuit—and from a couple from outside the Eighth Circuit.

A number of judges have contacted me indicated that they have holdings in Berkshire Hathaway and that they have accumulated substantial capital gains that would be problematic if they moved the investment into ETFs or Mutual funds. Each of them called me because he or she had recently discovered that Berkshire Hathaway was either a parent or the parent of a parent company. The parent companies are usually disclosed on the Rule 7.1 disclosure and are caught before a judge acts or is even assigned. The problem arises when Berkshire Hathaway is the parent company of a parent company and the disclosure does not appear to be required under Rule 7.1 of the FRCivP. As an example, Orange Julius of America is wholly owned by International Dairy Queen. In compliance with Rule 7.1 Orange Julius would disclose that International Dairy Queen is its parent company—but it would not disclose that IDQ is wholly owned by Berkshire Hathaway. In some cases judges have presided only to find out later about the relationship. People who own CitiGroup have similar problems as CitiGroup has a controlling interest in some 300 companies. Given the breadth of Canon 3C(1) and the broad definition of “financial interest” in 3C(3)(C) of the Code of Conduct for United States Judges, as well as the guidance in Advisory Opinion 57 the conflict is a thorny one for judges to maneuver in the field.

This brings to mind a couple of issues, one for the Codes Committee and one for the Civil Rules Advisory Committee. First, should we amend the Certificate of Divestiture process so as to allow judges a window to preemptively divest themselves of these sorts of holdings and move into qualified investments and get a Certificate of Divestiture? As I said, the large capital gains tax is the main reason that judges still hold these investments even though they know they create a conflict nightmare.

Second, should we amend Rule 7.1 to require the disclosure of companies that hold the parent corporations of corporations in a parent relationship to a party to the action? It seems to me that more information rather than less is prudent in today's environment.

Thanks for your consideration. Have a great Independence Day holiday!

Ralph R. Erickson
U.S. Court of Appeals for the 8th Circuit
Fargo, ND
[REDACTED]

TAB 11B

From: Patty Barksdale
To: RulesCommittee Secretary
Subject: Suggestion for Fed. R. Civ. P. 7.1 (Disclosure Statement)
Date: Wednesday, June 08, 2022 10:20:32 AM

22-CV-F

To address issues with financial conflicts of interest, please consider amending Rule 7.1 to require a nongovernmental corporate party, when filing a disclosure statement, to certify the party has checked the assigned judges' publicly available financial disclosures and, if a conflict or possible conflict exists, will file a motion to recuse or a notice of a possible conflict of interest.

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS. A nongovernmental corporate party must file ~~2 copies of~~ a disclosure statement that:

(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or states that there is no such corporation;

~~(2) states that there is no such corporation and~~

~~(3) certifies that the party has checked the assigned judge or judges' publicly available financial disclosures and, if a conflict or possible conflict exists, will file a motion to recuse or a notice of a possible conflict within 14 days of filing the disclosure.-~~

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement with a supplemental certificate, if any required information changes.

Patricia D. Barksdale
 United States Magistrate Judge
 Bryan Simpson United States Courthouse
 300 North Hogan Street
 Jacksonville, FL 32202
 (904) 549-1950

TAB 12

1117 **12. Rule 38**

1118 At the Committee’s March 2022 meeting, there was a report about proposals to consider
1119 changes to the current rule provisions on demanding a jury trial. A 2016 submission (16-CV-F,
1120 from Judge Susan Graber and then-Judge Neil Gorsuch) proposed “switching the default” in
1121 Rule 38 into accord with Criminal Rule 23(a). Rule 38 provides that a party has a right to a jury
1122 trial only if it makes a timely demand for a jury trial. Criminal Rule 23(a), on the other hand,
1123 mandates a jury trial whenever the defendant is entitled to a jury trial unless the defendant
1124 waives in writing, the government consents, and the court approves. A concern was that one
1125 possible explanation for the declining frequency of civil jury trials has been failure to make a
1126 timely jury demand.

1127 The FJC undertook initial docket research regarding the frequency of jury trial demands
1128 in civil cases, the frequency of termination after commencement of a civil jury trial, and the
1129 frequency of orders for a jury trial despite failure to make a timely demand. The initial FJC
1130 report is included in this agenda book. This report does not show that the rule requirements to
1131 demand a jury trial are a major factor in whether jury trial occurs. Type of case seems more
1132 prominent. For example, as Table 5 shows, more than 90% of product liability cases show a jury
1133 demand, while only about 1% of prisoner cases show such a demand. The study does not show
1134 whether settlement occurs more frequently in cases in which a timely jury trial demand was not
1135 made, but a review of dockets would not show that. And the effect of facing a prospect of jury
1136 trial might be ambiguous in terms of affecting willingness to settle.

1137 The FJC report included in the agenda book for the October 2022 Advisory Committee
1138 meeting did not show that the demand requirement set forth in Rule 38 plays a significant role in
1139 right to jury trial. But a more expansive FJC report on jury trials was called for by Congress, so
1140 action on this topic was continued.

1141 That report to Congress was completed in March 2023 and is also included in this agenda
1142 book. It shows that there is very little variation among districts in the frequency of jury trials in
1143 civil cases. In general, though the absolute number of jury trials is higher in larger districts, the
1144 frequency of civil jury trials is larger in smaller districts. But the variation among districts is not
1145 distinctive. The District of Wyoming has 2.75% jury trials, and one other district has more than
1146 2% jury trials.

1147 The declining rate of civil jury trials is included in the charts at the end of the 2023 report
1148 to Congress. But though that decline may be much lamented, it is not clear that Rule 38
1149 contributes to it. Under these circumstances, it does not seem that revising Rules 38 and 39
1150 would be likely to have a significant effect on the rate of jury trials in civil cases. The March
1151 2023 report addresses jury demands on p. 18.

1152 The March 2023 report to Congress does, however, report some insights. One is that the
1153 rate of jury trials between civil and criminal cases correlate, which cuts against the notion that
1154 jury trial is more frequent in criminal cases than civil cases.

1155 Another insight is that there seems no correlation between the rate of civil jury trials and
1156 the rate of resolution of actions by summary judgment.

1157 Increasing judicial case management, however, does seem to correlate with declines in
1158 the frequency of civil jury trials. For example, Table A1 in the 2023 FJC report shows that in
1159 1962 some 5.5% of civil cases reached jury trial, while in 2019 the rate of civil jury trial was
1160 0.5%.

TAB 12A

Jury-Trial Demands in Terminated Civil Cases,
Fiscal Years 2010–2019

Prepared for the Judicial Conference Advisory Committee on Civil Rules

Kristin A. Garri
Emery G. Lee III

June 2022

This Federal Judicial Center publication was undertaken in furtherance of the Center’s statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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Executive Summary

The Judicial Conference Advisory Committee on Civil Rules is currently considering amending Federal Rules of Civil Procedure 38 and 39 related to the Seventh Amendment right to jury trial. To inform the advisory committee’s discussions, this report summarizes findings on jury-trial demands from court electronic records for civil cases terminated in fiscal years 2010–2019 (inclusive). Findings include:

- 0.7% of civil cases terminated during or after a jury trial during the study period.
- Jury-trial demands were recorded in half of civil cases (50%).
- Jury trials occur in 1.3% of cases in which a jury-trial demand is recorded.
- Jury trials occur rarely in cases in which no jury-trial demand is recorded (0.1%).
- The jury-trial demand rate varies by jurisdictional basis of a case, origin of a case, type of case, and the representation status of the parties.

Background

The Seventh Amendment preserves the right to trial by jury in civil cases in federal court. But a jury trial is not the default setting in the Federal Rules of Civil Procedure. Rule 38 requires the parties to affirmatively demand a jury trial in order to preserve their Seventh Amendment right of trial by jury in civil cases. Failure to properly serve and file a jury-trial demand results in a waiver of the constitutional right. The Advisory Committee on Civil Rules is currently reviewing whether this default setting should be reversed and has requested information related to jury-trial demands drawn from court electronic records. This report is limited to precoronavirus pandemic data, analyzing civil cases terminated in fiscal years 2010–2019 (inclusive), as it is outside the scope of this report to determine the pandemic’s impact, if any, on jury-trial demands.

Jury-Trial Demands in Court Electronic Records

Rule 39(a) requires that, when a jury-trial demand has been made pursuant to Rule 38, “the action must be designated on the docket as a jury action.” In practical terms, this means that jury-trial demand information is available in court electronic records. For all civil cases terminated in the district courts in fiscal years 2010–2019 inclusive (N = 2,819,570), for example, court records indicate that a jury trial was demanded by at least one party in 50% of closed cases and not demanded in 49%, with 1% missing. The category of “all civil cases,” of course, includes cases that would not normally be tried to a jury, including cases against the United States¹ and habeas corpus cases. More information on case characteristics associated with jury-trial demands is presented in the next section.

1. “The Seventh Amendment right to a jury trial does not apply in actions against the Federal Government,” *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981), although Congress can authorize jury trials by statute, *id.* at 160–61.

One concern with the civil rules' default setting is that it insufficiently protects the constitutional guarantee, creating situations in which parties inadvertently waive their Seventh Amendment right to trial by jury. Rule 39(b) provides discretion for the court on motion to “order a jury trial on any issue for which a jury might have been demanded,” but many courts require “some cause beyond mere inadvertence . . . to permit an untimely demand.”² Court records were examined to determine how often jury trials occur in civil cases when a jury-trial demand is not recorded. Regardless of whether a jury trial is demanded, of course, very few civil cases terminate after the start of a jury trial. For fiscal years 2010–2019, only 0.7% of closed civil cases terminated during or after³ a jury trial (a total of 20,047 civil cases over the ten-year period). As can be seen in Table 1, terminated civil cases in which a jury-trial demand was recorded were much more likely to terminate during or after a jury trial (1.3%) than cases in which a jury-trial demand was not recorded (0.1%), but jury trials did occur in the latter category of cases. It is likely that the court ordered a jury trial despite waiver, pursuant to Rule 39(b), in many of these cases.⁴

Table 1: Civil Cases Terminating During or After Jury Trial by Jury-Trial Demand, FYs 2010–2019 (N = 2,819,570)

Jury-Trial Demand Recorded	Percentage of All Civil Terminations	N	Percentage Terminating During or After Jury Trial	N
Yes	50%	1,420,881	1.3%	18,178
No	49%	1,374,134	0.1%	1,205
Missing	1%	24,555	2.7%	664
All	100%	2,819,570	0.7%	20,047

For the 1% of cases in which the jury-trial demand information was missing from court records for fiscal years 2010–2019, fully 2.7% terminated after the start of a jury trial—which translates to 664 jury trials in cases in which no jury-trial demand information was recorded. Without more research, it is impossible to know in how many of these cases the court ordered a jury trial despite waiver and in how many the court records should have reflected a properly made jury-trial demand. But at minimum, the absence of a jury-trial demand in the court records is not determinative of whether a jury trial occurs.

Table 2 includes civil cases that terminated after the start of any trial (including bench trials). Fully 85% of cases that terminated by trial and in which a jury-trial demand was recorded

2. *Chen v. Hunan Manor Enter., Inc.*, 340 F.R.D. 85, 88 (S.D.N.Y. 2022) (quotation omitted).

3. This includes incomplete jury trials (e.g., the case settled before the jury verdict). Note, however, that incomplete jury trials represent only about one in ten cases in which a jury trial starts.

4. In other words, a civil case in which a jury-trial demand was recorded was “only” thirteen times more likely to reach a jury trial and not infinitely more likely, as would be the case if no jury trials were ever conducted in cases in which a demand was not recorded.

terminated during or after a jury trial, as opposed to during or after a bench trial (15%). But note that 18% of cases in which a jury-trial demand was not recorded terminated during or after a jury trial. In other words, almost one in five trials that started in cases in which a jury-trial demand was not recorded was before a jury. Moreover, one-third of cases (33%) terminating during or after a trial in which the jury-trial demand was missing terminated during or after a jury trial. These findings are difficult to square with the view that courts are not ordering jury trials despite waivers, at least in some subset of cases.

Table 2: Civil Cases Terminating During or After Jury or Bench Trial, by Jury-Trial Demand, FYs 2010–2019 (N = 28,890)

Jury-Trial Demand Recorded	During or After Jury Trial	During or After Bench Trial	N
Yes	85%	15%	21,321
No	18%	82%	6,578
Missing	33%	67%	991
All	69%	31%	28,890

Case Characteristics Associated with Jury-Trial Demands

As mentioned in the previous section, the Seventh Amendment right to a jury trial in civil cases does not extend to all cases in federal court, including cases against the United States. As can be seen in Table 3, which is broken out by the basis of jurisdiction, United States defendant cases have the lowest rate of jury-trial demands (7%), and diversity-of-citizenship cases, based on state law, have the highest rate (67%). It is clear from Table 3 that the largest category, cases based on federal-question jurisdiction, includes large swaths of cases in which jury trials do not occur—for example, habeas corpus proceedings brought by state prisoners.

Table 3: Jury-Trial Demands by Basis of Jurisdiction, Terminated Civil Cases, FYs 2010–2019

Basis of Jurisdiction	Demand	No Demand	Missing	N
Federal Question	53%	46%	1%	1,472,058
Diversity of Citizenship	67%	32%	1%	896,584
United States Defendant	7%	92%	< 1%	384,053
United States Plaintiff	17%	82%	1%	68,622
All	50%	49%	1%	2,819,570

Given that the highest jury-trial demand rate observed in Table 3 was among diversity-of-citizenship jurisdiction cases, there should also be a high jury-trial demand rate among cases removed from the state courts.⁵ Table 4 shows the jury-trial demand rate by origin of the case (excluding reopened cases and appellate remands). The jury-trial demand rate is, indeed, relatively high for removals to federal court (70%), but the highest jury-trial demand rate is among multi-district litigation (MDL) cases directly filed in the transferee district (94%). MDL cases are often filed in the transferee district for the purpose of providing the transferee court with the authority to try the case. In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* (1998),⁶ the Supreme Court held that 28 U.S.C. § 1407 transfer is limited to pretrial proceedings, but nothing prevents an MDL court from trying cases filed directly in the district after centralization.⁷ In contrast, MDL cases transferred pursuant to § 1407 have a relatively low jury-trial demand rate (30%). Original proceedings and interdistrict (non-MDL) transfer cases have jury-trial demand rates comparable to federal-question cases in general (both at 49%).

Table 4: Jury-Trial Demand Rate by Origin, Terminated Civil Cases, FYs 2010–2019

Case Origin	Percentage in Which Demand is Recorded	N
Original Proceeding	49%	2,085,418
Removal from State Court	70%	329,921
Interdistrict Transfer	49%	51,234
MDL Transferred to Transferee District	30%	211,860
MDL Directly Filed in Transferee District	94%	30,710

To shed more light on the jury-trial rate by case type, Table 5 shows the jury-trial demand rate for the eighteen largest nature-of-suit codes; each of these nature-of-suit codes accounted for at least 2% of terminated cases during fiscal years 2010–2019.

5. Jury-trial demands in removals from state court are governed by Fed. R. Civ. P. 81(c)(3).

6. 523 U.S. 26. *See also* Melissa J. Whitney, Bellwether Trials in MDL Proceedings 11–13 (Fed. Jud. Ctr. 2019).

7. The data on direct-filed MDL cases is somewhat limited because this origin code did not exist prior to July 1, 2016. It should also be noted for the 30,710 cases in this category of cases, *only five* are recorded in court electronic records as having terminated after a jury trial (0.0002%). It appears that bellwether trials do not appear in the court data as jury-trial terminations. It seems likely that there would have been more than five bellwether trials among the MDL direct-file cases terminated 2016–2019.

Table 5: Jury-Trial Demand Rate for 18 Largest Nature-of-Suit Codes, Terminated Civil Cases, FYs 2010–2019

Nature-of-Suit Code	Percentage in Which Demand is Recorded	N
Insurance (110)	63%	97,473
Other Contract Actions (190)	55%	125,951
Other Personal Injury (360)	84%	93,383
Product Liability-Personal Injury (365)	94%	262,946
Product Liability-Pharm./Med. Device (367)	98%	67,358
Asbestos Product Liability (368)	9%	155,882
Other Civil Rights (440)	69%	156,134
Civil Rights (Jobs) (442)	85%	132,933
Consumer Credit (480)	85%	94,230
Prisoner Petition-Vacate Sentence (510)	< 1%	80,975
Prisoner Petition-Habeas Corpus (530)	1%	187,547
Prisoner-Civil Rights (550)	38%	179,912
Prisoner-Prison Conditions (555)	45%	92,727
Fair Labor Standards Act (710)	80%	75,601
Employee Retirement Income Security Act (791)	12%	76,819
D.I.C.W./D.I.W.W. (863)	1%	79,160
S.S.I.D. (864)	1%	86,626
Other Statutory Actions (890)	60%	93,481

The lowest jury-trial demand rates are observed for prisoner petitions brought under 28 U.S.C. §2254 (state-prisoner, non-capital habeas) and §2255 (vacate federal sentence), nature-of-suit codes 510 and 530; Social Security disability appeals, 863 and 864; asbestos cases, 368; and ERISA cases, 791. The highest jury-trial demand rates are observed in the product liability nature-of-suit codes.

The jury-trial demand rate also varies by the representation status of the parties (see Table 6); cases in which all parties are represented by counsel have much higher rates of jury-trial demands than cases in which there is at least one self-represented party. There is obviously overlap between case types with low jury-trial demand rates—e.g., noncapital habeas petitions (in Table 5)—and the incidence of self-represented parties.

Table 6: Jury-Trial Demand by Representation Status, Terminated Civil Cases, FYs 2010–2019

Representation Status	Percentage in Which Demand is Recorded	N
No Self-Represented Parties	59%	2,040,110
Self-Represented Plaintiffs	27%	708,472
Self-Represented Defendants	36%	59,257
Self-Represented Plaintiffs and Defendants	36%	11,731

Conclusion

Jury-trial demands were recorded in half of civil cases terminated in fiscal years 2010–2019 (inclusive), though only 0.7% of civil cases were terminated during or after a jury trial. Jury trials occur at a higher rate for cases in which a jury-trial demand is recorded (1.3%). However, jury trials also occur in cases in which no jury-trial demand appears in court electronic records (0.1%). The absence of a jury-trial demand in court records may not necessarily be indicative of no demand, however, making it difficult to know the true jury-trial demand rate.

TAB 12B

Jurisdictions with a High Number of Civil Jury Trials

Prepared for the House and Senate Committees on Appropriations

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March 2023

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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Executive Summary

The Consolidated Appropriations Act, 2022 (Pub. L. No. 117-103) directed the Federal Judicial Center to submit a report “identifying jurisdictions that have a high number of civil jury trials” and analyzing “whether the litigation practices, local court rules, or other factors in those jurisdictions may contribute to a higher incidence of civil jury trials.” Because the number of civil jury trials was dramatically affected by the coronavirus pandemic, this report focuses on federal court data from fiscal years 2010–2019. This report draws on data reported by the district courts to the Administrative Office of United States Courts; these data provide the basis for the tables in the official judiciary reports and are made available to the public by the Federal Judicial Center.

Civil cases terminated during or after civil jury trial represent only 0.7% of all civil cases terminated in the study period. The percentage of cases terminated during or after a jury trial varied over the course of the study period, with the lowest percentage of jury trial terminations, 0.5%, observed in fiscal year 2019.

With respect to “districts with a high number of civil jury trials,” the size of the caseloads of the federal district courts is key: district courts with larger numbers of overall civil terminations tend to have larger numbers of civil jury trials in absolute terms, but those relatively larger courts tend to have lower civil jury trial rates than district courts with fewer overall civil terminations. The 10 districts with the most civil terminations during or after a jury trial in fiscal years 2010–2019 were California Central, Illinois Northern, New York Southern, Pennsylvania Eastern, Florida Southern, New York Eastern, Florida Middle, Texas Southern, California Eastern, and Colorado. These districts are all relatively large districts in terms of overall caseload.

On the other hand, the 10 districts with the highest civil jury trial rates (i.e., the highest percentages of civil terminations during or after jury trial) in fiscal years 2010–2019 were all medium to small districts in terms of overall caseload: Wyoming, New York Northern, Wisconsin Western, Illinois Central, Virgin Islands, Louisiana Middle, Nebraska, Guam, South Dakota, and Connecticut.

There is little variation among districts in terms of the civil jury trial rate in fiscal years 2010–2019. The overwhelming majority of districts (77) had a civil jury trial rate between 0.5% and 1.5%; only two districts had a civil jury trial rate equal to or greater than 2.0%, and no district had a civil jury trial rate greater than the District of Wyoming’s, at 2.75%. The report’s ability to assess factors associated with higher civil jury trial rates is constrained by this lack of variation in the variable of interest.

The report presents data on several factors that may contribute to a higher incidence of civil jury trials. Findings include:

- The composition of a district’s caseload is only weakly related to its civil jury trial rate. No district “lacks” civil cases eligible to try.
- There is a positive correlation at the district level between the civil jury trial rate and the percentage of civil cases that are tried by the court (bench trial rate).

- Districts' criminal caseloads are strongly correlated with their civil caseloads, and districts with larger combined criminal and civil caseloads tend to have lower civil jury trial rates than districts with relatively smaller combined caseloads.
- There is no correlation between districts' civil jury trial rates and the criminal defendant jury trial rates (i.e., percentage of criminal defendants' cases terminated by jury trial). This finding is somewhat contrary to the conventional wisdom that there is a trade-off between civil and criminal jury trials.
- There is no correlation between districts' civil jury trial rates and the percentage of civil cases resolved by summary judgment.
- With existing data sources, it is difficult to say how local rules or districts' use of various forms of alternative dispute resolution (ADR) affect the civil jury trial rate.
- One factor that may have reduced the civil jury trial rate across time, a shift in judges' mindset to a focus on case management, is difficult to assess at the district level.

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I. Background

Division E, title III, of the explanatory statement accompanying the Consolidated Appropriations Act, 2022 (Pub. L. No. 117-103) included the following reporting requirement for the Federal Judicial Center (Center):

Civil Jury Trials.—The FJC is directed to submit a report to the Committees no later than one year after enactment of this Act identifying jurisdictions that have a high number of civil jury trials and analyze whether the litigation practices, local court rules, or other factors in those jurisdictions may contribute to a higher incidence of civil jury trials.

The Committees' interest in the number of civil jury trials is likely related to concerns over the vanishing or disappearing trial in both criminal and civil cases. Although commentators have bemoaned the jury trial's decline for at least 100 years,¹ contemporary interest was spurred by Professor Galanter's comprehensive 2004 article, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts."² As Galanter and others have repeatedly documented, civil jury trials have declined sharply, both in absolute terms and in terms of the percentage of civil cases terminated during or after jury trial, i.e., the civil jury trial rate (see **Table A-1**). In absolute terms, the number of civil terminations during or after jury trial fell to a new low of 1,570 in fiscal year 2019, even as overall civil terminations peaked at 311,520. The number of civil jury trials in 2019 was down 75% from a high of 6,279 in 1987. The civil jury trial rate has declined from a high of 5.5% in 1962 to a low of 0.5% in 2019.

Then came the coronavirus pandemic. As seen in **Table 1**, the number of civil jury trials plummeted during the pandemic.³ The pandemic struck almost in the middle of FY 2020; in that fiscal year, only 827 civil cases terminated during or after jury trial; in FY 2021, the comparable

1. See Herbert M. Kritzer, *The Trials and Tribulations of Counting Trials*, 62 DePaul L. Rev. 415, 416 (2013): [I]t is important to realize that concerns in the United States about the decline of the jury trial are by no means new. Such concerns have been expressed at least since the late 1920s in scholarship such as Raymond Moley's article *The Vanishing Jury*, Dunbar Carpenter's letter to the ABA Journal, *The Jury System's Manifest Destiny*, Silas Harris's *Is the Jury Vanishing*, and J. A. C. Grant's *Felony Trials Without a Jury*. In fact, the decline in jury trials during this earlier period produced laments similar to what some commentators are expressing today

(citations omitted).

2. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004).

3. According to a recent Center report:

Jury trials were directly impacted by the pandemic. When courts closed their doors in the early days of the pandemic, they moved many kinds of proceedings to telephone and video conference. Jury trials, however, could not be moved online with the same ease As a result, many districts suspended jury trials altogether during the first wave of the pandemic. Once jury trials resumed, social distancing requirements, cleaning protocols, and COVID-19 infections limited the number of trials courts could conduct at any given time. Through subsequent waves of the pandemic, some courts again opted to suspend jury trials.

Roy Germano, Timothy Lau, & Kristin Garri, Federal Judicial Center, COVID-19 and the U.S. District Courts: An Empirical Investigation (2022), at 6–7.

figure was 846 civil cases. Jury trials appear to have mostly rebounded in FY 2022 to 1,486, only about 5% lower than in fiscal year 2019.

Table 1. Civil Jury Trials, Total Civil Terminations, and Civil Jury Trial Rate, FYs 2010–2022

Fiscal Year	Civil Jury Trials	Total Civil Terminations	Jury Trial Rate
2010	2,251	309,361	0.7
2011	2,253	302,817	0.7
2012	2,219	271,385	0.8
2013	2,152	255,071	0.8
2014	2,028	258,278	0.8
2015	2,091	274,362	0.8
2016	1,965	271,302	0.7
2017	1,812	289,595	0.6
2018	1,706	275,879	0.6
2019	1,570	311,520	0.5
2020	827	270,902	0.3
2021	846	271,275	0.3
2022	1,486	307,923	0.5
Total	23,206	3,669,670	0.6

Given the district courts’ inability to conduct jury trials during the pandemic, this report draws upon pre-coronavirus pandemic data, specifically fiscal years 2010–2019. The numbers of civil jury trials presented in this report are drawn from the Center’s Integrated Database (IDB), a longitudinal database based on yearly data extracts of civil case filings and terminations reported by the federal district courts to the Administrative Office of the United States Courts (AOUSC). The IDB includes the data used in Table C-4A, “U.S. District Courts – Civil Cases Terminated, by District and Action Taken,” published annually in the Judicial Business of United States Courts report.⁴ The ninth column of Table C-4A provides the number of civil cases in a particular jurisdiction that terminated during or after the start of a jury trial during the fiscal year. In court records, civil trials are defined as contested proceedings in which evidence is introduced; jury trials, as opposed to what is commonly called a bench trial, are those in which a panel of citizens is charged with making findings of fact. All told, 20,047 civil cases were terminated during or after

4. The IDB is available for public download at <https://www.fjc.gov/research/idb>. Table C-4A as published in the annual Judicial Business of the United States Courts report can be accessed at <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts>.

civil jury trials in fiscal years 2010–2019.⁵ The “during or after” language denotes that incomplete jury trials are included in counts of civil jury trials. About 87% of these cases were resolved after a jury verdict.

These 20,047 civil jury trials represent only 0.7% of all civil cases terminated in fiscal years 2010–2019. **Table 2** summarizes the procedural progress of civil terminations during the study period as recorded by the district courts, following Table C-4 in the Judicial Business reports. Across the entire period, 19% of civil cases were terminated without any court action. Most civil cases, 70%, were terminated before a pretrial (Rule 16) conference. Ten percent of civil cases were terminated before a trial began but after a pretrial (Rule 16) conference. Less than one half of one percent of cases were terminated during or after a bench trial. The percentage of cases terminated during or after a jury trial varied over the course of the study period, but the lowest percentage of jury trial terminations, 0.5%, was observed in fiscal year 2019.

Table 2. Percentage of Total Civil Cases Terminated, by Action Taken, FYs 2010–2019

Fiscal Year	No Court Action	Before Pretrial	During or After Pretrial	During or After Jury Trial	During or After Nonjury Trial
2010	17.4%	72.4%	9.1%	0.7%	0.3%
2011	18.0%	72.0%	9.0%	0.7%	0.3%
2012	20.2%	69.4%	9.2%	0.8%	0.4%
2013	21.2%	67.4%	10.1%	0.8%	0.4%
2014	20.1%	68.3%	10.5%	0.8%	0.4%
2015	20.7%	67.4%	10.8%	0.8%	0.3%
2016	19.5%	68.8%	10.7%	0.7%	0.3%
2017	18.4%	70.2%	10.5%	0.6%	0.3%
2018	18.5%	69.1%	11.4%	0.6%	0.3%
2019	18.5%	70.4%	10.3%	0.5%	0.2%
Total	19.2%	69.6%	10.1%	0.7%	0.3%

The remainder of this report proceeds as follows: Part II identifies the districts with the highest number of civil jury trials in three ways: the number of civil terminations during or after jury trial (Part II.A), the number of civil terminations during or after jury trial controlling for the number of authorized judgeships (Part II.B), and the rate at which civil cases terminate during or after jury trial (Part II.C). These three measures of “high number of civil jury trials” lead to different rankings of the districts.

5. For fiscal year 2011, the data in the IDB differ slightly from Table C-4A: there were 105 fewer total civil terminations and 1 fewer civil case terminated during or after jury trial in the IDB.

Part III then turns to “the litigation practices, local court rules, or other factors” that may explain the variation in the number of civil jury trials. Part III.A examines whether the type of cases initiated in the different districts (in terms of jurisdictional basis, origin, and nature of suit) explains variation in the civil jury trial rate. Part III.B briefly examines the role of jury trial demands pursuant to Fed. R. Civ. P. 38. Part III.C addresses the incidence of bench trials. Part III.D considers the relative sizes of the districts’ criminal caseloads, the relationship between civil and criminal jury trial rates, and the effects of the districts’ combined civil and criminal caseloads on the civil jury trial rates. Parts III.E and III.F look to district practices with respect to summary judgment; the former examines whether the civil jury trial rate varies by the rate at which districts resolve cases by means of summary judgment, and the latter to variations in districts’ local rules with respect to summary judgment procedures. Part III.G discusses alternative dispute resolution (ADR) and Part III.H the view that judges’ case-management mindset explains some of the overall rate at which civil cases go to trial. Part IV provides a brief conclusion.

II. Identifying Districts That Have a High Number of Civil Jury Trials

The explanatory statement directs the Center to identify “jurisdictions that have a high number of civil jury trials.” For purposes of this report, “jurisdictions” is limited to the 94 federal judicial districts. The Center does not have access to comparable, comprehensive data on civil jury trials in the state courts.⁶

Both words in the phrase “high number” are open to interpretation. With respect to “high,” few legal commentators would say that any district has a “high” number of civil jury trials. This report will focus on identifying districts with higher rates of civil jury trials than other districts rather than absolute numbers of civil jury trials. In addition, “number” may be interpreted in multiple ways. Taking “number” literally, Part II.A identifies the districts that conducted the most civil jury trials in fiscal years 2010–2019. **Table A-2** lists the 94 federal district courts in order from the district with the highest yearly average number of civil jury trials to the district with the lowest yearly average number of civil jury trials, showing for each district the yearly average number of civil jury trials, percentage of all civil jury trials for the entire period held in that district, yearly average number of civil terminations, and district rank in terms of yearly average civil terminations. Districts with a greater number of civil terminations overall generally tend to have more civil jury trials than districts with fewer civil terminations overall.

To partly account for court size, Part II.B identifies the districts with the highest yearly average number of civil jury trials per authorized judgeship for the period fiscal years 2010–2019. **Table A-3** lists the 94 federal district courts in order from the district with the highest yearly average number of civil jury trials per authorized judgeship to the district with the lowest yearly average number of civil jury trials per authorized judgeship. The district rankings differ between Tables A-2 and A-3, although three districts (California Eastern, Colorado, and New York Eastern) rank in the top 10 in both.

“Highest number,” however, may also be interpreted in terms of the rate at which civil cases go to jury trial, i.e., the percentage of a district’s civil case terminations occurring during or after a civil jury trial. This is often the key measure in the vanishing jury trial literature. Civil jury trial rates are presented in Part II.C. **Table A-4** lists the federal district courts in order from the district with the highest yearly average rate of civil jury trials as a percentage of all civil terminations for fiscal years 2010–2019, to the district with the lowest yearly average rate of civil jury trials as a percentage of all civil terminations. In general, large districts in terms of overall caseload tend to

6. Data on the state courts comparable to the federal court data simply do not exist. *See, e.g.,* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts: Does It Matter?* *Judicature*, Winter 2017, at 31 (“The data concerning state court trial activity are neither as comprehensive nor as current and consistent as the federal court data.”). *See also* Robert Moog, *Piercing the Veil of Statewide Data: The Case of Vanishing Trials in North Carolina*, 6 *J. Empirical Legal Stud.* 147, 148–49 (2009):

The literature on declining trials has encompassed both the federal and state courts, but the majority of the research and analysis has been at the federal level. Data from the states tend to be spotty, cross-state comparisons are crude at best because of incomparable data, and doubts regarding the consistency and reliability of the data are likely to be greater at the state level than at the federal level.”

have lower civil jury trial rates, and the districts with the highest civil jury trial rates tend to be smaller districts in terms of overall caseload. However, as will be addressed below, there is little district-to-district variation in civil jury trial rates. The overwhelming majority of districts have civil jury trial rates between 0.5% and 1.5% for fiscal years 2010–2019.

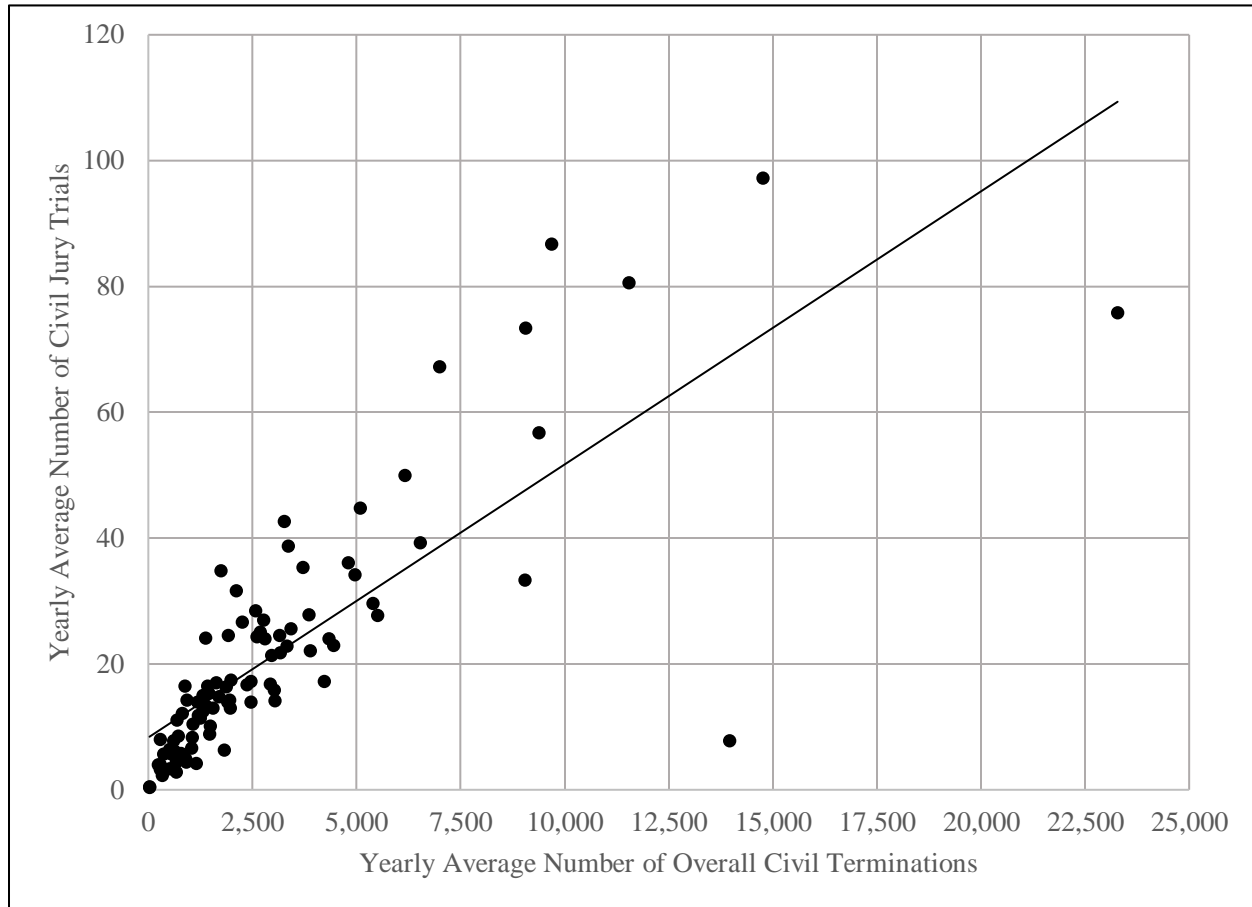
A. Districts with the Most Civil Jury Trials

Table A-2 displays the yearly average number of civil cases terminated during or after a jury trial by district for fiscal years 2010–2019 (the third column), ranked from the district with the highest average to the district with the lowest (the first and second columns). The fourth column shows the percentage of all civil jury trials for the entire period that were conducted in each district; for example, 4.8% (almost one in 20) of all civil terminations during or after jury trial for fiscal years 2010–2019 were in California Central. To provide a sense of each district’s relative size, the fifth column in Table A-2 shows the yearly average number of total civil cases terminated, and the sixth column lists each district’s rank in terms of civil terminations overall for fiscal years 2010–2019.

For fiscal years 2010–2019, the average number of civil jury trials per year ranged from 97 in California Central—the second-largest district in terms of overall civil terminations during the study period—to 0 in the smallest district, Northern Mariana Islands. The median district court averaged 16 civil jury trials per year. Like civil terminations in general, civil jury trials are highly concentrated in the largest districts. This is shown in the fourth column of Table A-2. Half of all civil jury trials were held in the 20 districts conducting the most civil jury trials, while three-quarters (75%) of all civil jury trials were conducted in 41 districts. The remaining 53 districts accounted for 25% of the civil jury trials during fiscal years 2010–2019.

There is a strong, positive correlation between the number of civil jury trials and number of overall civil terminations. As can be seen in **Figure 1**, larger districts in overall terminations (toward the righthand side of the figure) tend to have higher numbers of civil jury trials (on the vertical axis). A bivariate test of correlation, Pearson’s r , returns a coefficient of .798 ($p < .001$).

Figure 1: Yearly Average Number of Civil Jury Trials by Yearly Average Number of Overall Civil Terminations, FYs 2010–2019



The largest districts in terms of overall civil terminations tend to be the districts with the most civil jury trials, with California Central followed by Illinois Northern (5th overall), New York Southern (4th), Pennsylvania Eastern (1st), and Florida Southern (7th) in the top five districts in terms of average number of civil jury trials per year. These five districts alone account for 21% of all civil jury trials during fiscal years 2010–2019. West Virginia Southern was the most extreme outlier among the largest districts overall, ranking 3rd in terms of overall civil terminations (because of the pelvic mesh litigation centralized in that district) but tied (with Idaho) for 72nd in terms of average number of civil jury trials per year. In addition, New Jersey ranked 8th in overall terminations but 17th in average number of civil jury trials per year.

In general, districts larger than the median overall tended to also rank higher than the median in terms of average number of civil jury trials per year, and districts smaller than the median tended to rank lower than the median in terms of average number of civil jury trials per year. The only district smaller than the median district overall to rank in the top 20 districts in terms of average number of civil jury trials per year was New York Northern (50th overall, 15th in terms of average number of civil jury trials per year); Illinois Central, 58th overall, was 30th in terms of average number of civil jury trials per year.

B. Districts with the Most Civil Jury Trials per Authorized Judgeship

Table A-3 displays the yearly average number of civil cases terminated during or after a jury trial per district per authorized judgeship for fiscal years 2010–2019, ranked from the district with the highest average to the district with the lowest. The number of authorized judgeships serves here as a rough measure of district size, with the largest districts in terms of caseload having more authorized judgeships than smaller districts in terms of caseload. New York Southern and California Central, for example, each have 28 authorized judgeships, but several districts have only two. The median district court has 5 authorized judgeships. For ease of reference, the fourth column of Table A-3 lists each district’s number of authorized judgeships. As in Table A-2, the righthand column of Table A-3 lists each district’s rank in the average number of civil terminations per year for the same period.

The median district in Table A-3 averaged less than three civil jury trials per authorized judgeship per year. For fiscal years 2010–2019, Wisconsin Western averaged 8.25 civil jury trials per authorized judgeship per year (73rd in civil terminations), followed by California Eastern, 7.47 (14th), New York Northern, 6.96 (50th), Illinois Southern, 6.75 (34th), and Colorado, 6.10 (26th).

Both Colorado and California Eastern were ranked in the top 10 districts in Table A-2 in terms of average number of civil jury trials per year. In addition, New York Eastern ranks 10th in average number of civil jury trials per authorized judgeship per year and 6th in terms of average number of civil jury trials per year in Table A-2. These 3 districts have both a high number of civil jury trials, relative to other districts, and a high number of civil jury trials per authorized judgeship, relative to other districts. New York Eastern, with 15 authorized judgeships, is something of an outlier. Districts with relatively large numbers of authorized judgeships tend to rank lower in Table A-3 than in Table A-2 partly because the number of authorized judgeships is serving as the denominator. But Florida Southern (18 authorized judgeships) and Illinois Northern (22 authorized judgeships) are also in the top 20 districts in terms of average number of civil jury trials per authorized judgeship per year.

Interestingly, once the number of authorized judgeships is introduced into the denominator to roughly control for district size, the correlation between the average number of civil terminations and the average number of civil jury trial terminations disappears (Pearson’s $r = .167$, $p = .114$). District size drives the number of civil jury terminations in Table A-2 but is much less of a factor in the rank ordering of districts in Table A-3. It is less clear what explains the distribution observed in the latter table.

C. Districts with the Highest Civil Jury Trial Rates

Table A-4 displays the yearly average civil jury trial rate—the percentage of civil cases terminated during or after a civil jury trial—for each district for fiscal years 2010–2019, ranked from the

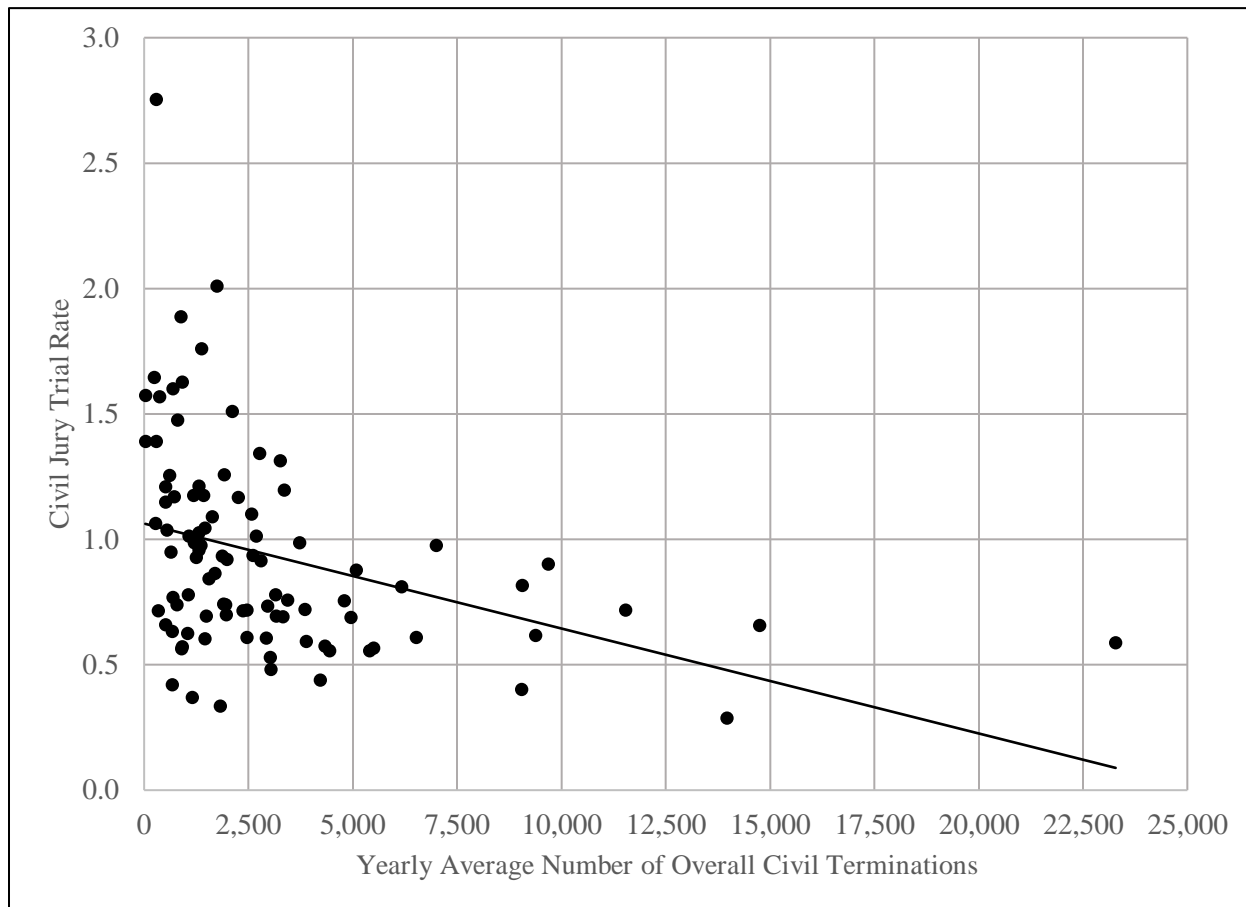
district with the highest average civil jury trial rate to the district with the lowest average civil jury trial rate. For fiscal years 2010–2019, the overall civil jury trial rate⁷ was 0.7%.

Wyoming, with a civil jury trial rate of 2.75%, was ranked 1st, followed by New York Northern, 2.01%, Wisconsin Western, 1.89%, Illinois Central, 1.76%, and the Virgin Islands, 1.65%. The next five districts with the highest civil jury trial rates for fiscal years 2010–2019 are Louisiana Middle, 1.63%, Nebraska, 1.60%, Guam, 1.57%, South Dakota, 1.57%, and Connecticut, 1.51%. These are, generally speaking, medium- to small-sized districts, in terms of both authorized judgeships and overall civil terminations during the study period. Wyoming is one of the smallest districts in terms of overall civil terminations, ranking 89th.

Not all small districts have relatively high civil jury trial rates, however. Alaska, which is slightly larger than Wyoming at 88th in terms of overall civil terminations, is 63rd in terms of civil jury trial rate. But even so, as can be seen in **Figure 2**, there is an inverse (negative) relationship between a district's number of overall civil terminations (the horizontal axis) and its civil jury trial rate (the vertical axis) (Pearson's $r = -.366$, $p < .001$). Districts with higher civil caseloads tend to have lower civil jury trial rates, and vice versa. The same relationship holds between a district's overall civil terminations per authorized judgeship and its civil jury trial rate (Pearson's $r = -.292$, $p = .005$). The largest district in the top 10 is Connecticut, which has eight authorized judgeships and is ranked 42nd in terms of overall civil terminations. Connecticut is the only district larger than the median district on either measure in the top 10; New York Northern is median-sized in terms of authorized judgeships (five).

7. For ease of reference, the term “civil jury trial rate” will be used in place of “yearly average civil jury trial rate” going forward. Civil jury trial rate represents the average of the civil jury trial rate for each of the 10 fiscal years in the study period. The overall civil jury trial rate represents the sum of cases disposed of during or after a jury trial in the 10-year study period divided by the sum of all civil cases terminated in the 10-year study period multiplied by 100.

Figure 2: Civil Jury Trial Rate by Yearly Average Number of Overall Civil Terminations, FYs 2010–2019



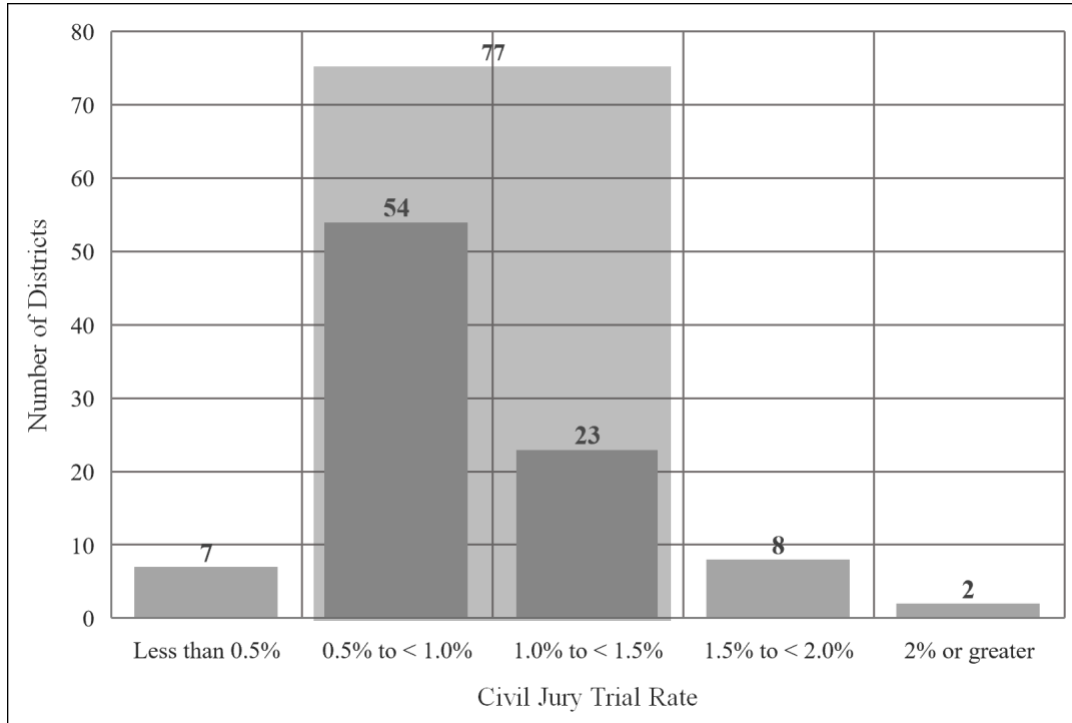
There is some overlap between the top-ranked districts in Tables A-3 and A-4. Four districts appear in the top 10 in both tables: Illinois Central, Louisiana Middle, New York Northern, and Wisconsin Western. None of these districts appear in the top 10 districts in Table A-2 because they do not have many civil jury trials in absolute terms. But in terms of the number of civil jury trials by the number of authorized judgeships and in terms of the civil jury trial rate, these four districts have more civil jury trials than other districts.

The highest any district in the top 10 in Table A-2 ranks in Table A-4 is Colorado, 15th in civil jury trial rate, 1.31%, and 10th in terms of number of civil jury trials. Colorado, which has seven authorized judgeships and is 26th in terms of overall civil terminations, is a consistent performer on all three metrics.

Note, however, that the civil jury trial rate does not vary greatly by district. For fiscal years 2010–2019, most districts have a civil jury trial rate between 0.5% and 1.0%, and more than 80% of districts—77 out of 94—have a civil jury trial rate between 0.5% and 1.5%, a range of only one percentage point (see **Figure 3**). Only 10 districts have civil jury trial rates greater than or equal to 1.5%, and no district has a civil jury trial rate greater than 3%. The Center’s ability to analyze

factors that explain the variation among districts is limited, to a great extent, by the fact that there is simply little or no variation to explain.

Figure 3. Civil Jury Trial Rates, FYs 2010–2019



III. Factors Potentially Affecting Civil Jury Trial Rate

Part III provides an overview of “the litigation practices, local court rules, or other factors . . . [that] may contribute to a higher incidence of civil jury trials.” In general, Part III relies on publicly available data from the IDB on the districts’ civil and criminal caseloads (Part III.A–D), as well as publicly available data on the districts’ litigation practices with respect to summary judgment and ADR (Part III.E–G). Similarly, the Center report on local rules related to summary judgment is also publicly available.

The consistent thread running through Part II is that any measure of the number of civil jury trials, including the civil jury trial rate, is correlated with district caseload. Most civil terminations and most civil jury trials are in a minority of districts—for the most part, the largest overall districts. These districts have a large number of civil cases to resolve, and no matter how low the overall rate of going to trial is, these districts will always try the most civil cases.

To simplify the presentation going forward, the analysis will be limited to factors potentially contributing to the civil jury trial rate. Because the three potential interpretations of “number” are all related to district caseload, however, the findings in Part II generally hold for these analyses, as well. The largest districts have the most cases in the nature-of-suit codes most likely to go to jury trial, for example.

A. Civil Caseload

The types of civil cases filed in, removed to, or transferred to a district may affect its trial rate. This section examines the jurisdictional bases of cases, case origins, and nature-of-suit composition of districts’ caseloads.

1. Jurisdictional Basis

The Seventh Amendment right to trial by jury in civil cases does not extend to all civil cases. Most notably, “[t]he Seventh Amendment right to a jury trial does not apply in actions against the Federal Government.”⁸ As seen in **Table 3**, cases based on U.S. defendant jurisdiction account for about 14% of all civil terminations in fiscal years 2010–2019 but only 2% of civil terminations during or after a civil jury trial. During the study period, 66% of jury trials were cases based on federal-question jurisdiction and 31% based on diversity-of-citizenship jurisdiction. Cases based on federal-question jurisdiction went to trial at a rate of 0.9%, diversity-of-citizenship jurisdiction, 0.7%, U.S. plaintiff jurisdiction, 0.4%, but U.S. defendant jurisdiction only 0.1% (i.e., one termination in 1,000). There is, however, no statistically significant correlation between the percentage of a district’s terminations that were based on U.S. defendant jurisdiction and its civil jury trial rate (Pearson’s $r = -.181$, $p = .081$). Few districts outside of the District of Columbia have substantial numbers of U.S. defendant cases, so this is not surprising.

8. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981), although Congress can authorize jury trials by statute, *id.* at 160–61.

Table 3. Civil Jury Trials, Total Civil Terminations, and Jury Trial Rate, by Jurisdiction, FYs 2010–2019

Basis of Jurisdiction	Civil Jury Trials	Percentage of Civil Jury Trials	Total Civil Terminations	Percentage of Total Civil Terminations	Jury Trial Rate
US Government Plaintiff	261	1.3%	68,622	2.4%	0.4%
US Government Defendant	429	2.1%	384,053	13.6%	0.1%
Federal Question	13,145	65.6%	1,470,258	52.1%	0.9%
Diversity of Citizenship	6,211	31.0%	896,584	31.8%	0.7%
Local Question	1	0.0%	53	0.0%	1.9%
Total	20,047	100%	2,819,570	100%	0.7%

2. Origin

As seen in **Table 4**, the vast majority of civil terminations are cases originating in the district courts (74%). Because original proceedings in the district court make up such a large proportion of all terminations, they are also the largest category of civil jury trials (70%) and drive the overall civil jury trial rate (0.7%). The second-largest category is cases initiated in the state courts and removed to the district courts, which account for 16.5% of civil jury trials and 11.7% of total civil terminations. Removals have a jury trial rate, 1.0%, that is similar to original proceedings, as do interdistrict transfer cases, 0.8%. Actions previously filed and disposed of by the district that were reopened have slightly higher jury trial rates; initial reopens have a rate of 1.8% while second and subsequent reopens have a rate of 2.0%. Compared to cases of other origins, appellate remands have a much higher jury trial rate, approaching 6%. While these cases make up a very small portion of jury trials (1.8%) and total civil terminations (0.2%), they are much more likely to be disposed of during or after jury trial than cases originating in other ways. There is, however, no statistically significant bivariate correlation between the percentage of a district's terminations that were appellate remands and its civil jury trial rate (Pearson's $r = .087$, $p = .404$).

Table 4. Civil Jury Trials, Total Civil Terminations, and Jury Trial Rate, by Origin, FYs 2010–2019

Case Origin	Civil Jury Trials	Percentage of Civil Jury Trials	Total Civil Terminations	Percentage of Total Civil Terminations	Jury Trial Rate
Original Proceeding	14,025	70.0%	2,085,418	74.0%	0.7%
Removal from State Court	3,305	16.5%	329,921	11.7%	1.0%
Remand from U.S. Court of Appeals	369	1.8%	6,311	0.2%	5.8%
Initial Reinstatement/Reopen	1,658	8.3%	93,174	3.3%	1.8%
Second or Subsequent Reinstatement/Reopen	213	1.1%	10,923	0.4%	2.0%
Transferred From Another District (Pursuant to 28 U.S.C. § 1404)	418	2.1%	51,234	1.8%	0.8%
Multidistrict Litigation—Transferred from Another District	54	0.3%	211,860	7.5%	0.0%
Multidistrict Litigation—Direct File	5	0.0%	30,710	1.1%	0.0%
Appeal to a District Judge of a Magistrate Judge’s Decision	0	-	19	0.0%	-
Total	20,047	100%	2,819,570	100%	0.7%

3. Nature-of-Suit Categories (Type of Case)

Variation in the types of cases initiated in the district courts may affect civil jury trial rates. Jury trials are not available for certain categories of civil cases—for example, habeas corpus proceedings, Social Security disability appeals, and civil forfeiture actions. Districts with more of such cases will likely have a lower civil jury trial rate as a result. Conversely, districts with relatively large numbers of civil cases with a higher jury trial rate, such as civil rights cases, including those brought by prisoners, may have a higher civil jury trial rate.⁹

Table 5 lists the 20 nature-of-suit codes accounting for the greatest number of civil jury trials in fiscal years 2010–2019, ranked highest to lowest. Combined, these natures of suit accounted for 90% of trials and 55% of all civil terminations. Forty-five percent of civil jury trials terminated actions alleging a civil rights violation. This category includes *other civil rights* (22%)—actions

9. Prisoner civil rights cases accounted for a large percentage of civil jury trials (more than 30%) in a handful of districts with the highest civil jury trial rates during the study period. This includes four districts among the top 10 in terms of civil jury trial rate—New York Northern (2nd in civil jury trial rate; 39% of its civil jury trials involved prisoners), Wisconsin Western, (3rd, 39%), Illinois Central (4th, 57%), and Louisiana Middle (6th, 34%)—and one district in the top 20, Illinois Southern (14th, 65%). California Eastern, which ranks very high in both Table A-2 (9th) and Table A-3 (2nd), also had a relatively large percentage of jury trials in prisoner civil rights cases (46% of its civil jury trials during the study period were in prisoner civil rights cases).

involving civil rights violations not related to voting, employment, housing, claims under the Americans with Disabilities Act, or education; *civil rights employment* (13%)—actions related to employment under Title VII of the Civil Rights Act; *prisoner – civil rights* (9%)—actions filed by prisoners under 42 U.S.C. § 1983; and *Americans with Disabilities Act – employment*, (1%)—actions of discrimination against an employee with disabilities of any type in the workplace, filed under 42 U.S.C. § 12117. An additional 16% of jury trials involved actions alleging personal injury, and 12% of jury trials involved actions primarily based on rights and obligations under a contract.

The nature of suit with the highest jury trial rate, 5%, involved claims of personal injury or wrongful death brought by railroad employees or their survivors under the Federal Employers’ Liability Act (FELA, 45 U.S.C. § 51 et seq.). Personal injury suits as a category had the highest jury trial rates, followed by civil rights actions, with other civil rights (440) having the second-highest rate (2.8%), then contract actions and personal property claims.

Table 5. Civil Jury Trials, Total Civil Terminations, and Jury Trial Rate, by Nature-of-Suit Category, FYs 2010–2019

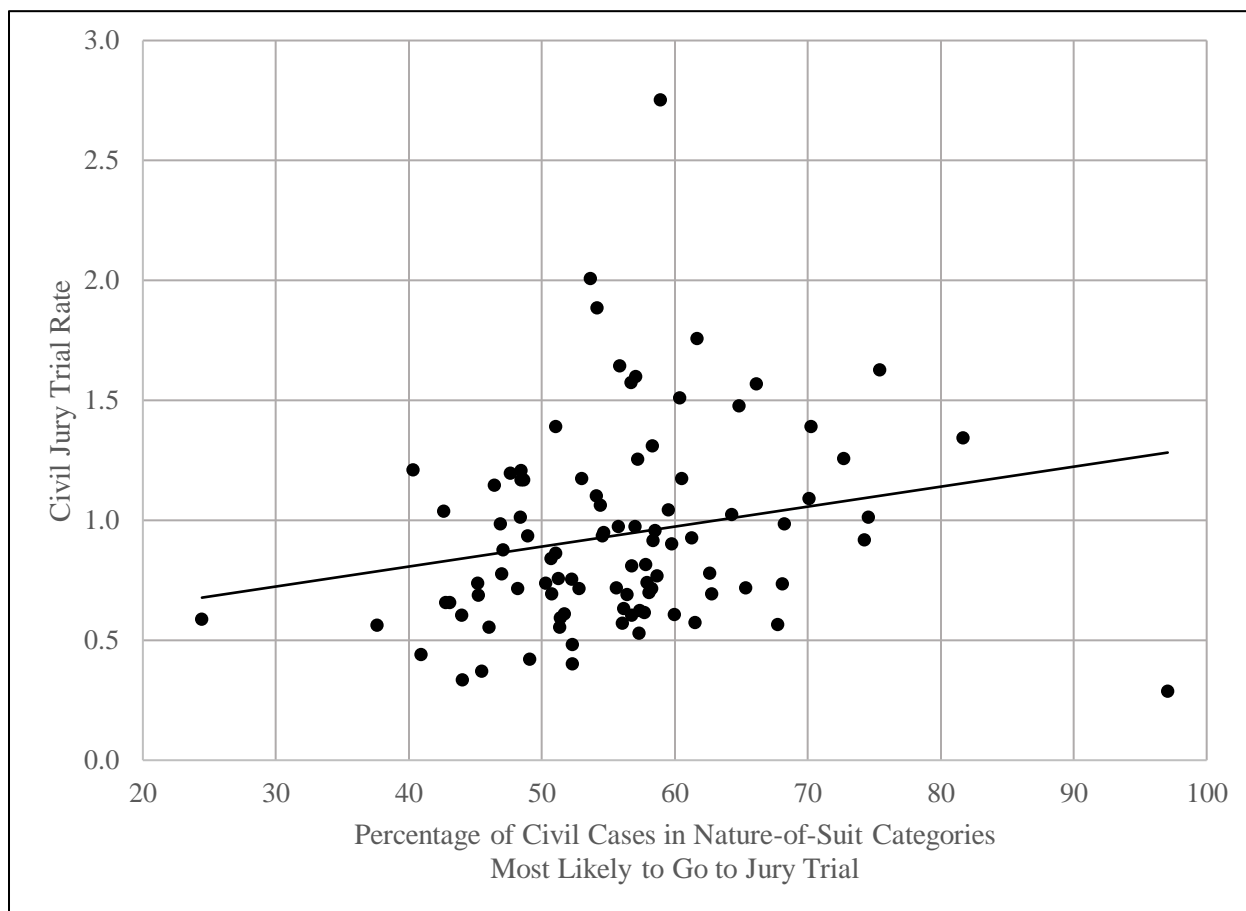
Nature-of-Suit Category	Nature-of-Suit Code	Civil Jury Trials	Percentage of Civil Jury Trials	Percentage of Total Civil Terminations	Jury Trial Rate
Civil Rights	Other Civil Rights (440)	4,313	21.5%	5.5%	2.8%
Civil Rights	Civil Rights Employment (442)	2,638	13.2%	4.7%	2.0%
Civil Rights	Prisoner - Civil Rights (550)	1,765	8.8%	6.4%	1.0%
Contract	Other Contract Actions (190)	1,550	7.7%	4.5%	1.2%
Personal Injury	Other Personal Injury (360)	1,248	6.2%	3.3%	1.3%
Contract	Insurance (110)	946	4.7%	3.5%	1.0%
Personal Injury	Motor Vehicle Personal Injury (350)	857	4.3%	1.4%	2.2%
Prisoner	Prisoner - Prison Condition (555)	731	3.6%	3.3%	0.8%
Intellectual Property Rights	Patent (830)	628	3.1%	1.6%	1.4%
Labor	Fair Labor Standards Act (710)	624	3.1%	2.7%	0.8%
Personal Injury	Personal Injury - Product Liability (365)	544	2.7%	9.3%	0.2%
Other	Other Statutory Actions (890)	369	1.8%	3.3%	0.4%
Personal Injury	Medical Malpractice (362)	300	1.5%	0.4%	2.7%
Civil Rights	Americans with Disabilities Act - Employment (445)	290	1.4%	0.7%	1.5%
Intellectual Property Rights	Trademark (840)	279	1.4%	1.2%	0.8%
Intellectual Property Rights	Copyright (820)	208	1.0%	1.3%	0.6%
Personal Property	Other Fraud (370)	199	1.0%	0.7%	1.0%
Personal Injury	Federal Employers' Liability (330)	190	0.9%	0.1%	5.0%
Personal Injury	Marine Personal Injury (340)	157	0.8%	0.5%	1.2%
Personal Property	Other Personal Property Damage (380)	155	0.8%	0.5%	1.1%
Total		17,991	89.7%	54.9%	1.2%

Because the nature-of-suit categories with the highest numbers of civil jury trials account for more than half of all civil terminations, the relationships discussed in sections II.A, II.B, and II.C hold for these cases as well. **Table A-5** displays the rankings for percentage of civil cases terminated in these nature-of-suit categories per district for fiscal years 2010–2019, from the district with the highest percentage to the district with the lowest. It also includes the yearly average number of jury trials, average number of jury trials per authorized judgeship, average jury

trial rate, rank of overall civil terminations in these 20 nature-of-suit categories, and rank of overall civil terminations for reference.

The largest districts in terms of caseload have the largest numbers of these types of cases and thus the largest number of jury trials conducted in these types of cases. In terms of the civil jury trial rates, the districts with higher rates of these types of cases tend to have higher civil jury trial rates. As can be seen in **Figure 4**, the relationship between a district’s percentage of caseload in the nature-of-suit categories accounting for the most civil jury trials (the horizontal axis) and its civil jury trial rate (the vertical axis) was positive. A bivariate correlation, Pearson’s *r*, returns a coefficient of .204 ($p < .05$). This suggests that the composition of a district’s civil caseload in terms of the types of cases terminated in the district has a relatively small effect on its civil jury trial rate.

Figure 4: Civil Jury Trial Rate by Percentage of Civil Cases in Nature-of-Suit Categories Most Likely to Go to Jury Trial, FYs 2010–2019



B. Jury Demand

Rule 38 of the Federal Rules of Civil Procedure requires the parties to affirmatively demand a jury trial in order to preserve their Seventh Amendment right of trial by jury in civil cases. Failure to properly serve and file a jury trial demand results in a waiver of the constitutional right. During the study period, a jury trial was demanded by at least one party in 50% of closed civil cases and not demanded in 49%, with 1% missing.¹⁰ The category of “all civil cases,” of course, includes cases that would not normally be tried to a jury, including cases against the United States and habeas corpus cases.

As can be seen in **Table 6**, terminated civil cases in which a jury-trial demand was recorded were much more likely to terminate during or after a jury trial (1.3%) than cases in which a jury-trial demand was not recorded, but jury trials did occur in the latter category of cases (0.1%).

Table 6: Civil Cases Terminating During or After Jury Trial by Jury-Trial Demand, FYs 2010–2019

Jury-Trial Demand Recorded	Percentage of All Civil Terminations	N	Percentage Terminating During or After Jury Trial	N
Yes	50%	1,420,881	1.3%	18,178
No	49%	1,374,134	0.1%	1,205
Missing	1%	24,555	2.7%	664
All	100%	2,819,570	0.7%	20,047

Of cases that terminated during or after a civil jury trial, 91% recorded a jury demand. However, there was no relationship at the district level between the rate at which a jury demand is made in terminated cases and the civil jury trial rate (Pearson’s $r = -.025$, $p = .814$).

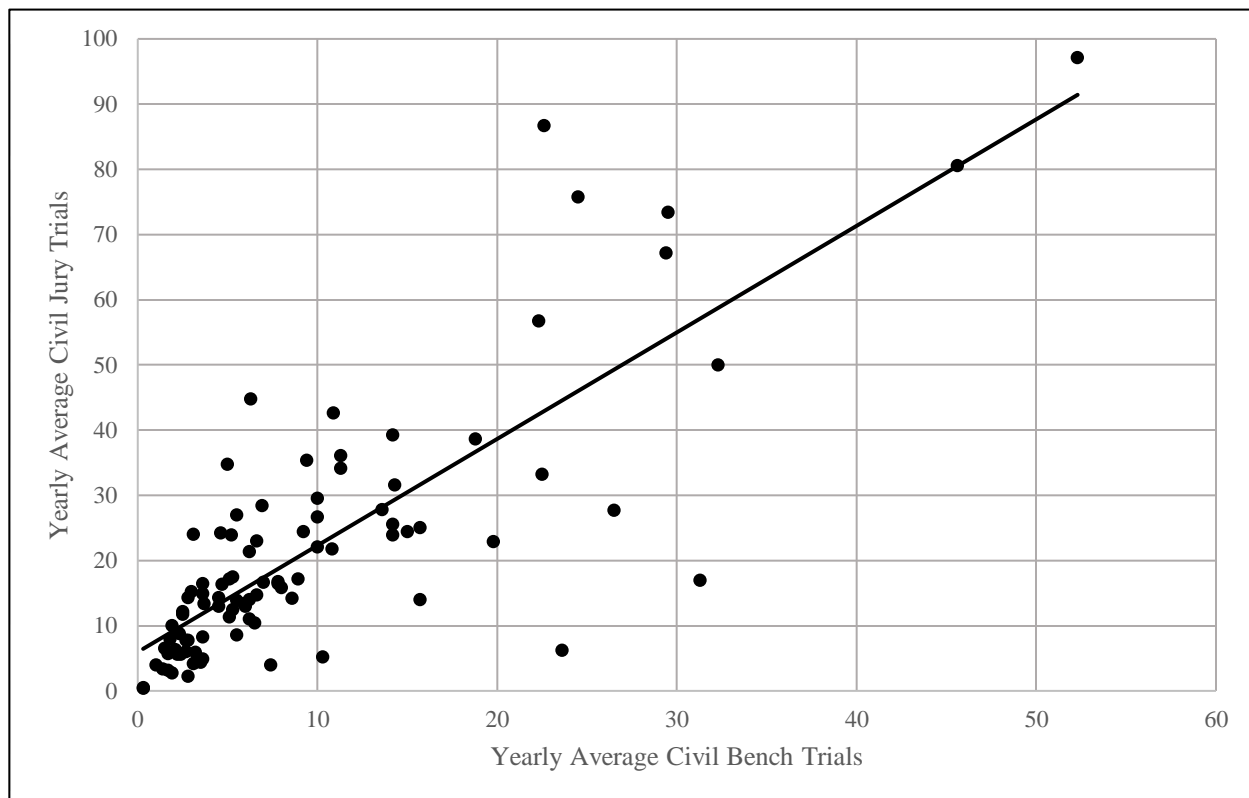
C. Bench Trials

A bench trial is one in which there is no jury and a judge acts as the finder of fact. During the study period, bench trials represented only 0.2%–0.4% of overall civil terminations. Again, the overall civil caseload drives the number of trials, and districts with larger overall caseloads have a greater number of bench trials than smaller districts (Pearson’s $r = .681$, $p < .001$). Because overall civil caseload is strongly correlated with the number of civil jury trials, districts with a larger number of civil jury trials also tend to have a larger number of civil bench trials. As can be seen in **Figure 5**, this is a significant and strong relationship (Pearson’s $r = .806$, $p < .001$). Six of the districts in

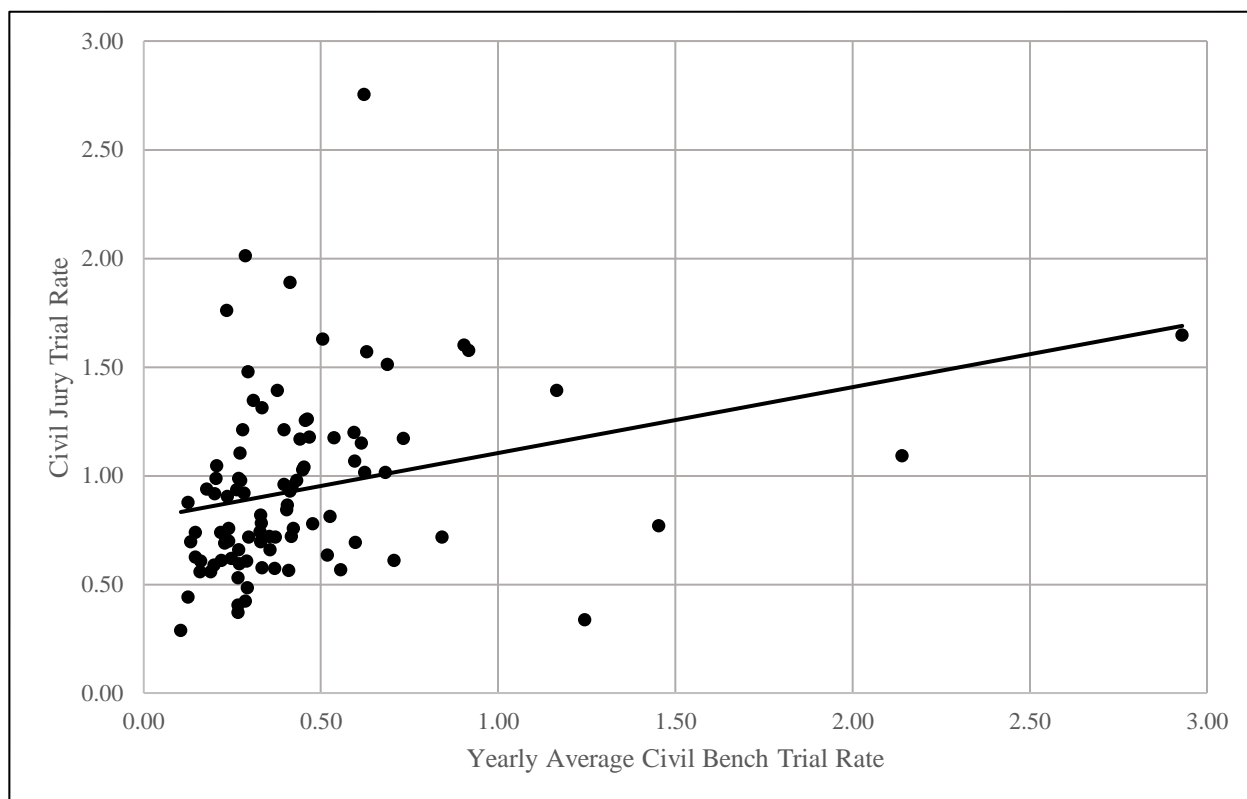
10. For more information on civil jury trial demands, see Kristin A. Garri & Emery G. Lee III, Federal Judicial Center, *Jury-Trial Demands in Terminated Civil Cases, Fiscal Years 2010–2019* (2022), <https://www.fjc.gov/content/373277/jury-trial-demands-terminated-civil-cases-fiscal-years-2010-2019>.

the top 10 for civil bench trials are in the top 10 for civil jury trials and overall civil case terminations (see **Table A-6**).

Figure 5: Yearly Average Number of Civil Jury Trials by Yearly Average Number of Civil Bench Trials, FYs 2010–2019



The rate at which civil cases go to bench trial ranged from 0.10% in West Virginia Southern to 2.93% in the Virgin Islands, which is similar to the range in civil jury trial rates. The correlation between civil bench trial rate and civil jury trial rate is significant and positive (Pearson’s $r = .293$, $p = .004$), meaning districts with a higher percentage of cases being disposed of during or after bench trial (the horizontal axis) tend to have a higher percentage of cases being disposed of during or after jury trial (the vertical axis) (see **Figure 6**). There does not appear to be a tradeoff between holding bench trials and holding jury trials, as districts with relatively high numbers of civil bench trials had high numbers of civil jury trials, and district with high civil bench trial rates had high civil jury trial rates.

Figure 6: Civil Jury Trial Rate by Yearly Average Civil Bench Trial Rate, FYs 2010–2019

D. Criminal Caseload

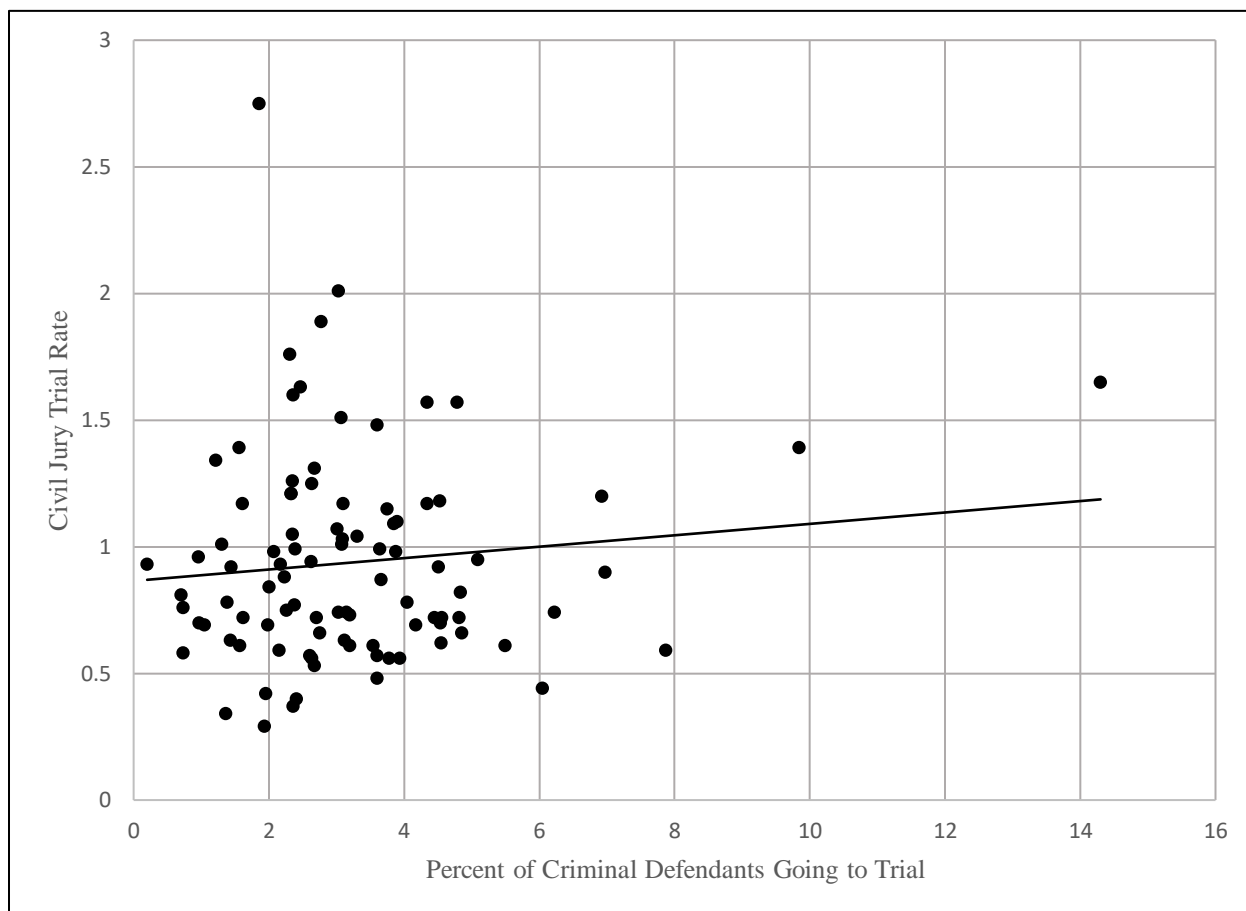
The literature points to the rising criminal caseloads of the federal courts as a potential factor in the decline of civil jury trials.¹¹ In terms of this report’s district-level analysis, however, it is important to point out that the size of a district’s criminal caseload (in terms of the number of criminal defendants’ cases terminated) is correlated with the size of its civil caseload—districts with large civil caseloads tend to have large criminal caseloads (see **Table A-7**). This is not a particularly strong bivariate relationship (Pearson’s $r = .208$, $p = .044$), and other factors, including geography, affect the size of a district’s criminal caseload.¹² This relationship based on overall district size also applies between the yearly average number of civil jury trials and the yearly average number of criminal defendant jury trials (Pearson’s $r = .721$, $p < .001$). On average, courts with more civil jury trials have more criminal jury trials in absolute numbers and relative to other districts. This is, again, mostly a function of district caseload size, though. The bivariate relationship between the number of civil and criminal jury trials in a district is much stronger than the correlation between the size of a district’s civil and criminal caseloads.

11. See, e.g., Galanter, *supra* note 2, at 492 (“Some observers have suspected that the decline in civil trials is a response to increasing business on the criminal side of the federal courts.”).

12. The five largest districts, in terms of criminal caseload, in fiscal years 2010–2019 are all districts on the southern U.S. border. See Table A-7, *infra*.

There is no statistically significant correlation between a district's civil jury trial rate and the rate at which criminal defendants go to jury trial (Pearson's $r = .109$, $p = .295$). This finding is somewhat contrary to the conventional wisdom that there is a trade-off between civil and criminal jury trials. In the case of such a trade-off, one might expect the two measures to be inversely correlated, with districts with a high criminal jury trial rate having, at the same time, a low civil jury trial rate, and vice versa. But as can be seen in **Figure 7**, the relationship between these two measures in fiscal years 2010–2019 does not reflect any such trade-off.

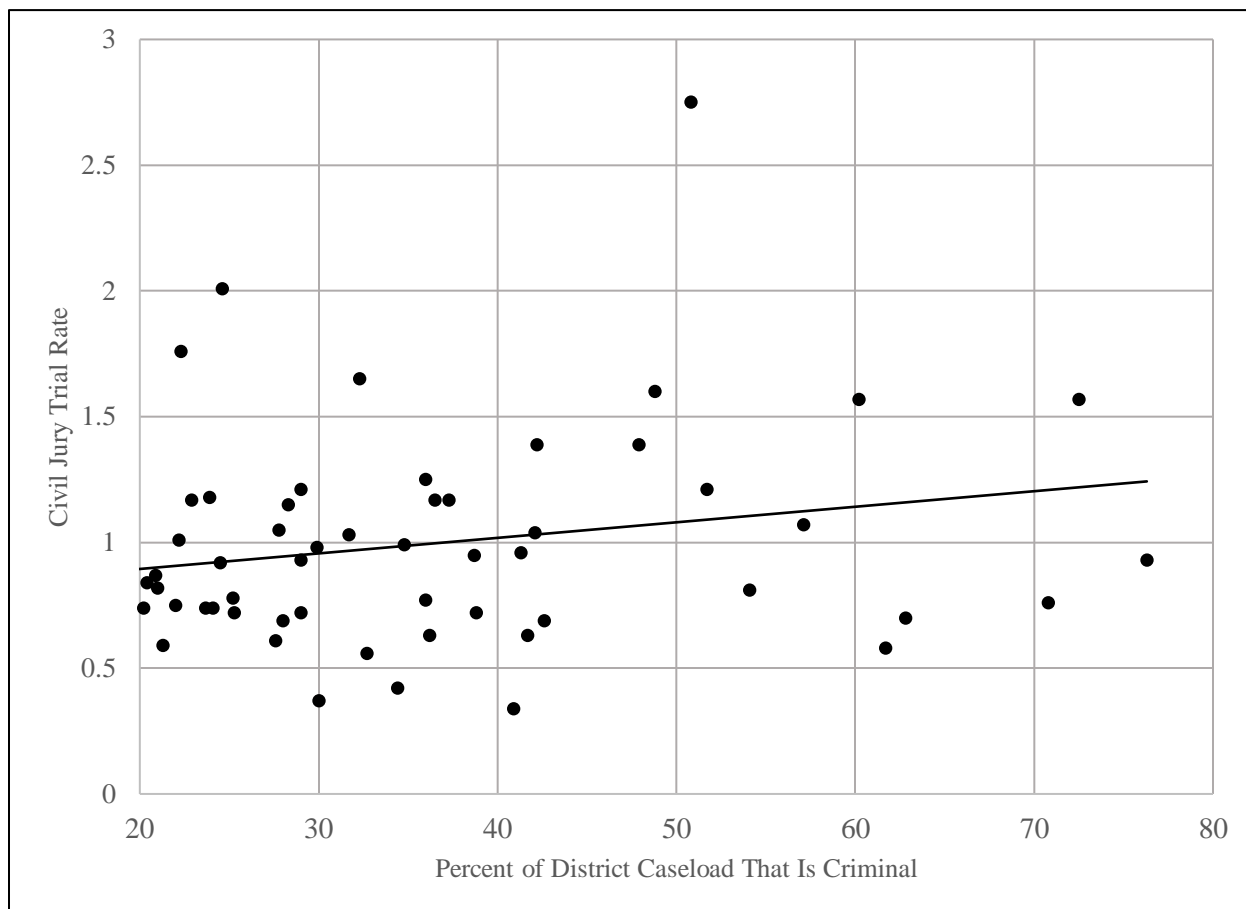
Figure 7: Civil Jury Trial Rate by Criminal Jury Trial Rate, FYs 2010–2019



Once again, the overall size of a district's caseload (civil or criminal) appears to be the important factor. The civil and criminal caseloads can be combined into one measure of overall terminations (see **Table A-8**). The districts ranked highest in overall terminations are those with the largest civil caseloads and the three largest courts on the southern U.S. border. As one would expect, overall terminations and civil jury trial rate are negatively correlated (Pearson's $r = -.365$, $p < .001$). The larger the overall caseload, the lower the civil jury trial rate. However, districts with relatively few civil cases often have, as a result, a higher percentage of criminal cases in terms of their overall workload. Indeed, the percentage of a district's overall terminations that are criminal defendants is positively correlated to the civil jury trial rate (see **Table A-9**). Districts with a

greater percentage of criminal defendants in terms of overall terminations tend to have a higher percentage of civil cases terminated during or after civil jury trial both on average and relative to other districts (Pearson's $r = .244$, $p < .05$). This relationship, which is not particularly strong, is displayed in **Figure 8**.

Figure 8: Civil Jury Trial Rate by Percentage of District Caseload That is Criminal, FYs 2010–2019



E. Summary Judgment Rates

The vanishing-trials literature posits that declining trial rates are linked to an increase in case terminations through summary judgment.¹³ Litigation practices with respect to summary judgment are a long-standing source of controversy.¹⁴ Data on the percentage of cases in which summary judgment motions are filed is difficult to obtain, but it is possible to estimate the percentage of civil cases terminated by summary judgment using the court data. In this section, non-prisoner cases disposed of by “judgment – motion before trial” are treated as having been resolved by

13. See, e.g., Galanter, *supra* note 2, at 483–84.

14. See, e.g., Sujata A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139 (2007).

summary judgment.¹⁵ For fiscal years 2010–2019, the overall rate at which civil cases were reported as terminated by “judgment – motion before trial” was 12%. Because of the way this data is reported in prisoner cases, the rate in prisoner cases was much higher than the overall rate, 26.2%. In non-prisoner cases, it was 8.5%. In the rest of this section, prisoner cases will be excluded from the rate at which civil cases were reported as terminated by “judgment – motion before trial” (see **Table 7**).

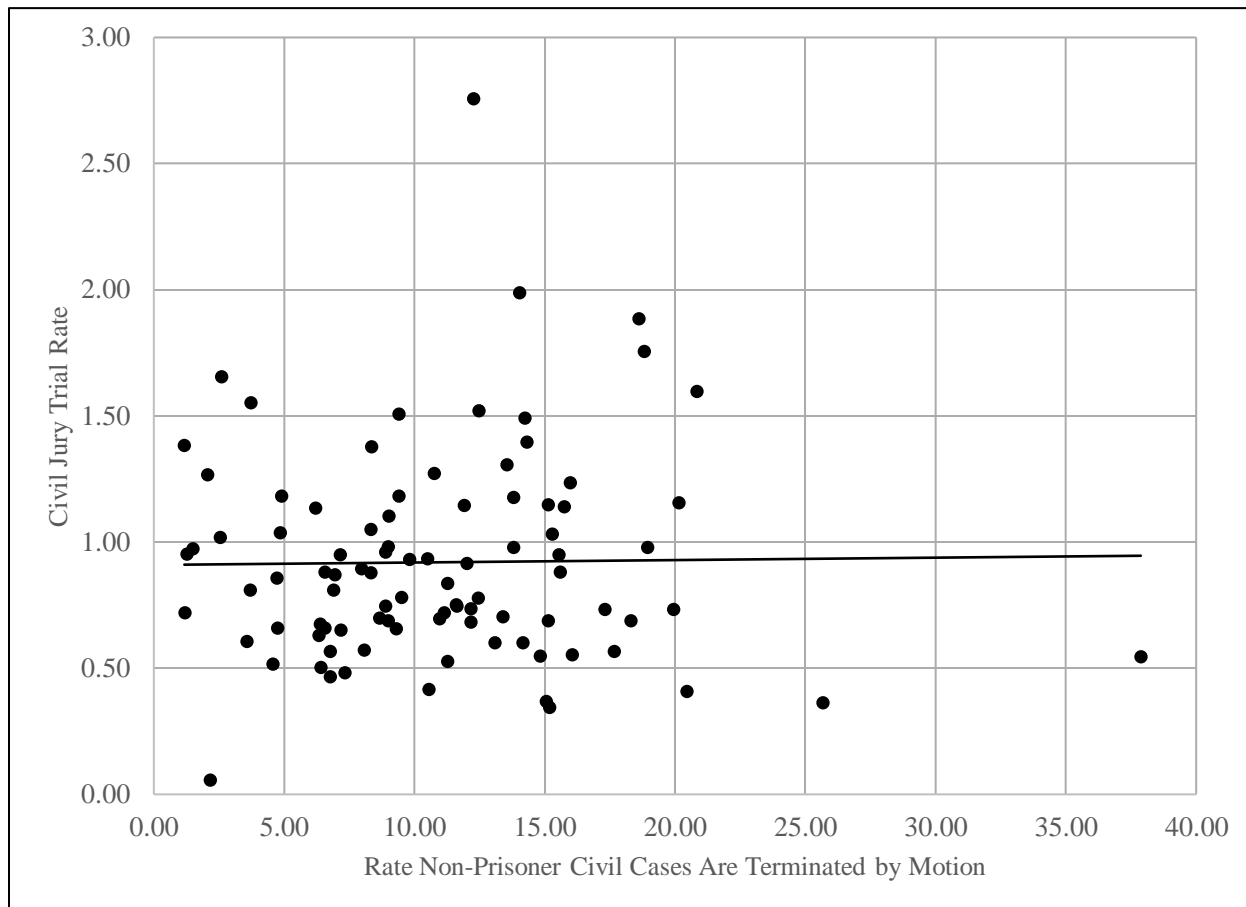
Table 7. Total Civil Terminations Excluding Prisoner Petitions, by Disposition, FYs 2010–2019

Disposition Type	Total Civil Terminations	Percentage of Total Civil Terminations
Dismissed – Settled	829,669	36.8%
Dismissed – Voluntarily	335,302	14.9%
Dismissed – All Other	372,917	16.5%
Judgment – Motion Before Trial	191,222	8.5%
Judgment – All Other	309,941	13.7%
Transfer/Remand	216,145	9.6%
Total	2,255,196	100.0%

Figure 9 illustrates the relationship between districts’ civil jury trial rate (on the vertical axis) and the rate at which they reported terminating non-prisoner cases by “judgment – motion before trial” (the horizontal axis). There is considerable variation in the rate at which districts report terminating non-prisoner cases by “judgment – motion before trial,” which probably reflects both variations in adjudication practices and in how the courts report case terminations to the AOUSC. But as the flat trendline makes clear, there is no bivariate correlation between a district’s civil jury trial rate and the reported rate at which it terminates non-prisoner cases by “judgment – motion before trial” (Pearson’s $r = .039$, $p = .709$).

15. Using the disposition method field in the court data. The documentation specifies that this disposition method applies to the following cases: “The action was disposed of by a final judgment based on a motion for judgment on the pleadings as defined in Rule 12(c), Fed. R. Civ. P.; a motion for summary judgment as defined in Rule 56, Fed. R. Civ. P.; any other contested motion that resulted in a disposition before trial; or any order dismissing a prisoner petition.” Civil Statistical Reporting Guide, v. 3.0, at 26.

Figure 9: Civil Jury Trial Rate by Rate at Which Non-Prisoner Civil Cases Are Terminated by Judgment – Motion Before Trial, FYs 2010–2019



F. Local Rules

The explanatory language tasks the Center with analyzing the effects of local rules on civil jury trial numbers. As discussed in the previous section, one potential area of investigation is local rules with respect to summary judgment. Districts have adopted a variety of summary judgment practices that supplement (but are not inconsistent with) the requirements in Federal Rule of Civil Procedure 56.¹⁶ A 2008 Center study classified districts' local rules regarding motions for summary judgment into three groups:

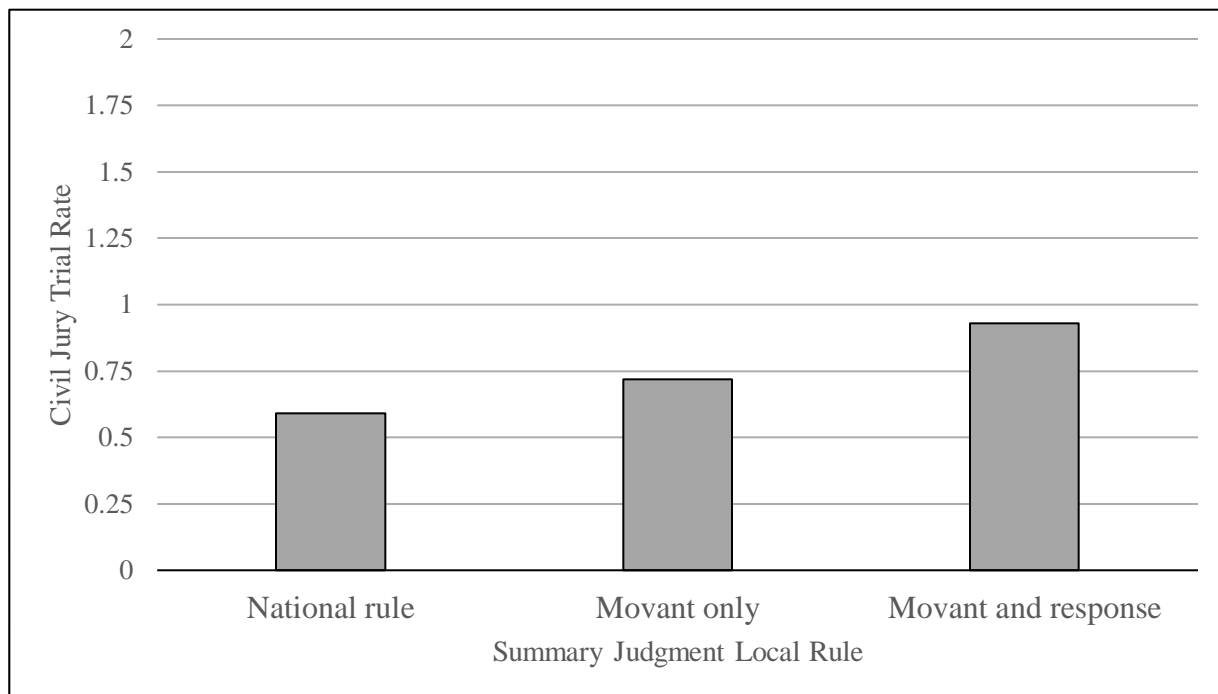
- The local rule does not supplement the national rule (37 districts)
- The local rule requires structured motion by movant only (34)
- The local rule requires structured motion and response (20)¹⁷

16. See Joe Cecil & George Cort, Federal Judicial Center, Report on Summary Judgment Practice Across Districts with Variations in Local Rules (2008), <https://www.fjc.gov/content/report-summary-judgment-practice-across-districts-variations-local-rules>.

17. Three districts have missing information. See *id.*

These local rules would have been in effect during some or all of fiscal years 2010–2019. Using these groupings, the civil jury trial rate for each group was calculated by summing the number of civil jury trials in the study period and dividing by the total number of terminations during the same period. As can be seen in **Figure 10**, districts with local rules similar to the national rule—that is, not requiring either a structured motion or response—had the lowest observed civil jury trial rate, .59%. Districts requiring a structured motion but not a structured response had a civil jury trial rate of .72%. Districts requiring a structured motion and response had the highest civil jury trial rate, .93%.

Figure 10: Civil Jury Trial Rate by Summary Judgment Local Rules, FYs 2010–2019



Because of the large number of observations, the differences among the three groups in Figure 10 are statistically significant ($p < .001$). The substantive significance of those differences is questionable, however. Even though the structured motion and response had the highest civil jury trial rate of the three groups, none of the three groups had a civil jury trial rate greater than 1%. As discussed above, there is little actual variation in the civil jury trial rate among jurisdictions.

Beyond the summary judgment context, it is difficult to know how to assess the effects of local rules on civil jury trial rates. Some commentators argue that the Federal Rules of Civil Procedure have an anti-trial bias.¹⁸ To the extent the national rules have an anti-trial bias, this bias should be relatively uniform across districts.¹⁹ Because local rules must be consistent with the national

18. See, e.g., Richard L. Jolly, Valerie P. Hans & Robert S. Peck, *Democratic Renewal and the Civil Jury*, __ Georgia L. Rev. __, 131–34 (2023, forthcoming) (pointing to a number of “anti-jury” provisions in the Federal Rules of Civil Procedure).

19. To be clear, this report takes no position on whether the national rules have an anti-trial bias.

rules,²⁰ they should share whatever anti-trial bias is inherent in the national rules. Of course, districts may have adopted local rules that are inconsistent with the biases of national rules, although this seems to be a legal question the determination of which may be outside the remit of the Center.²¹ Setting that aside, it is unclear how local rules might affect civil jury trial rates. Given the short timeframe required by the explanatory language, it was simply not feasible to categorize the local rules of the 94 federal districts and analyze their potential pro- or anti-trial bias. It would be difficult, moreover, to determine whether any particular local rule was inconsistent with the national rules in a pro- or anti-trial direction. Indeed, it is unclear which aspects of procedure such an inconsistent local rule would govern.

G. ADR

The prominence of alternative dispute resolution (ADR) in the federal courts is a common explanation for the decline in the number of civil jury trials. Since 1998, Congress has required every district court to authorize ADR in its local rules as well as to encourage and promote its use.²² ADR is an overarching term that encompasses many different practices, but it is clear that civil cases resolved by settlement (whether facilitated by a private mediator, court-appointed neutral, or magistrate judge, or after a mini- or summary trial) or in arbitration do not go to trial.²³ The practice of encouraging ADR likely has a downstream effect that in turn influences attorney and litigant strategy. Systematic and consistent data on the use of ADR in the district courts are not available, but existing Center research may shed some light on whether districts' varying use of ADR is related to their civil jury trial rates during fiscal years 2010–2019. A Center report provides a detailed listing of the types of ADR programs authorized for use in each district as of late 2011.²⁴ It is clear from the 2011 Center report that some districts are more focused on ADR than others. For example, the report identifies the 49 districts that applied to the AOUSC for supplemental ADR funding for the 12-month period ending June 30, 2011. Forty-five districts did not apply for supplemental ADR funding that year. The civil jury trial rates of these two groups, however, were very similar. The applying districts' civil jury trial rate over the 10-year study period, 0.72%, was not meaningfully different from that of districts that did not apply for supplemental funding, 0.71% ($p = .130$).

Districts authorizing more than one type of ADR program as of 2011 (51 districts) had a statistically significant lower civil jury trial rate over the 10-year study period, 0.68%, compared

20. Fed. R. Civ. P. 83(a)(1).

21. To be clear, this report does not state that districts are adopting local rules inconsistent with the national rules; it is merely stating that this is theoretically possible.

22. 28 U.S.C. § 651(b).

23. Galanter, *supra* note 2, at 514 (“One of the most prominent explanations of the decline of trials is the migration of cases to other forums.”). ADR is an alternative to jury trial, among other things.

24. Donna Stienstra, Federal Judicial Center, ADR in the Federal District Courts: An Initial Report (2011), <https://www.fjc.gov/content/adr-federal-district-courts-initial-report>.

to districts authorizing only one type of ADR program (43 districts), 0.78% ($p < .001$).²⁵ However, the actual observed difference between these two groups is only 0.1%, or a difference of one additional trial per 1,000 civil terminations—a finding of limited substantive importance. Moreover, there is a clear pattern that larger districts in terms of caseload tend to authorize more than one form of ADR—the median district in this group terminated 22,575 civil cases during the 10-year study period versus 13,208 for the districts authorizing only one form of ADR. Given the relationship between district caseload and civil jury trial rates, it is likely that the difference between the civil jury trial rates of the two ADR groups is largely a result of differing caseloads. Indeed, there were almost twice as many trials (13,013) in the districts authorizing more than one type of ADR than there were in the districts authorizing only one type (7,034), even though the latter group of districts had a slightly higher civil jury trial rate. Districts with larger relative caseloads tended to authorize additional forms of ADR and have marginally lower civil jury trial rates; it is likely that the larger caseloads in these districts explain both their greater use of ADR (to the extent these measures capture that) and their relatively lower civil jury trial rates.

There is also a statistically significant difference in civil jury trial rates for fiscal years 2010–2019 between districts that authorized some form of mediation program in 2011 and those that did not.²⁶ The civil jury trial rate for the 63 mediation-authorizing districts was 0.68% compared to 0.79% for the 31 non-authorizing districts ($p < .001$). Again, however, the actual observed difference in civil jury trial rates is small, 0.11%, or about one more trial per 1,000 civil terminations in the districts not authorizing mediation as a form of ADR. Moreover, the districts authorizing mediation as a form of ADR tended to be much larger districts, in terms of civil caseload, than those that did not. The median size of a district authorizing mediation in 2011 was 35,596 civil terminations (for fiscal years 2010–2019) compared to the 18,613 civil terminations for non-authorizing districts, and the median may understate how large the districts in the former category were relative to those in the latter—almost 80% of civil terminations in the 10-year period were in districts authorizing mediation as a form of ADR. Most cases, and most jury trials, actually occurred in districts that had authorized mediation as a type of ADR; there were 15,288 civil jury trials in the districts authorizing mediation compared to 4,759 in the other districts, even though the civil jury trial rate was higher in the latter group.

H. Judges' Case-Management Mindset

One possible explanation for variation in districts' civil jury trial rates is variation in the attitudes of judges in those districts toward trying civil cases. The rise of what is often called “managerial judging”²⁷ is frequently offered as an explanation for the vanishing-trials phenomenon. In the

25. According to the 2011 Center report, every district authorized some type of ADR, even if just in general. *See id.* at Appendix Five. For purposes of the current analysis, districts with one row in the table in Appendix Five are treated as authorizing one type of ADR, and districts with more than one row in the table are treated as authorizing more than one type of ADR. In this way, this report deviates from the approach taken in the 2011 report, which counted 34 districts as authorizing multiple forms of ADR.

26. Mediation was the most common type of ADR in the 2011 report. *See id.* at 7 table 2.

27. *See* Judith Resnick, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

conclusion of his seminal article on the subject, Professor Galanter directly considers the effects of judges' focus on case management in causing the vanishing trial:

Courts are not only worked on by external forces, but are the site and source of changing institutional practice and of ideology that inspires and justifies that practice. Modern procedure has conferred on trial court judges broader unreviewed (and perhaps unreviewable) discretion. This discretion has been used to shape a new style of judging, frequently referred to as managerial judging. . . .

These institutional changes flow from and reinforce changes in judicial ideology. Trial judges are equipped with enhanced discretionary power in order to resolve cases and clear dockets. In the 1970s, as institutional pressures focused measures of judges' performance on their control over caseload, influential judges and administrators of the federal courts embraced the notion that judges were problem solvers and case managers as well as adjudicators. Training programs emphasized the role of the judge as mediator, producing settlements by actively promoting them. This turn to judges as promoters of settlement and case managers was endorsed by the amendment of Rule 16 of the Federal Rules of Civil Procedure in 1983 and by the enactment of the Civil Justice Reform Act in 1990.²⁸

Criticisms of managerial judging can occasionally be heard emanating from the federal bench. For example, Judge Joseph F. Anderson, Jr., of the District of South Carolina, has written that among the reasons for the demise of the civil jury trial is “the mindset preached by the Administrative Office of the United States Courts.”²⁹ Perhaps the most vocal proponent of this view on the federal bench today is Judge William G. Young of the District of Massachusetts.³⁰ Judge Young argues that most district judges adhere to what he calls “the administrative model of district court business.”³¹ This model, in conformity with Fed. R. Civ. P. 1, “seeks the speedy, inexpensive (to the courts), and cost-efficient resolution of every case,” which means, according to Judge Young, “Trials, being costly and inefficient, are disfavored.”³² Crucially, Judge Young does not argue against judges managing their cases; instead, he argues that judges should manage their cases toward trial.³³

The gravamen of this complaint is that district judges would try more cases if they wanted and tried to do so. The failure, however, is not personal but institutional. Collectively Congress and the federal courts, including the Federal Judicial Center through its training programs and

28. Galanter, *supra* note 2. at 519–20 (citations omitted).

29. Joseph F. Anderson Jr., *Where Have You Gone, Spot Mozingo—A Trial Judge's Lament over the Demise of the Civil Jury Trial*, 4 Fed. Cts. L. Rev. 99, 105 (2010) (citations omitted). This report takes no position on whether this mindset can be attributed to an entire agency, but it can be found on www.uscourts.gov. For example:

To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute. The courts encourage the use of mediation, arbitration, and other forms of alternative dispute resolution, designed to produce a resolution of a dispute without the need for trial or other court proceedings. As a result, litigants often agree to a “settlement.” Absent a settlement, the court will schedule a trial.

About Federal Courts: Civil Cases, <https://www.uscourts.gov/about-federal-courts/types-cases/civil-cases>.

30. See, e.g., William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B. C. Int'l & Comp. L. Rev. 305 (2009); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 Suffolk U. L. Rev. 67 (2006).

31. William G. Young, *Keynote: Mustering Holmes' Regiments*, 48 New Eng. L. Rev. 451, 452 (2014) (citations omitted).

32. *Id.*

33. *Id.* at 452–53 (“Everyone agrees judicial management is necessary and beneficial.”).

materials, decided to de-emphasize the civil jury trial, and there are fewer civil jury trials than there would otherwise have been.

This is, obviously, a difficult thing to measure empirically. The transition to managerial judging occurred 40 years ago or more. Almost all current district judges have only served during this period. There are no federal jurisdictions in which the judges have not been exposed long-term to the managerial mindset. To the extent that mindset would matter, it would matter at the individual-judge level and not the district level. Moreover, at the individual-judge level, there are obvious difficulties with asking judges how they balance the desirability of conducting civil jury trials vis-à-vis the importance of effective case management. Even those judges who think there should be a greater emphasis on civil jury trials agree judges should be hands-on case managers.

IV. Conclusion

To the extent that any districts have “high numbers of civil jury trials,” those districts tend to be either the largest districts in terms of overall caseload (absolute numbers) or relatively small districts in terms of overall caseload with higher civil jury trial rates (civil jury terminations as a percentage of all terminations). The 10 districts with the most civil terminations during or after a jury trial in fiscal years 2010–2019 (all relatively large districts in terms of overall caseload) were California Central, Illinois Northern, New York Southern, Pennsylvania Eastern, Florida Southern, New York Eastern, Florida Middle, Texas Southern, California Eastern, and Colorado. The 10 districts with the highest civil jury trial rates in fiscal years 2010–2019 (all relatively small districts in terms of overall caseload) were Wyoming, New York Northern, Wisconsin Western, Illinois Central, Virgin Islands, Louisiana Middle, Nebraska, Guam, South Dakota, and Connecticut.

Most districts have a civil jury trial rate between 0.5% and 1.5%, and no district has a civil jury trial rate greater than 2.75% (Wyoming) for fiscal years 2010–2019. Given the lack of variation in civil jury trial rates, it is difficult to assess factors that may contribute to higher rates. To a large extent, there is no variation to assess—there are few civil jury trials in any district. This is not because any district is lacking in cases in which a jury trial might be conducted (Part III.A.3, Nature of Suit) or in which the parties have made a jury trial demand (III.B), or in which summary judgment has not been granted (III.E), regardless of local rules (III.F). Indeed, civil cases like these are relatively common, comprising a large part of the denominator of the civil jury trial rate. ADR may resolve many of these cases, although comprehensive data on the percentage of cases referred to ADR procedures (of the various types) do not exist. But ADR practices almost certainly vary more from district to district than does the civil jury trial rate.

The finding that civil rights cases, including those brought by prisoners, make up a large percentage of civil jury trials is consistent with the vanishing-trials literature and suggests that one factor worth considering—but beyond the scope of the present report—is how litigants’ knowledge and strategy play into the rate at which civil cases go to trial. If trials take place where it proves impossible for the litigants to resolve the dispute through settlement, then it makes sense that such difficulties appear more often in civil rights cases. Most tort actions, on the other hand, involve data-rich insurance companies as defendants, able to estimate the expected settlement value of cases based on information about past settlements and verdicts. One suspects that savvy personal injury attorneys on the plaintiff side also have access to comparable settlement value information. Civil rights claims are probably more difficult to value and involve defendants—especially state departments of corrections—that are less inclined to settle.

Litigant strategy also clearly relates to the cost of civil jury trials, a topic outside the scope of this report. To the extent that jury terminations are among the most expensive civil cases,³⁴ the

34. A Center survey of attorneys in recently closed civil cases found that plaintiff attorneys reported 53% higher costs, all else equal, in cases terminated by trial, and that defendant attorneys reported 24% higher costs, all else equal, in such cases. See Emery G. Lee III & Thomas E. Willging, Federal Judicial Center, *Litigation Costs in Civil Cases: Multivariate Analysis*; Report to the Judicial Conference Advisory Committee on Civil Rules 5, 7 (2010), <https://www.fjc.gov/content/litigation-costs-civil-cases-multivariate-analysis-report-judicial-conference-advisory-0>.

cost of going to trial clearly influences the decisions of litigants. Judges cannot try cases that the parties choose to settle to avoid the costs of trial.

A few of this report's findings suggest that, at the district level, at least, some of the conventional wisdom about the trade-offs associated with civil jury trials should be reconsidered. At the district level, for example, there does not appear to be a trade-off between civil jury trials and criminal jury trials. Instead, there is no correlation between the rates at which criminal defendants go to jury trial and at which civil cases terminate during or after a jury trial, while there is a strong correlation between the number of civil and criminal jury trials in a district. The same appears to be true with respect to summary judgment rates: districts that resolve higher percentages of civil cases by summary judgment do not tend to have lower civil jury trial rates. With respect to bench trials, districts' civil jury trial rates and bench trial rates are positively correlated—suggesting that districts that tend to conduct more jury trials also tend to conduct more bench trials. These findings do not mean that there is no trade-off for judges in deciding how to allocate their time between deciding summary judgment motions or conducting civil jury trials. Rather, the findings suggest that these very real trade-offs in terms of judges' allocation of time are not translating into differences in civil jury trial rates at the district level, given the existing levels of civil jury trials.

Appendix Tables

Table A-1: Civil Jury Trials, Total Civil Terminations, and Civil Jury Trial Rate, Per Year, FYs 1962–2019

Fiscal Year	Civil Jury Trials	Total Civil Terminations	Civil Jury Trial Rate
1962	2,765	50,320	5.5
1963	3,017	54,513	5.5
1964	2,886	56,332	5.1
1965	3,087	59,063	5.2
1966	3,158	60,449	5.2
1967	3,074	64,556	4.8
1968	3,148	63,165	5.0
1969	3,147	67,914	4.6
1970	3,183	75,101	4.2
1971	3,240	81,478	4.0
1972	3,361	90,177	3.7
1973	3,264	93,917	3.5
1974	3,250	94,188	3.5
1975	3,462	101,089	3.4
1976	3,501	106,103	3.3
1977	3,462	113,093	3.1
1978	3,505	121,955	2.9
1979	3,576	138,874	2.6
1980	3,894	153,950	2.5
1981	4,679	172,126	2.7
1982	4,771	184,835	2.6
1983	5,036	212,979	2.4
1984	5,510	240,750	2.3
1985	6,253	268,070	2.3
1986	5,621	265,082	2.1
1987	6,279	236,937	2.7
1988	5,907	237,634	2.5
1989	5,666	233,971	2.4
1990	4,781	213,020	2.2
1991	4,280	210,410	2.0
1992	4,279	230,171	1.9

1993	4,109	225,278	1.8
1994	4,444	227,448	2.0
1995	4,122	229,051	1.8
1996	4,359	249,832	1.7
1997	4,551	249,118	1.8
1998	4,330	261,669	1.7
1999	4,000	271,936	1.5
2000	3,778	259,046	1.5
2001	3,632	247,433	1.5
2002	3,006	258,876	1.2
2003	2,674	252,197	1.1
2004	2,529	252,016	1.0
2005	2,610	270,973	1.0
2006	2,415	272,644	0.9
2007	8,739	239,292	3.7
2008	2,213	233,826	0.9
2009	2,274	263,049	0.9
2010	2,251	309,361	0.7
2011	2,253	302,817	0.7
2012	2,219	271,385	0.8
2013	2,152	255,071	0.8
2014	2,028	258,278	0.8
2015	2,091	274,362	0.8
2016	1,965	271,302	0.7
2017	1,812	289,595	0.6
2018	1,706	275,879	0.6
2019	1,570	311,520	0.5

Source: Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004) (1962–2002); Federal Judicial Center Civil Integrated Database, <https://www.fjc.gov/research/idb> (2002–2019).

Table A-2: Districts Ranked by Yearly Average Number of Civil Jury Trials, FYs 2010–2019

Rank	District	Average Number of Civil Jury Trials	Percentage of Total Civil Jury Trials	Average Total Civil Terminations	Rank, Average Total Civil Terminations
1	California Central	97	4.8	14,758	2
2	Illinois Northern	87	4.3	9,692	5
3	New York Southern	81	4.0	11,547	4
4	Pennsylvania Eastern	76	3.8	23,282	1
5	Florida Southern	73	3.7	9,065	7
6	New York Eastern	67	3.4	6,997	9
7	Florida Middle	57	2.8	9,383	6
8	Texas Southern	50	2.5	6,165	11
9	California Eastern	45	2.2	5,086	14
10	Colorado	43	2.1	3,268	26
11	California Northern	39	2.0	6,528	10
12	Massachusetts	39	1.9	3,367	24
13	Texas Northern	36	1.8	4,806	16
14	Texas Eastern	35	1.8	3,720	22
15	New York Northern	35	1.7	1,749	50
16	Michigan Eastern	34	1.7	4,962	15
17	New Jersey	33	1.7	9,042	8
18	Connecticut	32	1.6	2,118	42
19	Georgia Northern	30	1.5	5,402	13
20	Pennsylvania Middle	29	1.4	2,581	37
21	Maryland	28	1.4	3,855	21
22	Louisiana Eastern	28	1.4	5,501	12
23	Illinois Southern	27	1.3	2,776	34
24	Oregon	27	1.3	2,258	41
25	Texas Western	26	1.3	3,433	23
26	Arkansas Eastern	25	1.3	2,687	35
27.5	Washington Western	25	1.2	3,152	28
27.5	Mississippi Southern	25	1.2	1,926	46
29	Pennsylvania Western	24	1.2	2,612	36
30	Illinois Central	24	1.2	1,372	58
31.5	Arizona	24	1.2	4,338	18
31.5	Missouri Eastern	24	1.2	2,796	33
33	Ohio Northern	23	1.1	4,451	17

34	Virginia Eastern	23	1.1	3,324	25
35	South Carolina	22	1.1	3,891	20
36	California Southern	22	1.1	3,172	27
37	Alabama Northern	21	1.1	2,967	31
38	Tennessee Middle	18	0.9	1,987	43
39.5	Minnesota	17	0.9	4,224	19
39.5	District of Columbia	17	0.9	2,471	38
41	Delaware	17	0.8	1,641	52
42	Ohio Southern	17	0.8	2,934	32
43	Missouri Western	17	0.8	2,370	40
44.5	Tennessee Eastern	17	0.8	1,428	57
44.5	Wisconsin Western	17	0.8	876	73
46	Kansas	16	0.8	1,868	48
47	Nevada	16	0.8	3,021	30
48	Oklahoma Western	15	0.8	1,455	56
49	Puerto Rico	15	0.7	1,321	60
50	Michigan Western	15	0.7	1,700	51
51.5	New York Western	14	0.7	1,947	45
51.5	Louisiana Middle	14	0.7	921	70
53	Indiana Southern	14	0.7	3,036	29
54.5	Louisiana Western	14	0.7	2,466	39
54.5	Florida Northern	14	0.7	1,910	47
56	Virginia Western	14	0.7	1,180	65
57.5	Georgia Middle	13	0.7	1,369	59
57.5	Tennessee Western	13	0.7	1,317	62
59.5	Indiana Northern	13	0.6	1,976	44
59.5	Wisconsin Eastern	13	0.6	1,553	53
61	Utah	13	0.6	1,317	61
62	Mississippi Northern	12	0.6	809	74
63	North Carolina Western	12	0.6	1,204	64
64	New Mexico	11	0.6	1,245	63
65	Nebraska	11	0.6	695	78
66	Arkansas Western	11	0.5	1,069	67
67	Kentucky Western	10	0.5	1,496	54
68	Kentucky Eastern	9	0.4	1,462	55
69	Iowa Southern	9	0.4	728	76
70	Alabama Middle	8	0.4	1,062	68

71	Wyoming	8	0.4	290	89
72.5	West Virginia Southern	8	0.4	13,964	3
72.5	Idaho	8	0.4	616	82
74	Georgia Southern	7	0.3	1,048	69
75	New Hampshire	6	0.3	518	85
76	North Carolina Eastern	6	0.3	1,821	49
77	Montana	6	0.3	642	81
78	Maine	6	0.3	524	84
79	Oklahoma Northern	6	0.3	787	75
80.5	Iowa Northern	6	0.3	552	83
80.5	South Dakota	6	0.3	375	87
82	Hawaii	5	0.3	696	77
83	Washington Eastern	5	0.2	896	72
84.5	Rhode Island	4	0.2	914	71
84.5	Alabama Southern	4	0.2	674	79
86	North Carolina Middle	4	0.2	1,158	66
87.5	Vermont	4	0.2	290	90
87.5	Virgin Islands	4	0.2	242	92
89	Oklahoma Eastern	3	0.2	516	86
90	North Dakota	3	0.2	280	91
91	West Virginia Northern	3	0.1	673	80
92	Alaska	2	0.1	337	88
93	Guam	1	0.0	36	93
94	Northern Mariana Islands	0	0.0	29	94

Source: Federal Judicial Center Civil Integrated Database, <https://www.fjc.gov/research/idb>.

Table A-3: Districts Ranked by Yearly Average Number of Civil Jury Trials per Authorized Judgeship, FYs 2010–2019

Rank	District	Average Number of Civil Jury Trials per Authorized Judgeship	Authorized Judgeships	Rank, Average Total Civil Terminations
1	Wisconsin Western	8.25	2	73
2	California Eastern	7.47	6	14
3	New York Northern	6.96	5	50
4	Illinois Southern	6.75	4	34
5	Colorado	6.10	7	26
6	Illinois Central	6.03	4	58
7	Arkansas Eastern	5.02	5	35
8	Louisiana Middle	4.77	3	70
9	Pennsylvania Middle	4.75	6	37
10	New York Eastern	4.48	15	9
11	Oregon	4.45	6	41
12	Texas Eastern	4.43	8	22
13	Tennessee Middle	4.38	4	43
14	Delaware	4.25	4	52
15	Mississippi Southern	4.08	6	46
16	Florida Southern	4.08	18	7
17	Mississippi Northern	4.07	3	74
18	Connecticut	3.95	8	42
19	Illinois Northern	3.94	22	5
20	Idaho	3.90	2	82
21	Florida Middle	3.79	15	6
22	Nebraska	3.70	3	78
23	Michigan Western	3.70	4	51
24	New York Western	3.58	4	45
25	Washington Western	3.50	7	28
26	Arkansas Western	3.50	3	67
26	Florida Northern	3.50	4	47
28	Virginia Western	3.48	4	65
29	California Central	3.47	28	2
30	Pennsylvania Eastern	3.45	22	1
31	Georgia Middle	3.35	4	59
32	Tennessee Eastern	3.30	5	57
33	Texas Northern	3.01	12	16

34	Missouri Eastern	3.00	8	33
35	Massachusetts	2.98	13	24
36	New York Southern	2.88	28	4
37	Iowa Southern	2.87	3	76
38	Iowa Northern	2.85	2	83
39	Indiana Southern	2.84	5	29
40	California Northern	2.81	14	10
41	Missouri Western	2.78	6	40
42	Maryland	2.78	10	21
43	Alabama Middle	2.77	3	68
44	Kansas	2.73	6	48
45	Georgia Northern	2.69	11	13
46	Tennessee Western	2.68	5	62
47	Alabama Northern	2.68	8	31
48	Wyoming	2.67	3	89
49	Texas Southern	2.63	19	11
50	Wisconsin Eastern	2.60	5	53
51	Indiana Northern	2.60	5	44
52	Oklahoma Western	2.55	6	56
53	Utah	2.50	5	61
54	Minnesota	2.46	7	19
55	Pennsylvania Western	2.43	10	36
56	North Carolina Western	2.36	5	64
57	Louisiana Eastern	2.31	12	12
58	Michigan Eastern	2.28	15	15
59	Nevada	2.27	7	30
60	Oklahoma Eastern	2.27	1.5	86
61	Kentucky Western	2.24	4.5	54
62	South Carolina	2.21	10	20
63	Georgia Southern	2.20	3	69
64	Puerto Rico	2.14	7	60
65	New Hampshire	2.13	3	85
66	Ohio Southern	2.10	8	32
67	Ohio Northern	2.09	11	17
68	Virginia Eastern	2.08	11	25
69	Montana	2.03	3	81
70	Louisiana Western	2.00	7	39

70	Maine	2.00	3	84
70	Vermont	2.00	2	90
73	Texas Western	1.97	13	23
74	New Jersey	1.96	17	8
75	South Dakota	1.90	3	87
76	Arizona	1.85	13	18
77	California Southern	1.68	13	27
78	Oklahoma Northern	1.66	3.5	75
79	New Mexico	1.63	7	63
80	Kentucky Eastern	1.60	5.5	55
81	North Dakota	1.60	2	91
82	North Carolina Eastern	1.58	4	49
83	West Virginia Southern	1.56	5	3
84	Rhode Island	1.47	3	71
85	Alabama Southern	1.47	3	79
86	Hawaii	1.30	4	77
87	Washington Eastern	1.23	4	72
88	District of Columbia	1.15	15	38
89	North Carolina Middle	1.05	4	66
90	West Virginia Northern	0.93	3	80
91	Alaska	0.77	3	88
--	Virgin Islands	--	0	92
--	Guam	--	0	93
--	Northern Mariana Islands	--	0	94

Source: Federal Judicial Center Civil Integrated Database, <https://www.fjc.gov/research/idb>.

Table A-4: Districts Ranked by Yearly Average Civil Jury Trial Rates, FYs 2010–2019

Rank	District	Average Civil Jury Trial Rate	Rank, Average Total Civil Terminations
1	Wyoming	2.75	89
2	New York Northern	2.01	50
3	Wisconsin Western	1.89	73
4	Illinois Central	1.76	58
5	Virgin Islands	1.65	92
6	Louisiana Middle	1.63	70
7	Nebraska	1.60	78
8	Guam	1.57	93
9	South Dakota	1.57	87
10	Connecticut	1.51	42
11	Mississippi Northern	1.48	74
12	Northern Mariana Islands	1.39	94
13	Vermont	1.39	90
14	Illinois Southern	1.34	34
15	Colorado	1.31	26
16	Mississippi Southern	1.26	46
17	Idaho	1.25	82
18	Puerto Rico	1.21	60
19	New Hampshire	1.21	85
20	Massachusetts	1.20	24
21	Virginia Western	1.18	65
22	Tennessee Eastern	1.17	57
23	Iowa Southern	1.17	76
24	Oregon	1.17	41
25	Maine	1.15	84
26	Pennsylvania Middle	1.10	37
27	Delaware	1.09	52
28	North Dakota	1.07	91
29	Oklahoma Western	1.05	56
30	Iowa Northern	1.04	83
31	Tennessee Western	1.03	62
32	Arkansas Western	1.01	67
33	Arkansas Eastern	1.01	35
34	North Carolina Western	0.99	64

35	Texas Eastern	0.99	22
36	Georgia Middle	0.98	59
37	New York Eastern	0.98	9
38	Utah	0.96	61
39	Montana	0.95	81
40	Pennsylvania Western	0.94	36
41	Kansas	0.93	48
42	New Mexico	0.93	63
43	Tennessee Middle	0.92	43
44	Missouri Eastern	0.92	33
45	Illinois Northern	0.90	5
46	California Eastern	0.88	14
47	Michigan Western	0.87	51
48	Wisconsin Eastern	0.84	53
49	Florida Southern	0.82	7
50	Texas Southern	0.81	11
51	Alabama Middle	0.78	68
52	Washington Western	0.78	28
53	Hawaii	0.77	77
54	Texas Western	0.76	23
55	Texas Northern	0.75	16
56	Florida Northern	0.74	47
57	Oklahoma Northern	0.74	75
58	New York Western	0.74	45
59	Alabama Northern	0.73	31
60	Maryland	0.72	21
61	New York Southern	0.72	4
62	District of Columbia	0.72	38
63	Alaska	0.72	88
64	Missouri Western	0.72	40
65	Indiana Northern	0.70	44
66	California Southern	0.70	27
67	Kentucky Western	0.69	54
68	Virginia Eastern	0.69	25
69	Michigan Eastern	0.69	15
70	Oklahoma Eastern	0.66	86
71	California Central	0.66	2

72	Alabama Southern	0.63	79
73	Georgia Southern	0.63	69
74	Florida Middle	0.62	6
75	California Northern	0.61	10
76	Louisiana Western	0.61	39
77	Ohio Southern	0.61	32
78	Kentucky Eastern	0.60	55
79	South Carolina	0.59	20
80	Pennsylvania Eastern	0.59	1
81	Arizona	0.58	18
82	Rhode Island	0.57	71
83	Louisiana Eastern	0.57	12
84	Washington Eastern	0.56	72
85	Georgia Northern	0.56	13
86	Ohio Northern	0.56	17
87	Nevada	0.53	30
88	Indiana Southern	0.48	29
89	Minnesota	0.44	19
90	West Virginia Northern	0.42	80
91	New Jersey	0.40	8
92	North Carolina Middle	0.37	66
93	North Carolina Eastern	0.34	49
94	West Virginia Southern	0.29	3

Source: Federal Judicial Center Civil Integrated Database, <https://www.fjc.gov/research/idb>.

Table A-5: Rank of Percentage of Civil Terminations in the 20 Nature-of-Suit Categories Most Likely to Go to Jury Trial, by District, FYs 2010–2019

Rank	District	Rank, Average Civil Jury Trials	Rank, Average Civil Jury Trials per Authorized Judgeship	Rank, Average Civil Jury Trial Rate	Rank, Total Civil Terminations in Top 20 NOS	Rank, Average Total Civil Terminations
1	West Virginia Southern	72.5	83	94	1	3
2	Illinois Southern	23	4	14	18	34
3	Louisiana Middle	51.5	8	6	62	70
4	Arkansas Eastern	26	7	33	23	35
5	Tennessee Middle	38	13	43	37	43
6	Mississippi Southern	27.5	15	16	40	46
7	Northern Mariana Islands	94	--	12	94	94
8	Delaware	41	14	27	43	52
9	Texas Eastern	14	12	35	15	22
10	Alabama Northern	37	47	59	22	31
11	Louisiana Eastern	22	57	83	10	12
12	South Dakota	80.5	75	9	84	87
13	New York Southern	3	36	61	2	4
14	Mississippi Northern	62	17	11	70	74
15	Tennessee Western	57.5	46	31	55	62
16	Kentucky Western	67	61	67	48	54
17	Alabama Middle	70	43	51	63	68
18	Illinois Central	30	6	4	56	58
19	Arizona	31.5	76	81	14	18
20	New Mexico	64	79	42	61	63
21	Tennessee Eastern	44.5	32	22	54	57
22	Connecticut	18	18	10	42	42
23	Louisiana Western	54.5	70	76	36	39
24	Illinois Northern	2	19	45	4	5
25	Oklahoma Western	48	52	29	53	56
26	Wyoming	71	48	1	89	89
27	Hawaii	82	86	53	74	77
28	Utah	61	53	38	59	61
29	Missouri Eastern	31.5	34	44	31	33
30	Colorado	10	5	15	25	26

31	District of Columbia	39.5	88	62	38	38
32	Indiana Northern	59.5	51	65	44	44
33	Florida Northern	54.5	26	56	46	47
34	Florida Southern	5	16	49	7	7
35	Florida Middle	7	21	74	6	6
36	Georgia Southern	74	63	73	66	69
37	Nevada	47	59	87	28	30
38	Idaho	72.5	20	17	80	82
39	Nebraska	65	22	7	76	78
40	New York Eastern	6	10	37	9	9
41	Ohio Southern	42	66	77	30	32
42	Texas Southern	8	49	50	11	11
43	Guam	93	--	8	93	93
44	Virginia Eastern	34	68	68	26	25
45	Alabama Southern	84.5	85	72	78	79
46	Rhode Island	84.5	84	82	72	71
47	Virgin Islands	87.5	--	5	92	92
48	Georgia Middle	57.5	31	36	60	59
49	Maryland	21	42	60	20	21
50	Montana	77	69	39	77	81
51	Pennsylvania Western	29	55	40	39	36
52	North Dakota	90	81	28	90	91
53	Wisconsin Western	44.5	1	3	73	73
54	Pennsylvania Middle	20	9	26	41	37
55	New York Northern	15	3	2	49	50
56	Virginia Western	56	28	21	65	65
57	Alaska	92	91	63	88	88
58	Indiana Southern	53	39	88	34	29
59	New Jersey	17	74	91	8	8
60	Texas Northern	13	33	55	16	16
61	California Northern	11	40	75	12	10
62	South Carolina	35	62	79	24	20
63	Georgia Northern	19	45	85	13	13
64	Texas Western	25	73	54	27	23
65	Michigan Western	50	23	47	52	51
66	Vermont	87.5	70	13	91	90
67	California Southern	36	77	66	32	27

68	Wisconsin Eastern	59.5	50	48	58	53
69	Oklahoma Northern	79	78	57	75	75
70	West Virginia Northern	91	90	90	82	80
71	Kansas	46	44	41	50	48
72	Iowa Southern	69	37	23	79	76
73	New Hampshire	75	65	19	83	85
74	Oregon	24	11	24	47	41
75	Arkansas Western	66	26	32	71	67
76	Missouri Western	43	41	64	45	40
77	Massachusetts	12	35	20	33	24
78	California Eastern	9	2	46	17	14
79	Washington Western	27.5	25	52	35	28
80	North Carolina Western	63	56	34	67	64
81	Maine	78	70	25	85	84
82	Ohio Northern	33	67	86	21	17
83	North Carolina Middle	86	89	92	69	66
84	Michigan Eastern	16	58	69	19	15
85	New York Western	51.5	24	58	51	45
86	North Carolina Eastern	76	82	93	57	49
87	Kentucky Eastern	68	80	78	64	55
88	California Central	1	29	71	3	2
89	Oklahoma Eastern	89	60	70	87	86
90	Iowa Northern	80.5	38	30	86	83
91	Minnesota	39.5	54	89	29	19
92	Puerto Rico	49	64	18	68	60
93	Washington Eastern	83	87	84	81	72
94	Pennsylvania Eastern	4	30	80	5	1

Source: Federal Judicial Center Civil Integrated Database, <https://www.fjc.gov/research/idb>.

Table A-6: Yearly Average Civil Bench Trials, by District, FYs 2010–2019

Rank	District	Average Civil Bench Trials	Average Civil Jury Trials	Rank, Average Civil Jury Trials	Average Civil Bench Trial Rate	Average Civil Jury Trial Rate	Rank, Average Total Civil Terminations
1	California Central	52	97	1	0.36	0.66	2
2	New York Southern	46	81	3	0.42	0.72	4
3	Texas Southern	32	50	8	0.53	0.81	11
4	Delaware	31	17	41	2.14	1.09	52
5	Florida Southern	30	73	5	0.33	0.82	7
6	New York Eastern	29	67	6	0.43	0.98	9
7	Louisiana Eastern	27	28	22	0.56	0.57	12
8	Pennsylvania Eastern	25	76	4	0.20	0.59	1
9	North Carolina Eastern	24	6	76	1.24	0.34	49
10	Illinois Northern	23	87	2	0.24	0.90	5
11	New Jersey	23	33	17	0.27	0.40	8
12	Florida Middle	22	57	7	0.25	0.62	6
13	Virginia Eastern	20	23	34	0.60	0.69	25
14	Massachusetts	19	39	12	0.59	1.20	24
15	Louisiana Western	16	14	55	0.71	0.61	39
16	Arkansas Eastern	16	25	26	0.68	1.01	35
17	Washington Western	15	25	28	0.48	0.78	28
18	Connecticut	14	32	18	0.69	1.51	42
19	Texas Western	14	26	25	0.42	0.76	23
20	Arizona	14	24	32	0.33	0.58	18
21	California Northern	14	39	11	0.22	0.61	10
22	Maryland	14	28	21	0.36	0.72	21
23	Texas Northern	11	36	13	0.24	0.75	16
24	Michigan Eastern	11	34	16	0.23	0.69	15
25	Colorado	11	43	10	0.33	1.31	26
26	California Southern	11	22	36	0.33	0.70	27
27	Hawaii	10	5	82	1.45	0.77	77
28	Oregon	10	27	24	0.44	1.17	41

29	South Carolina	10	22	35	0.27	0.59	20
30	Georgia Northern	10	30	19	0.19	0.56	13
31	Texas Eastern	9	35	14	0.27	0.99	22
32	Mississippi Southern	9	25	28	0.46	1.26	46
33	District Of Columbia	9	17	40	0.37	0.72	38
34	Indiana Southern	9	14	53	0.29	0.48	29
35	Nevada	8	16	47	0.27	0.53	30
36	Tennessee Eastern	8	17	45	0.54	1.17	57
37	Ohio Southern	8	17	42	0.29	0.61	32
38	Virgin Islands	7	4	88	2.93	1.65	92
39	Missouri Western	7	17	43	0.30	0.72	40
40	Pennsylvania Middle	7	29	20	0.27	1.10	37
41	Michigan Western	7	15	50	0.40	0.87	51
42	Ohio Northern	7	23	33	0.16	0.56	17
43	Arkansas Western	7	11	66	0.62	1.01	67
44	California Eastern	6	45	9	0.12	0.88	14
45	Nebraska	6	11	65	0.90	1.60	78
46	Florida Northern	6	14	55	0.33	0.74	47
47	Alabama Northern	6	21	37	0.23	0.73	31
48	Wisconsin Eastern	6	13	60	0.40	0.84	53
49	Tennessee Western	6	13	58	0.45	1.03	62
50	Iowa Southern	6	9	69	0.73	1.17	76
51	Virginia Western	6	14	56	0.47	1.18	65
52	Illinois Southern	6	27	23	0.31	1.34	34
53	Utah	5	13	61	0.40	0.96	61
54	Tennessee Middle	5	18	38	0.28	0.92	43
55	Missouri Eastern	5	24	32	0.20	0.92	33
56	New Mexico	5	11	64	0.41	0.93	63
57	Minnesota	5	17	40	0.12	0.44	19
58	New York Northern	5	35	15	0.29	2.01	50

59	Kansas	5	16	46	0.26	0.93	48
60	Pennsylvania Western	5	24	29	0.18	0.94	36
61	Louisiana Middle	5	14	52	0.50	1.63	70
62	Indiana Northern	5	13	60	0.24	0.70	44
63	Georgia Middle	4	13	58	0.27	0.98	59
64	Wisconsin Western	4	17	45	0.41	1.89	73
65	Washington Eastern	4	5	83	0.41	0.56	72
66	Alabama Middle	4	8	70	0.33	0.78	68
67	Puerto Rico	4	15	49	0.28	1.21	60
68	Alabama Southern	4	4	85	0.52	0.63	79
69	Maine	3	6	78	0.61	1.15	84
70	Rhode Island	3	4	85	0.37	0.57	71
71	North Carolina Middle	3	4	86	0.27	0.37	66
72	Illinois Central	3	24	30	0.23	1.76	58
73	Oklahoma Western	3	15	48	0.21	1.05	56
74	Alaska	3	2	92	0.84	0.72	88
75	New York Western	3	14	52	0.15	0.74	45
76	West Virginia Southern	3	8	73	0.10	0.29	3
77	Idaho	3	8	73	0.46	1.25	82
78	Montana	3	6	77	0.42	0.95	81
79	Mississippi Northern	3	12	62	0.29	1.48	74
80	North Carolina Western	3	12	63	0.20	0.99	64
81	Iowa Northern	2	6	81	0.45	1.04	83
82	Kentucky Eastern	2	9	68	0.16	0.60	55
83	South Dakota	2	6	81	0.63	1.57	87
84	New Hampshire	2	6	75	0.40	1.21	85
85	West Virginia Northern	2	3	91	0.29	0.42	80
86	Kentucky Western	2	10	67	0.13	0.69	54
87	Wyoming	2	8	71	0.62	2.75	89
88	North Dakota	2	3	90	0.59	1.07	91

89	Oklahoma Northern	2	6	79	0.22	0.74	75
90	Georgia Southern	2	7	74	0.15	0.63	69
91	Oklahoma Eastern	1	3	89	0.27	0.66	86
92	Vermont	1	4	88	0.38	1.39	90
93	Northern Mariana Islands	0	0	94	1.16	1.39	94
94	Guam	0	1	93	0.92	1.57	93

Source: Federal Judicial Center Civil Integrated Database, <https://www.fjc.gov/research/idb>.

Table A-7: Yearly Average Criminal Defendants Terminated, by District, FYs 2010–2019

Rank	District	Rank, Average Criminal Jury Trials	Average Criminal Jury Trial Rate	Rank, Average Criminal Jury Trial Rate	Rank, Average Total Civil Terminations	Rank, Average Civil Jury Trials	Average Civil Jury Trial Rate	Rank, Average Civil Jury Trial Rate
1	Texas Western	5	0.73	91	23	25	0.76	54
2	Texas Southern	8	0.70	93	11	8	0.81	50
3	Arizona	7	0.73	92	18	31.5	0.58	81
4	California Southern	9	0.97	89	27	36	0.70	66
5	New Mexico	74.5	0.20	94	63	64	0.93	42
6	Virginia Eastern	10	1.98	74	25	34	0.69	68
7	Florida Southern	1	4.83	11	7	5	0.82	49
8	Florida Middle	2	4.55	15	6	7	0.62	74
9	California Central	11.5	2.75	49	2	1	0.66	71
10	New York Southern	3	4.45	19	4	3	0.72	61
11	Maryland	11.5	2.70	50	21	21	0.72	60
12	Puerto Rico	16	2.33	65	60	49	1.21	18
13	Texas Northern	19	2.26	68	16	13	0.75	55
14	North Carolina Eastern	40	1.36	85	49	76	0.34	93
15	Washington Western	48.5	1.38	84	28	27.5	0.78	52
16	South Carolina	26.5	2.15	71	20	35	0.59	79
17	Michigan Eastern	13	4.17	22	15	16	0.69	69
18	New York Eastern	14	3.88	26	9	6	0.98	37
19	Utah	73	0.96	90	61	61	0.96	38
20	New Jersey	28	2.41	58	8	17	0.40	91
21	Texas Eastern	29	2.39	59	22	14	0.99	35
22	Missouri Eastern	56	1.44	82	33	31.5	0.92	44
23	California Eastern	35	2.23	69	14	9	0.88	46
24	Pennsylvania Eastern	4	7.87	3	1	4	0.59	80
25	Tennessee Eastern	22.5	3.10	41	57	44.5	1.17	22
26	Illinois Northern	6	6.97	4	5	2	0.90	45

27	Missouri Western	55	1.62	78	40	43	0.72	64
28	Ohio Northern	18	3.93	24	17	33	0.56	86
29	Kansas	38.5	2.17	70	48	46	0.93	41
30	California Northern	22.5	3.54	35	10	11	0.61	75
31	Georgia Southern	63	1.43	83	69	74	0.63	73
32	Georgia Northern	21	3.78	28	13	19	0.56	85
33	Oregon	67	1.61	79	41	24	1.17	24
34	Nebraska	46	2.36	61	78	65	1.60	7
35	Ohio Southern	65	1.57	80	32	42	0.61	77
36	North Carolina Western	26.5	3.64	31	64	63	0.99	34
37	New York Western	37	3.03	46	45	51.5	0.74	58
38	Tennessee Western	33.5	3.09	42	62	57.5	1.03	31
39	Nevada	45	2.67	52	30	47	0.53	87
40	Colorado	47	2.67	51	26	10	1.31	15
41	Georgia Middle	61	2.07	72	59	57.5	0.98	36
42	Kentucky Western	81	1.05	88	54	67	0.69	67
43	New York Northern	41	3.03	45	50	15	2.01	2
44	South Dakota	25	4.34	20	87	80.5	1.57	9
45	Kentucky Eastern	20	5.49	8	55	68	0.61	78
46	Oklahoma Western	53	2.35	63	56	48	1.05	29
47	Massachusetts	15	6.92	5	24	12	1.20	20
48	Alabama Northern	42	3.19	37	31	37	0.73	59
49	Pennsylvania Western	51.5	2.62	55	36	29	0.94	40
50	North Carolina Middle	60	2.36	62	66	86	0.37	92
51	Florida Northern	17	6.22	6	47	54.5	0.74	56
52	Pennsylvania Middle	32	3.89	25	37	20	1.10	26
53	Arkansas Eastern	51.5	3.08	43	35	26	1.01	33
54	Michigan Western	43.5	3.66	30	51	50	0.87	47
55	Washington Eastern	62	2.63	54	72	83	0.56	84
56	Iowa Southern	33.5	4.34	21	76	69	1.17	23

57	Minnesota	24	6.04	7	19	39.5	0.44	89
58	Indiana Southern	48.5	3.60	33	29	53	0.48	88
59	Indiana Northern	31	4.54	16	44	59.5	0.70	65
60	Louisiana Eastern	66	2.60	56	12	22	0.57	83
61	Montana	30	5.09	9	81	77	0.95	39
62	Iowa Northern	54	3.30	36	83	80.5	1.04	30
63	Connecticut	58.5	3.07	44	42	18	1.51	10
64	Wisconsin Eastern	74.5	2.00	73	53	59.5	0.84	48
65	Illinois Central	72	2.31	67	58	30	1.76	4
66	Hawaii	76.5	2.38	60	77	82	0.77	53
67	Mississippi Southern	71	2.35	64	46	27.5	1.26	16
68	District of Columbia	36	4.56	14	38	39.5	0.72	62
69	Alabama Southern	58.5	3.12	40	79	84.5	0.63	72
70	North Dakota	64	3.01	47	91	90	1.07	28
71	Virginia Western	38.5	4.53	17	65	56	1.18	21
72	Louisiana Western	57	3.19	38	39	54.5	0.61	76
73	Illinois Southern	91	1.21	87	34	23	1.34	14
74	West Virginia Northern	80	1.95	75	80	91	0.42	90
75	Idaho	70	2.63	53	82	72.5	1.25	17
76	West Virginia Southern	82	1.93	76	3	72.5	0.29	94
77	Arkansas Western	92	1.30	86	67	66	1.01	32
78	Tennessee Middle	50	4.51	18	43	38	0.92	43
79	Wyoming	84.5	1.85	77	89	71	2.75	1
80	Alabama Middle	69	4.04	23	68	70	0.78	51
81	Oklahoma Northern	78	3.15	39	75	79	0.74	57
82	Alaska	68	4.81	12	88	92	0.72	63
83	New Hampshire	86.5	2.33	66	85	75	1.21	19
84	Vermont	93	1.56	81	90	87.5	1.39	13
85	Maine	76.5	3.75	29	84	78	1.15	25
86	Mississippi Northern	79	3.60	32	74	62	1.48	11

87	Louisiana Middle	86.5	2.47	57	70	51.5	1.63	6
88	Wisconsin Western	88	2.77	48	73	44.5	1.89	3
89	Rhode Island	83	3.60	34	71	84.5	0.57	82
90	Oklahoma Eastern	84.5	4.85	10	86	89	0.66	70
91	Virgin Islands	43.5	14.30	1	92	87.5	1.65	5
92	Delaware	89.5	3.85	27	52	41	1.09	27
93	Guam	89.5	4.78	13	93	93	1.57	8
94	Northern Mariana Islands	94	9.84	2	94	94	1.39	12

Source: Federal Judicial Center Civil and Criminal Integrated Database, <https://www.fjc.gov/research/idb>.

Table A-8: Combined Civil and Criminal Terminations, by District, FYs 2010–2019

Rank	District	Percentage of Caseload Civil	Percentage of Caseload Criminal	Rank, Average Civil Jury Trials	Average Civil Jury Trial Rate	Rank, Average Civil Jury Trial Rate	Rank, Average Total Civil Terminations
1	Pennsylvania Eastern	96.5	3.5	4	0.59	80	1
2	California Central	90.1	9.9	1	0.66	71	2
3	West Virginia Southern	97.8	2.2	72.5	0.29	94	3
4	Texas Southern	45.9	54.1	8	0.81	50	11
5	New York Southern	88.0	12.0	3	0.72	61	4
6	Texas Western	29.2	70.8	25	0.76	54	23
7	Florida Southern	79.0	21.0	5	0.82	49	7
8	Arizona	38.3	61.7	31.5	0.58	81	18
9	Florida Middle	85.2	14.8	7	0.62	74	6
10	Illinois Northern	92.2	7.8	2	0.90	45	5
11	New Jersey	90.8	9.2	17	0.40	91	8
12	California Southern	37.2	62.8	36	0.70	66	27
13	New York Eastern	88.1	11.9	6	0.98	37	9
14	California Northern	89.5	10.5	11	0.61	75	10
15	Texas Northern	78.0	22.0	13	0.75	55	16
16	Georgia Northern	88.3	11.7	19	0.56	85	13
17	California Eastern	85.1	14.9	9	0.88	46	14
18	Michigan Eastern	83.7	16.3	16	0.69	69	15
19	Louisiana Eastern	93.0	7.0	22	0.57	83	12
20	Virginia Eastern	57.4	42.6	34	0.69	68	25
21	Maryland	71.0	29.0	21	0.72	60	21
22	New Mexico	23.7	76.3	64	0.93	42	63
23	Ohio Northern	85.1	14.9	33	0.56	86	17

24	South Carolina	78.7	21.3	35	0.59	79	20
25	Minnesota	90.8	9.2	39.5	0.44	89	19
26	Texas Eastern	80.2	19.8	14	0.99	35	22
27	Washington Western	74.8	25.2	27.5	0.78	52	28
28	Massachusetts	86.1	13.9	12	1.20	20	24
29	Colorado	84.7	15.3	10	1.31	15	26
30	Missouri Eastern	75.5	24.5	31.5	0.92	44	33
31	Nevada	83.5	16.5	47	0.53	87	30
32	Ohio Southern	81.6	18.4	42	0.61	77	32
33	Alabama Northern	85.1	14.9	37	0.73	59	31
34	Indiana Southern	87.8	12.2	53	0.48	88	29
35	Missouri Western	74.7	25.3	43	0.72	64	40
36	Arkansas Eastern	85.3	14.7	26	1.01	33	35
37	Illinois Southern	88.5	11.5	23	1.34	14	34
38	Pennsylvania Western	83.6	16.4	29	0.94	40	36
39	North Carolina Eastern	59.1	40.9	76	0.34	93	49
40	Pennsylvania Middle	84.2	15.8	20	1.10	26	37
41	Oregon	77.1	22.9	24	1.17	24	41
42	District of Columbia	86.5	13.5	39.5	0.72	62	38
43	Louisiana Western	87.0	13.0	54.5	0.61	76	39
44	Puerto Rico	48.3	51.7	49	1.21	18	60
45	Kansas	71.0	29.0	46	0.93	41	48
46	New York Western	75.9	24.1	51.5	0.74	58	45
47	Connecticut	84.1	15.9	18	1.51	10	42
48	Indiana Northern	82.5	17.5	59.5	0.70	65	44
49	Florida Northern	79.8	20.2	54.5	0.74	56	47
50	New York Northern	75.4	24.6	15	2.01	2	50

51	Mississippi Southern	83.3	16.7	27.5	1.26	16	46
52	Tennessee Middle	86.7	13.3	38	0.92	43	43
53	Tennessee Eastern	63.5	36.5	44.5	1.17	22	57
54	Utah	58.7	41.3	61	0.96	38	61
55	Michigan Western	79.1	20.9	50	0.87	47	51
56	Kentucky Western	72.0	28.0	67	0.69	67	54
57	Kentucky Eastern	72.4	27.6	68	0.61	78	55
58	Oklahoma Western	72.2	27.8	48	1.05	29	56
59	Georgia Middle	70.1	29.9	57.5	0.98	36	59
60	Wisconsin Eastern	79.6	20.4	59.5	0.84	48	53
61	Tennessee Western	68.3	31.7	57.5	1.03	31	62
62	North Carolina Western	65.2	34.8	63	0.99	34	64
63	Georgia Southern	58.3	41.7	74	0.63	73	69
64	Illinois Central	77.7	22.3	30	1.76	4	58
65	Delaware	93.8	6.2	41	1.09	27	52
66	North Carolina Middle	70.0	30.0	86	0.37	92	66
67	Virginia Western	76.1	23.9	56	1.18	21	65
68	Arkansas Western	77.8	22.2	66	1.01	32	67
69	Nebraska	51.2	48.8	65	1.60	7	78
70	Washington Eastern	67.3	32.7	83	0.56	84	72
71	Alabama Middle	81.0	19.0	70	0.78	51	68
72	Iowa Southern	62.7	37.3	69	1.17	23	76
73	Louisiana Middle	82.3	17.7	51.5	1.63	6	70
74	Hawaii	64.0	36.0	82	0.77	53	77
75	Rhode Island	85.0	15.0	84.5	0.57	82	71
76	Alabama Southern	63.8	36.2	84.5	0.63	72	79

77	Montana	61.3	38.7	77	0.95	39	81
78	Wisconsin Western	83.8	16.2	44.5	1.89	3	73
79	Oklahoma Northern	76.3	23.7	79	0.74	57	75
80	West Virginia Northern	65.6	34.4	91	0.42	90	80
81	Mississippi Northern	80.2	19.8	62	1.48	11	74
82	Idaho	64.0	36.0	72.5	1.25	17	82
83	Iowa Northern	57.9	42.1	80.5	1.04	30	83
84	South Dakota	39.8	60.2	80.5	1.57	9	87
85	Maine	71.7	28.3	78	1.15	25	84
86	New Hampshire	71.0	29.0	75	1.21	19	85
87	North Dakota	42.9	57.1	90	1.07	28	91
88	Oklahoma Eastern	81.2	18.8	89	0.66	70	86
89	Wyoming	49.2	50.8	71	2.75	1	89
90	Alaska	61.2	38.8	92	0.72	63	88
91	Vermont	57.8	42.2	87.5	1.39	13	90
92	Virgin Islands	67.7	32.3	87.5	1.65	5	92
93	Guam	27.5	72.5	93	1.57	8	93
94	Northern Mariana Islands	52.1	47.9	94	1.39	12	94

Source: Federal Judicial Center Civil and Criminal Integrated Database, <https://www.fjc.gov/research/idb>.

Table A-9: Percentage of Overall Terminations that Are Criminal, by District, FYs 2010–2019

Rank	District	Percentage of Caseload Criminal	Rank, Average Civil Jury Trials	Average Civil Jury Trial Rate	Rank, Average Civil Jury Trial Rate	Rank, Average Total Civil Terminations
1	New Mexico	76.3	64	0.93	42	63
2	Guam	72.5	93	1.57	8	93
3	Texas Western	70.8	25	0.76	54	23
4	California Southern	62.8	36	0.70	66	27
5	Arizona	61.7	31.5	0.58	81	18
6	South Dakota	60.2	80.5	1.57	9	87
7	North Dakota	57.1	90	1.07	28	91
8	Texas Southern	54.1	8	0.81	50	11
9	Puerto Rico	51.7	49	1.21	18	60
10	Wyoming	50.8	71	2.75	1	89
11	Nebraska	48.8	65	1.60	7	78
12	Northern Mariana Islands	47.9	94	1.39	12	94
13	Virginia Eastern	42.6	34	0.69	68	25
14	Vermont	42.2	87.5	1.39	13	90
15	Iowa Northern	42.1	80.5	1.04	30	83
16	Georgia Southern	41.7	74	0.63	73	69
17	Utah	41.3	61	0.96	38	61
18	North Carolina Eastern	40.9	76	0.34	93	49
19	Alaska	38.8	92	0.72	63	88
20	Montana	38.7	77	0.95	39	81
21	Iowa Southern	37.3	69	1.17	23	76
22	Tennessee Eastern	36.5	44.5	1.17	22	57
23	Alabama Southern	36.2	84.5	0.63	72	79
24	Hawaii	36.0	82	0.77	53	77
25	Idaho	36.0	72.5	1.25	17	82
26	North Carolina Western	34.8	63	0.99	34	64
27	West Virginia Northern	34.4	91	0.42	90	80
28	Washington Eastern	32.7	83	0.56	84	72
29	Virgin Islands	32.3	87.5	1.65	5	92
30	Tennessee Western	31.7	57.5	1.03	31	62

31	North Carolina Middle	30.0	86	0.37	92	66
32	Georgia Middle	29.9	57.5	0.98	36	59
33	Kansas	29.0	46	0.93	41	48
34	New Hampshire	29.0	75	1.21	19	85
35	Maryland	29.0	21	0.72	60	21
36	Maine	28.3	78	1.15	25	84
37	Kentucky Western	28.0	67	0.69	67	54
38	Oklahoma Western	27.8	48	1.05	29	56
39	Kentucky Eastern	27.6	68	0.61	78	55
40	Missouri Western	25.3	43	0.72	64	40
41	Washington Western	25.2	27.5	0.78	52	28
42	New York Northern	24.6	15	2.01	2	50
43	Missouri Eastern	24.5	31.5	0.92	44	33
44	New York Western	24.1	51.5	0.74	58	45
45	Virginia Western	23.9	56	1.18	21	65
46	Oklahoma Northern	23.7	79	0.74	57	75
47	Oregon	22.9	24	1.17	24	41
48	Illinois Central	22.3	30	1.76	4	58
49	Arkansas Western	22.2	66	1.01	32	67
50	Texas Northern	22.0	13	0.75	55	16
51	South Carolina	21.3	35	0.59	79	20
52	Florida Southern	21.0	5	0.82	49	7
53	Michigan Western	20.9	50	0.87	47	51
54	Wisconsin Eastern	20.4	59.5	0.84	48	53
55	Florida Northern	20.2	54.5	0.74	56	47
56	Texas Eastern	19.8	14	0.99	35	22
57	Mississippi Northern	19.8	62	1.48	11	74
58	Alabama Middle	19.0	70	0.78	51	68
59	Oklahoma Eastern	18.8	89	0.66	70	86
60	Ohio Southern	18.4	42	0.61	77	32
61	Louisiana Middle	17.7	51.5	1.63	6	70
62	Indiana Northern	17.5	59.5	0.70	65	44
63	Mississippi Southern	16.7	27.5	1.26	16	46
64	Nevada	16.5	47	0.53	87	30

65	Pennsylvania Western	16.4	29	0.94	40	36
66	Michigan Eastern	16.3	16	0.69	69	15
67	Wisconsin Western	16.2	44.5	1.89	3	73
68	Connecticut	15.9	18	1.51	10	42
69	Pennsylvania Middle	15.8	20	1.10	26	37
70	Colorado	15.3	10	1.31	15	26
71	Rhode Island	15.0	84.5	0.57	82	71
72	California Eastern	14.9	9	0.88	46	14
73	Alabama Northern	14.9	37	0.73	59	31
74	Ohio Northern	14.9	33	0.56	86	17
75	Florida Middle	14.8	7	0.62	74	6
76	Arkansas Eastern	14.7	26	1.01	33	35
77	Massachusetts	13.9	12	1.20	20	24
78	District of Columbia	13.5	39.5	0.72	62	38
79	Tennessee Middle	13.3	38	0.92	43	43
80	Louisiana Western	13.0	54.5	0.61	76	39
81	Indiana Southern	12.2	53	0.48	88	29
82	New York Southern	12.0	3	0.72	61	4
83	New York Eastern	11.9	6	0.98	37	9
84	Georgia Northern	11.7	19	0.56	85	13
85	Illinois Southern	11.5	23	1.34	14	34
86	California Northern	10.5	11	0.61	75	10
87	California Central	9.9	1	0.66	71	2
88	New Jersey	9.2	17	0.40	91	8
89	Minnesota	9.2	39.5	0.44	89	19
90	Illinois Northern	7.8	2	0.90	45	5
91	Louisiana Eastern	7.0	22	0.57	83	12
92	Delaware	6.2	41	1.09	27	52
93	Pennsylvania Eastern	3.5	4	0.59	80	1
94	West Virginia Southern	2.2	72.5	0.29	94	3

Source: Federal Judicial Center Civil and Criminal Integrated Database, <https://www.fjc.gov/research/idb>.

TAB 13

1161 **13. Pro se e-filing intercommittee project**

1162 See Struve memo behind Tab 13A.

TAB 13A

MEMORANDUM

DATE: March 3, 2023

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Project on self-represented litigants' filing and service

Thank you for the illuminating discussions of this project during the fall 2022 advisory committee meetings. Those discussions generated further topics for investigation. By the time of the spring 2023 advisory committee meetings, I hope to have conducted further interviews that may shed light on some of the factual questions that came up during the fall meetings. Part I of this memo briefly summarizes a number of those questions, which concern increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and service by self-represented litigants on CM/ECF participants. The latter topic – namely, whether it may be desirable to eliminate the rules' requirement for paper service on CM/ECF participants by litigants who lack CM/ECF access – also generated a technical question about how such a change might affect the operation of the “three-day rule” in the rules' time-computation provisions. That query is a facet of a more general question: whether such a change would affect the operation of time periods that are measured after service of a paper. Part II of this memo addresses that question.

A fuller discussion of the self-represented litigants' filing and service project can be found in my August 2022 memo, which was included in the fall 2022 advisory committee agenda books. Under the national electronic-filing rules that took effect in 2018, self-represented litigants presumptively must file non-electronically, but they can file electronically if authorized to do so by court order or local rule.¹ In late 2021, in response to a number of proposals

¹ See Civil Rule 5(d)(3); Appellate Rule 25(a)(2)(B); Bankruptcy Rules 5005(a)(2) and 8011(a)(2)(B); and Criminal Rule 49(b)(3). The Civil, Bankruptcy, and Appellate Rules permit courts – by order or “by a local rule that includes reasonable exceptions” to *require* self-represented litigants to file electronically. By contrast, the Criminal Rule does not authorize a court to *require* electronic filing by a self-represented litigant. See Part I.A.1 of my August 2022 memo.

submitted to the advisory committees,² a cross-committee working group was formed to study whether developments since 2018 provide a reason to alter the rules' approach to e-filing by self-represented litigants. This working group includes the reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules advisory committees as well as attorneys from the Rules Committee Support Office and researchers from the Federal Judicial Center (FJC). The working group's efforts have been informed by a study conducted by Tim Reagan, Carly Giffin, and Roy Germano of the FJC. The final version of the FJC report became available in May 2022.³

I. Topics currently under investigation

Through inquiries between now and the time of the spring meetings, I hope to gather some answers to questions that surfaced during the fall 2022 discussions. Those questions concern three principal topics: access to CM/ECF for self-represented litigants; exempting self-represented litigants from the requirement of separate service on CM/ECF participants; and alternative (non-CM/ECF) modes of electronic access and notice for self-represented litigants.

A. Access to CM/ECF for self-represented litigants

The advisory committees have had varying discussions, so far, concerning the possibility of amending one or more of the national sets of rules to broaden self-represented litigants' access to CM/ECF. The types of potential amendments under discussion would not require the use of CM/ECF by self-represented litigants, but could switch the default rule (that is, provide a presumption of voluntary access to CM/ECF – for non-incarcerated litigants⁴ – unless a court acted to deny such access) or could set a standard for a court's consideration of whether to grant such access.⁵ Participants in the discussions raised a number of concerns that could usefully be investigated by inquiries with selected courts that currently provide broader access to CM/ECF for self-represented litigants.

The inquiries in this regard will focus on how self-represented litigants' access to

² See, e.g., Suggestion No. 21-CV-J (Sai) (proposing adoption of nationwide presumptive permission for self-represented litigants to file electronically); Suggestion No. 20-CV-EE (John Hawkinson) (proposing that if the requirement of permission by court order or local rule is retained, then the national rules could be amended to address the standard for granting permission).

³ See Tim Reagan et al., Federal Courts' Electronic Filing by Pro Se Litigants (FJC 2022), available at <https://www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants> ("FJC Study").

⁴ I will inquire about the courts' approach to incarcerated self-represented filers as well. Based on our study so far, I expect to hear that the courts that grant CM/ECF access to non-incarcerated self-represented litigants typically do not extend that access to incarcerated self-represented litigants.

⁵ As to the latter question, it is worth noting that in a minority of district courts CM/ECF access appears to be flatly unavailable to self-represented litigants – an approach that seems out of step with a majority of the district courts around the country. See FJC Study, *supra* note 3, at 7.

CM/ECF works in the districts that offer it, and perhaps also how it could work in future. For example, how are self-represented litigants identified for CM/ECF purposes, given that they lack attorney ID numbers? How do courts handle CM/ECF docketing errors (e.g., wrong event or wrong case) by self-represented litigants? Does the court require training on use of CM/ECF, and how is that training provided?⁶ Has the clerk's office experienced burdens and/or benefits as a result of CM/ECF access by self-represented litigants? Are inappropriate filings more troublesome when made by a CM/ECF user, especially as compared to paper filings by similarly situated users? Have self-represented litigants inappropriately shared their CM/ECF credentials? Does the version of CM/ECF matter? Is there a possibility for CM/ECF to be set so that a filing could be "gated," that is held for clerk's office review after it is uploaded into CM/ECF and before it is placed into the electronic docket?⁷ What are the options and approaches for handling case-initiating filings (as distinct from filings in a case that has already been opened)? What resources would a court find necessary or useful if it were to permit or expand CM/ECF access for self-represented litigants?

B. Exempting litigants from separate service on CM/ECF participants

As discussed in Part II, a separate question concerns whether to repeal the current rules' requirement that non-CM/ECF users serve CM/ECF users separately from the notice of electronic filing generated after a filing is scanned and uploaded into CM/ECF. Inquiries relating to that topic will focus on the logistics in districts⁸ that have exempted self-represented litigants⁹ from serving CM/ECF participants.

Relevant questions include: How do the self-represented litigants know who is in CM/ECF (and need not be separately served) and who is not in CM/ECF (such that separate service is still required)?¹⁰ Does the exemption only concern service on CM/ECF participants, or

⁶ It would be useful to inquire about training both for self-represented litigants and for attorneys. See, e.g., http://www.cod.uscourts.gov/Portals/0/Documents/CMECF/Required_Reading_for_Electronic_Filing.pdf.

⁷ The FJC Study reports a practice that is somewhat analogous, albeit with respect to case-initiating filings. A number of courts permit attorneys to file complaints via CM/ECF without opening a new case file; the filing goes into a shell case, and the clerk's office then (if appropriate) opens the new case file and transfers the filing into it. See FJC Study, *supra* note 3, at 6.

⁸ Local provisions indicate that these districts include the District of Arizona and the Southern District of New York.

⁹ On this set of issues, the inquiry should focus on both incarcerated and non-incarcerated litigants. Indeed, relief from the burden of making paper service may be particularly important for a litigant who must pay for postage out of a prison account.

¹⁰ Litigants who file via CM/ECF receive a system-generated notice of electronic filing that

does it also extend to service on non-CM/ECF participants who have opted into an electronic-noticing program? Have the courts experienced any downsides to exempting litigants from the separate service requirement? (For example, has the clerk's office experienced any new or additional burden as a result of the change?) Does the fact that a filing is sealed make any difference? Are there any paper filings that do *not* get scanned and uploaded into CM/ECF? (Also, for purposes of comparison, how are filing and service handled when a CM/ECF user files a document under seal?)

A discrete set of questions, for these districts, concerns how they treat time periods measured from service when the service is effected through CM/ECF but the filing was filed other than through CM/ECF. (This, of course, is the topic discussed in Part II of this memo.) Questions include: What is the typical time interval between the time the clerk's office receives a paper filing and the time that the clerk's office (having scanned it) uploads it into CM/ECF? For time periods measured after service, what date is treated as the date of service – the date a paper filing is received by the clerk's office, or the date that the filing is later uploaded into CM/ECF by the clerk's office? If the date of receipt by the clerk's office is used, then (1) how does the recipient know the date of receipt and (2) are an extra three days added to the relevant time period?

C. Alternative (non-CM/ECF) modes of electronic access

This inquiry will seek further data on alternative methods of access for self-represented litigants – both for filing their own papers and for receiving others' filings in the case. Alternative modes of filing include email or portal submissions. A court could also provide a non-CM/ECF user with an alternative means of access to electronic noticing of other litigants' filings.

Inquiries on these topics will include: How have courts used portals or email submissions, and how have they handled virus scanning, file size, and other technical problems? What are the benefits and burdens to the clerk's office of an email or portal submission option for self-represented litigants? Does a litigant who files by email or by uploading to a portal qualify for the timing treatment accorded to electronic filing?¹¹ If the court provides access to

says who is being automatically served and who is not. Paper filers will not receive the notice of electronic filing (unless, perhaps, they are registered for electronic noticing). We have speculated that such filers might instead draw inferences from a party's status as counseled or self-represented, or from the contact information listed on the docket sheet; or they might ask the clerk's office.

11 Under the time-computation rules, those using "electronic filing" presumptively may file up to midnight in the court's time zone, whereas those using "other means" of filing must file before the scheduled closing of the clerk's office. See Bankruptcy Rule 9006(a)(4); Civil Rule 6(a)(4); Criminal Rule 45(a)(4). Appellate Rule 26(a)(4) includes a few more tailored approaches for

electronic noticing, what benefits and challenges has the court encountered with that program?¹²

II. The application of time periods measured from service, when a paper is filed by a non-CM/ECF participant

The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their filings¹³ on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even those that are CM/ECF users.

A review of Civil Rule 5 illustrates the general approach.¹⁴ Civil Rule 5(a)(1) sets the general requirement that litigation papers “must be served on every party.”¹⁵ Civil Rule 5(b)(2)(E) provides that one way to serve a paper is by “sending it to a registered user by filing it with the court’s electronic-filing system.”¹⁶ Civil Rule 5(d)(1)(B) requires a certificate of service for every filing, except that “[n]o certificate of service is required when a paper is served by filing it with the court’s electronic-filing system.”¹⁷

particular filing scenarios, but adopts the same basic idea that electronic filers get the latest deadline – midnight in the relevant time zone.

This feature of the time-computation rules is currently under study. See generally Tim Reagan et al., *Electronic Filing Times in Federal Courts* (FJC 2022), available at <https://www.fjc.gov/content/365889/electronic-filing-times-federal-courts>.

12 Questions could include whether the electronic noticing also provides a means of electronic access to the document that is the subject of the notice, and whether the electronic noticing encompasses both other parties’ filings and also court orders.

13 The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). The discussion here focuses on filings subsequent to the initiation of a case.

14 Bankruptcy Rule 7005 expressly applies Civil Rule 5 to adversary proceedings in a bankruptcy. The footnotes that follow cite provisions in Appellate Rule 25, Bankruptcy Rule 8011 (concerning appeals in bankruptcy cases), and Criminal Rule 49 that are similar to those in Civil Rule 5.

15 See also Appellate Rule 25(b) (“Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review.”); Bankruptcy Rule 8011(b) (“Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal.”); Criminal Rule 49(a)(1) (“Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.”).

16 See also Appellate Rule 25(c)(2)(A); Criminal Rule 49(a)(3)(A).

17 See also Appellate Rule 25(d)(1); Criminal Rule 49(b)(1).

In a case where all parties are represented by counsel,¹⁸ these provisions combine to exempt the litigants from any requirement that they separately serve other litigants; their filings via CM/ECF automatically effect service on all parties. In a case that involves one or more self-represented litigants, however, the situation is more complicated. Service on a self-represented litigant can only be made via CM/ECF if the self-represented litigant is a registered user of CM/ECF – which occurs only if the litigant receives permission (to use CM/ECF) by court order or local rule.¹⁹

As for service by a self-represented, non-CM/ECF-using, litigant on a registered user of CM/ECF, one might argue – as a policy matter – that separate service is just as unnecessary as it is when the filer is a registered user of CM/ECF. Because clerk’s offices routinely scan paper filings and upload them into CM/ECF, registered users will receive a CM/ECF-generated notice of electronic filing each time a paper filing (or a filing submitted by email or via a portal) is uploaded into CM/ECF in one of their cases. However, a number of courts appear to interpret the current rules to require that a person filing by means other than CM/ECF must separately serve the filing, even when the recipient of the filing is a registered user of CM/ECF.²⁰

Accordingly, if the policy judgment is made that non-CM/ECF users should not be required to serve CM/ECF users, it may be desirable to amend the national rules to clarify that they impose no such requirement. My August 2022 memo sketched one possible amendment, using Civil Rule 5 as the illustration.

But during the fall 2022 discussions, we realized that it is necessary to consider how such an amendment would interact with the “three-day rule” in the rules’ time-computation provisions. The “three-day rule” provides a cushion of extra time for deadlines measured after

18 Civil Rule 5(b)(1) presumptively requires that service on a represented party “must be made on the attorney.” See also Appellate Rule 25(b); Criminal Rule 49(a)(2). And Civil Rule 5(d)(3)(A)’s presumptive requirement that “[a] person represented by an attorney must file electronically” guarantees, in practice, that any attorney appearing as counsel of record will be a registered user of CM/ECF. See also Appellate Rule 25(a)(2)(B)(i); Criminal Rule 49(b)(3)(A).

19 See footnote 1 and accompanying text.

20 See, e.g., Pro Se Handbook for Civil Suits, U.S. District Court, Northern District of Texas, § 6 (“If you and the opposing side are both ECF users, the ECF system will complete the service for you, and a Certificate of Service is not required. If either of you is not an ECF user, or if you learn that service sent through ECF did not reach the person, you must serve the document by other means ...”), available at

<https://www.txnd.uscourts.gov/sites/default/files/documents/handbook.pdf>; Electronic Submission For Pro Se Filers, U.S. District Court, Western District of Texas (“Service of pleadings filed in the drop box must be performed by the filing party.”), available at <https://www.txwd.uscourts.gov/filing-without-an-attorney/electronic-filing-for-pro-se/> .

service,²¹ where the service is accomplished through a means that the rulemakers expected to include a time delay. Civil Rule 6(d) illustrates the mechanism:

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

The Rule 5 sketch in the fall 2022 agenda books would not have worked properly with the three-day rule, due to the interaction of two features in that sketch: First, proposed Rule 5(b)(3) would have defined service on a CM/ECF user as “filing” without accounting for the possibility of delay between the paper’s filing²² and its uploading into CM/ECF. And second, Rule 6(d)’s three-day rule would not have applied to service under proposed Rule 5(b)(3), because by Rule 6(d)’s terms the extra three days apply only when service is made under Rules 5(b)(2)(C), (D), or (F). A different way of putting the problem is that, when adjusting what is considered “service,” we need to be aware of how that adjustment affects the operation of time periods measured from the date of service.

Fortunately, there are ways to ensure that a proposed amendment accounts for the timing concerns reflected in the three-day rule. One simple way to do so is to adjust proposed Rule 5(b)(3) so that service via CM/ECF is not complete until the paper is actually in CM/ECF. The sketch that follows takes that approach.

In the course of preparing this memo, I became aware of one other consideration. The fall 2022 Rule 5(b) sketch sought to streamline the rule by redefining service on a CM/ECF user as filing. That still strikes me as the cleanest and simplest approach. But that approach needs to be

21 For such deadlines in the Civil Rules, see, e.g., Rule 11(c)(2) (time for correcting a litigation paper after service of Rule 11 motion); Rule 15(a)(1)(B) (time to amend pleading as of right); Rule 15(a)(3) (time to respond to amended pleading); Rule 33(b)(2) (time to respond to interrogatories); Rule 34(b)(2)(A) (time to respond to request for documents or ESI); Rule 36(a)(3) (time to respond to requests for admission); Rules 38(b)(1) & (c) (time for making jury demand); Rule 59(c) (time to file affidavits in opposition to new trial motion); Rule 68(a) (time to respond to offer of judgment). (This is an illustrative, not exhaustive, list.)

22 Civil Rule 5(d)(2) provides that “[a] paper not filed electronically is filed by *delivering* it: (A) *to the clerk*; or (B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk” (emphasis added). Thus, the clerk’s receipt of the filing, not the clerk’s later upload of the document into CM/ECF, would seem to be defined as the time of “filing” under the current rule.

nanced to account for the fact that certain papers (such as disclosures and discovery requests and responses) are served without being filed.²³ The sketch that follows accounts for this possibility by providing that, where a paper is not filed, service is governed by Rule 5(b)(2).

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service on non-users of electronic-filing [and electronic-noticing] system[s] in General. A paper is served under this rule on [one who has not registered for the court's electronic-filing system] [one who has not registered for either the court's electronic-filing system or a court-provided electronic-noticing system] by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address--in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing--in either of which~~

²³ See Civil Rule 5(d)(1)(A).

events service is complete upon ~~filing or~~ sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing--in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) ~~Using Court Facilities. [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.)]~~ **Service on users of the court’s electronic-filing [or electronic-noticing] system.**

- (A) A paper that must be filed is served under this rule on a registered user of [either] the court’s electronic-filing system [or a court-provided electronic-noticing system] by filing it.
- (B) If the paper is filed via the court’s electronic-filing system, service under Rule 5(b)(3)(A) is complete upon filing.
- (C) If the paper is filed other than via the court’s electronic-filing system, service under Rule 5(b)(3)(A) is complete when the paper is uploaded into²⁴ the court’s electronic-filing system.²⁵
- (D) Service under Rule 5(b)(3)(A) is not effective if the filer learns that it did not reach the person to be served.
- (E) Rule 5(b)(2) governs service of a paper that is not filed.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

* * *

(B) Certificate of Service. No certificate of service is required when a paper is served ~~by filing it with the court’s electronic-filing system~~ under subdivision (b)(3)(A). When a paper

²⁴ “Uploaded into” is used here as a placeholder for the concept, which is that the relevant demarcation should be the point in time when the CM/ECF system generates the notice of electronic filing. It may be useful to consider other possible formulations; “entered in” has been suggested as an alternative.

²⁵ This new provision would remove any need to include this type of service within Rule 6(d)’s three-day rule.

that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

* * *

The sketch above presents one way to lift the requirement of service on CM/ECF users. Other ways doubtless exist, but I present this sketch to illustrate that it is feasible to account for the timing concern that arose during the committees' fall 2022 discussions.

III. Conclusion

This memo presents an interim report. I hope to have further information to share with the advisory committees by the spring meetings. If Part I's list of questions strikes you as incomplete, I welcome suggestions concerning additional questions that we should be asking.

TAB 14

1163 **14. Rule 23**

1164 Two issues have arisen with regard to Rule 23. No current action is occurring, but as an
1165 information item it seems useful to introduce the issues.

1166 First, during the Committee’s October 2022 meeting attention was drawn to the 2-1
1167 decision of a panel of the Eleventh Circuit in *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244
1168 (11th Cir. 2020). The Eleventh Circuit declined to rehear the case en banc, 43 F.4th 1138 (11th
1169 Cir. 2022), and it appears that there are two petitions for certiorari (No. 22-389 and No. 22-517).
1170 A copy of the Eleventh Circuit decision is included in this agenda book.

1171 The Eleventh Circuit majority relied on two 19th century Supreme Court cases – *Internal*
1172 *Imp. Fund Trustees v. Greenough*, 105 U.S. 527 (1881), and *Central R.R. & Banking Co. v.*
1173 *Pettus*, 113 U.S. 116 (1885).

1174 Other courts of appeals have not followed the Eleventh Circuit decision. A recent
1175 illustration is provided by *Murray v. Grocery Delivery E-Services USA, Inc.*, 55 F.4th 340 (1st
1176 Cir. 2022), in an opinion by Judge Kayatta, who is a member of the Standing Committee.
1177 Presented with a challenge to incentive awards for class representatives, the court said (*id.* at
1178 352-53):

1179 Courts have blessed incentive payments for named plaintiffs in class actions for nearly a
1180 half century, despite *Greenough* and *Pettus*. Two of our sister circuits have distinguished
1181 *Greenough* and declined to categorically prohibit incentive payments. *Melito v. Experian*
1182 *Mktg. Sols, Inc.*, 923 F.3d 85, 96 (2d Cir. 2019); *In re Cont’l Ill Sec. Litig.*, 962 F.2d 566,
1183 571-72 (7th Cir. 1992).

1184 The Eleventh Circuit (in somewhat of an about-face) did recently bite on the *Greenough*
1185 argument. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1257 (11th Cir. 2020). It stated
1186 the class-action incentive awards were “roughly analogous” to the payments for personal
1187 services in *Greenough*.

1188 * * *

1189 Rule 23 class actions still require named plaintiffs to bear the brunt of litigation
1190 (document collection, depositions, trial testimony, etc.), which is a burden that could
1191 guarantee a net loss for the named plaintiffs unless somehow fairly shifted to those whose
1192 interests they advance. See *Continental Illinois*, 962 F.2d at 571. In this important
1193 respect, incentive payments remove an impediment to bringing meritorious class actions
1194 and fit snugly into the requirement of Rule 23(e)(2)(D) that the settlement “treats class
1195 members equitably relative to each other.”

1196 Accordingly, we choose to follow the collective wisdom of courts over the past several
1197 decades that have permitted these sorts of incentive payments, rather than create a
1198 categorical rule that refuses to consider the facts of each case.

1199 Other courts have agreed. E.g., *Somogyi v. Freedom Mortg. Corp.*, 495 F.Supp.3d 337,
1200 354 (D.N.J. 2020) (“Until and unless the Supreme Court or the Third Circuit bars incentive

1201 awards or payments to class plaintiffs, they will be approved by this Court if appropriate under
1202 the circumstances.”)

1203 For the present, then, this is a reporting item. It is interesting to see that the First Circuit
1204 opinion relies in part on the 2018 amendment to Rule 23(e)(2)(D), suggesting that perhaps a rule
1205 provision already addresses the issues, at least in part.

1206 The Lawyers for Civil Justice have submitted a proposal to amend Rule 23(b)(3), 22-CV-
1207 L, also included in this agenda book. The proposal is to amend the rule as follows regarding
1208 criteria for certifying 23(b)(3) class actions:

1209 **(3)** The court finds that the questions of law or fact common to class members
1210 predominate over any questions affecting only individual members, and that a class
1211 action is superior to other available methods for fairly and efficiently adjudicating the
1212 controversy or otherwise providing redress or remedy. The matters pertinent to these
1213 findings include:

1214 **(A)** the class members’ interests in individually controlling the prosecution or
1215 defense of separate actions, including the potential for higher value remedies
1216 through individual litigation or arbitration and the potential risk to putative class
1217 members of waiver of claims through class proceedings;

1218 **(B)** the extent and nature of any (i) litigation concerning the controversy already
1219 begun by or against the class members, (ii) government action, or (iii) remedies
1220 otherwise available to putative class members;

1221 **(C)** the desirability or undesirability of concentrating the litigation of the claims in
1222 the particular forum; ~~and~~

1223 **(D)** the likely difficulties in managing a class action-;

1224 **(E)** the relative ease or burden on claimants, including timeliness, of obtaining
1225 redress or remedy pursuant to the other available methods; and

1226 **(F)** the efficiency or inefficiency of the other available methods.

1227 No action is presently proposed on this submission, but it seems worthwhile to provide
1228 some background on prior Advisory Committee experience with Rule 23 amendment proposals.

1229 The class-action rule was extensively amended in 1966, introducing what has been called
1230 the “modern class action.” As the Supreme Court has said, Rule 23(b)(3) was the major addition
1231 to the federal-court class action, and it has proved something of a workhorse since adoption. See
1232 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842-43 (1999) (“the [Advisory] Committee was
1233 consciously retrospective with intent to codify pre-Rule categories under Rule 23(b)(1), not
1234 forward-looking as it was in anticipating innovations under Rule 23(b)(3)”). And during its first
1235 years in operation, Rule 23(b)(3) generated substantial controversy. For discussion, see Arthur
1236 Miller, *Of Frankenstein Monsters and Shining Knights: Myth Reality, and the “Class Action*
1237 *Problem,*” 92 Harv. L. Rev. 664 (1979).

1238 For three decades after 1966, the Advisory Committee proposed no amendments to Rule
1239 23. Then in 1996, it produced a preliminary draft of proposed changes to Rule 23(b)(3), along
1240 with the addition of Rule 23(f) on interlocutory review of class certification decisions. The Rule
1241 23(b)(3) proposals drew very extensive commentary, and eventually all the 23(b)(3) proposals
1242 were withdrawn, though Rule 23(f) went forward.

1243 At the time, the Advisory Committee’s focus shifted from certification standards to class
1244 action procedure. After considerable additional work, that effort produced the 2003 amendments
1245 to the rule, revising the timing of certification decisions under Rule 23(c) and 23(e) and adding
1246 Rule 23(g) (on appointment of class counsel) and Rule 23(h) (on attorney fee awards to class
1247 counsel).

1248 In 2018, further amendments to Rule 23(e) on settlement approval procedures were
1249 added. As noted above, Judge Kayatta invoked one of those when discussing the incentive award
1250 issues.

1251 So returning the focus to certification criteria may present challenges. Much of the
1252 litigation about 23(b)(3) has focused on predominance, and superiority (the focus of this
1253 proposal) has received less attention. At its simplest, superiority might be a way of recognizing
1254 that mass tort personal injury claimants might have a greater interest in controlling their own
1255 claims, as Rule 23(b)(3)(A) suggests, than consumer claimants who may have spent modest
1256 amounts of money for products they have found unsatisfactory.

1257 It seems, however, that this submission is largely focused on consumer type class actions.
1258 To take a leading example cited in the submission, In the Matter of Aqua Dots Products Liability
1259 Litigation, 654 F.3d 748 (7th Cir. 2011), involved a toy consisting of small, brightly colored
1260 beads. Unfortunately, when ingested these beads metabolized into an acid that can induce
1261 nausea, dizziness, unconsciousness, and death. As Judge Easterbrook noted for the Seventh
1262 Circuit, “it was inevitable given the age of the intended audience and the beads’ resemblance to
1263 candy that some would be eaten.”

1264 On learning of the problem, defendant recalled all of the Aqua Dots products, and
1265 honored requests for refunds. More than one million Aqua Dots kits had been sold, and
1266 consumers returned roughly 600,000 of them.

1267 Some purchasers did not ask for refunds and instead filed a class action relying on state
1268 consumer-protection statutes and seeking punitive damages under state law. The district court
1269 denied class certification under Rule 23(b)(3), however, concluding that the recall program
1270 adopted by defendant meant that “the substantial costs of the legal process make a suit inferior to
1271 a recall as a means to set things right.” *Id.* at 751.

1272 Judge Easterbrook observed that “[i]t is hard to quarrel with the district court’s
1273 objective,” emphasizing the costs that proceeding with the class action could entail. *Id.* But the
1274 rule does not permit individual district judges to “prefer their own policies” over what the rule
1275 says. And the alternative to a class action the rule says should be considered is “adjudication” in
1276 another format. “[T]he subsection poses the question whether a single suit would handle the
1277 dispute better than multiple suits. A recall campaign is not a form of ‘adjudication.’” *Id.* at 752.

1278 Though holding that the district court could not decline certification on superiority
1279 grounds, Judge Easterbrook noted as well that “Rule 23 gives a district judge ample authority to
1280 decide whether a class action is the best way to resolve a given dispute.” Id. For example, the
1281 court should have relied on Rule 23(a)(4), because plaintiffs sought “relief that duplicates a
1282 remedy that most buyers already have received, and that remains available to all members of the
1283 putative class.” Id. In addition, plaintiffs’ request for punitive damages under state law could
1284 pose considerable manageability challenges. Id. Moreover, it seemed that individual notice
1285 would be impossible. “The per-buyer costs of identifying the class members and giving notice
1286 would exceed the price of the toys (or any reasonable multiple of that price) leaving nothing to
1287 be distributed.” Id. at 752-53. In short:

1288 The principal effect of class certification, as the district court recognized, would be to
1289 induce the defendants to pay the class’s lawyers enough to make them go away; effectual
1290 relief for consumers is unlikely. (Id. at 753.)

1291 On these grounds, the court affirmed denial of certification, while also rejecting the district
1292 court’s reliance on superiority.

1293 The submission urges that the current rule’s focus only on the alternative of adjudication
1294 “stifles courts’ discretion” (submission at 4) and prevents judges from fulfilling their duty to
1295 protect the class. (Submission at 5) “Courts should be allowed to consider whether a company’s
1296 policy of curing a customer’s complaints is superior to what can be achieved with the proposed
1297 class action.” (Submission at 8) It also rejects the Rule 23(a)(4) “work-around” employed by
1298 Judge Easterbrook. (Submission at 10-11)

1299 It may be that the time has come to return the Committee’s attention to certification
1300 criteria. But pursuing this idea may raise considerable difficulties as well. It may be that the
1301 situation in *Aqua Dots* was particularly clear – more than half the items sold had already been
1302 returned. One might speculate that the prospect of a class action might have been one stimulus
1303 behind defendant’s aggressive efforts to satisfy potential class members by alternative means.

1304 The amendment proposal would ask a judge to compare what the defendant offered with
1305 what the class action might produce. Since most class actions result in settlements, that might
1306 seem to ask the judge to engage in the sort of careful analysis of the proposed alternative non-
1307 litigation “solution” that would be needed under Rule 23(e) to approve a settlement offering the
1308 same thing. Yet settlement approval is often timely only after considerable litigation activity has
1309 occurred. (True, class certification activity also often follows much litigation activity.)

1310 Under Rule 23(e), class members are entitled to notice of the proposed settlement and an
1311 opportunity to object or to opt out. Presumably, accepting the defendant’s non-litigation solution
1312 could be viewed as a form of opt out. But when called upon to make a determination about
1313 whether a proposed settlement is fair, reasonable, and adequate a judge is likely to have
1314 significantly more information than would be available to a judge making a decision early in the
1315 litigation that the defendant’s proposed solution is “fair, reasonable, and adequate.” Should the
1316 judge decline to endorse the non-litigation route only after a significant proportion of the
1317 potential class members (50%, perhaps) had opted for what defendant was offering?

1318 Another feature of the amendment is that it also asks the judge to consider the alternative
1319 of “government action.” There is considerable academic literature showing that action by
1320 government (for example, the SEC) often produces much smaller remedies, measured in dollars,
1321 than private class actions. Trying to guess whether government action would be a suitable
1322 substitute for a class action could pose another major challenge for the judge. Suppose, for
1323 example, that the governmental enforcement agency potentially involved told the court “We
1324 favor allowing the class action go forward.” Is the judge to disregard that governmental view?

1325 The general question of courts deferring to private resolutions is sometimes controversial.
1326 Consider, for example, the controversy surrounding “class action waivers” in arbitration
1327 agreements. Should arbitration be considered one of the alternatives a judge might find superior
1328 to a Rule 23(b)(3) class action? The submission does say: “Outside of Rule 23, courts have
1329 recognized at least one method of out-of-court resolution – arbitration – as ‘adjudication.’”
1330 (Submission at 4 n.14) Perhaps, then, a court could decline to certify under Rule 23(b)(3) based
1331 on a finding that arbitration would be superior to in-court resolution. Perhaps a court could do so
1332 even though there was no right to proceed on a class-wide basis in the arbitral proceeding. That
1333 idea seems to be picked up by addition to Rule 23(b)(3)(A) of arbitration as an alternative that
1334 the court should take into account in deciding whether to certify under Rule 23(b)(3).

1335 For the present, these issues are not ripe for immediate action, and this report is purely
1336 informational. Reactions from Committee members would be useful and welcome.

1337

TAB 14A



22-CV-L

**RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES**

**A SUPERIOR DEFINITION OF SUPERIORITY: REMOVING RULE 23(b)(3)’S BAN
AGAINST CONSIDERING NON-LITIGATION SOLUTIONS WHEN DECIDING
WHETHER A CLASS ACTION IS “SUPERIOR TO OTHER AVAILABLE METHODS”**

September 2, 2022

Lawyers for Civil Justice (“LCJ”)¹ respectfully submits this Rules Suggestion to the Advisory Committee on Civil Rules (“Committee”).

I. INTRODUCTION

Rule 23(b)(3) requires courts considering class certification motions to determine whether “a class action is *superior* to other available methods for fairly and efficiently *adjudicating* the controversy.”² According to the Committee Notes, this “superiority” requirement is intended to help ensure that “a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”³ Unfortunately, the superiority requirement frequently fails to serve this purpose—and even thwarts it—because the word “adjudicating” is often interpreted to prohibit courts from weighing a class action against non-litigation “other available methods” that provide quick and effective redress to putative class members—such as refunds, warranties, customer care programs, remediation, private claim resolution, and consent judgments. Ignoring these options can lead courts to certify class actions that not only fail to protect class members, but actually hurt them by delaying remedies and reducing plaintiffs’ recovery due to litigation costs and attorneys’ fees. Such cases also waste judicial resources, discourage companies from taking swift remedial action, and overburden the courts. Numerous published opinions reflect courts’ frustration that Rule 23(b)(3) prevents a full and complete

¹ Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

² Fed. R. Civ. P. 23(b)(3) (emphasis added). A court also must find that the requirements of Rule 23(a) are satisfied and the predominance requirement is met.

³ Fed. R. Civ. P. 23, 1966 Committee Note.

determination of whether a particular class action is in fact “superior to other available methods.” Some courts are resorting to rule gymnastics to conduct this analysis under Rule 32(a)(4)’s “adequacy” requirement, but this approach should not be necessary. The Committee should amend Rule 23(b)(3) to include consideration of all “other available methods”—whether in or out of court—for resolving the potential class claims as part of determining superiority. A suggested amendment is attached.

II. RULE 23(b)(3) AND THE COMMITTEE NOTES ARE WIDELY INTERPRETED TO PRECLUDE COURTS FROM CONSIDERING NON-LITIGATION REMEDIES WHEN DETERMINING WHETHER CLASS LITIGATION IS “SUPERIOR TO OTHER AVAILABLE METHODS”—SPURRING A CALL TO RULE MAKERS

Some courts presiding over class actions—including class actions that would provide no added value to class members—have held that, because Rule 23(b)(3) speaks of other methods of “adjudicating,” the rule prohibits judges from considering remedies already available to putative class members outside of litigation. For example, in *Aqua Dots*⁴—a consumer class action involving a defective toy—the Seventh Circuit held that the language of Rule 23(b)(3) did not permit the District Court to compare the defendant’s voluntary recall and refund program to the class action litigation device. While stating that he had no “quarrel with the district court’s objective” of avoiding duplicative litigation, Judge Easterbrook wrote that the participants in the rulemaking process—including the Committee—did not use the word adjudication “loosely to mean all ways to redress injuries,” but rather drafted Rule 23(b)(3) “with the legal understanding of ‘adjudication’ in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits.”⁵ In other words, because the defendant’s voluntary recall and refund program did not involve or result from an “adjudication” by a court, it could not be considered in the court’s analysis of whether “a class action is superior to other available methods for fairly and efficiently *adjudicating* the controversy.”⁶

Similarly, in *Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*,⁷ the Third Circuit found that the Rule 23(b)(3) superiority requirement “focus[es] on the question whether one suit is preferable to several,” and that “the rule was not intended to weigh the superiority of a class action against possible administrative relief.... We find no suggestion in the language of Rule 23, or in the committee notes, that the value of a class suit as a superior form of action was to be weighed against the advantages of an administrative remedy.”⁸

⁴ *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748 (2011).

⁵ *Id.* at 751-52.

⁶ *Id.* at 752 (emphasis added).

⁷ 478 F.2d 540 (3d Cir. 1973).

⁸ *Id.* at 579; *see also de Lacour v. Colgate-Palmolive Co.*, 338 F.R.D. 324, 346 (S.D.N.Y. 2021) (“Rule 23...was drafted with the legal understanding of adjudication in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits.”) (internal quotation marks omitted); *Bruzek v. Husky Oil Ops. Ltd.*, 520 F. Supp. 3d 1079, 1099 (W.D. Wis. 2021) (following *Aqua Dots*, and refusing to consider defendant’s reimbursement program as an “adjudication”); *Martin v. Monsanto Co.*, No. EDCV162168JFW(SP), 2017 WL 1115167, at *9 (C.D. Cal. Mar. 24, 2017) (“pursuant to the plain language of Fed. R. Civ. P. 23(b)(3), [t]he analysis is whether the class action format is superior to other methods of adjudication, not whether a class action is superior

The constraints of this common interpretation of Rule 23(b)(3) have created such “uneasiness” that at least one court has raised a “call to the Rulemakers.” In *In re Hannaford Brothers Co. Customer Data Security Breach Litigation*,⁹ the court understood that the defendant had already reimbursed its customers for the cost of replacing their credit cards after a data theft incident,¹⁰ and noted the defendant’s view that its program “afford[s] class members a comparable or even better remedy than they could hope to achieve in court.”¹¹ Nevertheless, the court refused to consider the program because it was not an “adjudication”:

[As] much as I too favor parties being able to resolve their controversies without expensive litigation, I observe that Rule 23(b)(3) does not address superiority as a matter of abstract economic choice analysis, but asks if a class action is “superior to other available methods for fairly and efficiently *adjudicating* the controversy”—*i.e.*, other possible adjudication methods such as individual lawsuits or a consolidated lawsuit.... [Defendant] Hannaford may or may not have a good program to satisfy aggrieved customers, but [] the Hannaford program is not relevant to my superiority determination under the class certification decision.¹²

In arriving at this conclusion, the Court noted that the language of the Rule compelled an outcome that failed to fulfill the policy goals of Rule 23.

[T]he recovery of generous fees for plaintiffs’ attorneys and large cy pres awards with little money going to actual class members call[s] into question the integrity of the class action process for resolving lawsuits.

* * *

to an out-of-court, private settlement program”) (quoting *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 610 (E.D. La. 2006)); *Allen v. Hyland’s Inc.*, 300 F.R.D. 643, 672 (C.D. Cal. 2014) (citing *Aqua Dots* with approval in concluding that defendant’s refund program did not constitute “superior method for ‘adjudicating’ the controversy”); *Githieya v. Global Tel*Link Corp.*, No. 1:15-cv-0986-AT, 2020 WL 12948011, at *11 (N.D. Ga. Nov. 30, 2020) (same); *Dean v. Colgate-Palmolive Co.*, No. EDCV 15-00107 JGB, 2018 WL 6265003, at *10 (C.D. Cal. Mar. 8, 2018) (in “close issue,” finding superiority despite preexisting corporate return policy because definition of “‘adjudication’... does not include non-legal forms of adjudication such as a recall campaign, or presumably, a money-back guarantee”), *aff’d*, 772 F. App’x 561 (9th Cir. 2018); *Korolshteyn v. Costco Wholesale Corp.*, No. 3:15-cv-709-CAB-RBB, 2017 WL 1020391, at *8 (S.D. Cal. Mar. 16, 2017) (finding superiority despite preexisting refund program because refund was not “adjudication”); *Melgar v. Zicam LLC*, No. 2:14-CV-00160-MCE-AC, 2016 WL 1267870, at *6 (E.D. Cal. Mar. 31, 2016) (finding that Defendants’ refund program was not superior because “it does not comport with the plain language of Rule 23”); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 415 (S.D.N.Y. 2015) (“[a]s an initial matter, the Court is not convinced non-adjudicative forms of redress may even be considered under Rule 23(b)(3)’s superiority analysis,” citing to use of word “adjudication”); *Forcellati v. Hyland’s, Inc.*, No. 12-1983-GHK (MRWx), 2014 WL 1410264, at *12 (C.D. Cal. Apr. 9, 2014) (finding superiority despite preexisting refund program because Rule 23 “directs courts to consider other available methods of *adjudication*”); *Jovel v. Boiron Inc.*, No. 2:11-CV-10803-SVW-SH, 2013 WL 12162440, at *5 (C.D. Cal. Mar. 28, 2013) (“[T]he Court shares Plaintiff’s doubt that such a private refund program even constitutes an alternative form of ‘adjudication.’”).

⁹ 293 F.R.D. 21 (D. Me. 2013).

¹⁰ *Id.* at 34.

¹¹ *Id.*

¹² *Id.* at 34-35.

[M]y concern here that this is a *de minimis* class action where virtually no one will bother to make a claim and that any recovery will serve solely the lawyers (and perhaps some modest measure of corporate deterrence) ***present[s] questions for those who write the class action rules*** and for Congress, not for this individual judge applying the language of the Rule.

* * *

Although reasonable people can certainly maintain that as a matter of policy other solutions are preferable to litigation, I do not see how that argument has a place in the class certification decision under the current Rule.¹³

As these cases reflect, the term “adjudicating” in Rule 23(b)(3) not only stifles courts’ discretion over the scope of their legal analysis, but also results in holdings that do not promote the best interests of class members and are contrary to the Committee’s stated policy of ensuring “economies of time, effort, and expense ... without sacrificing procedural fairness or bringing about other undesirable results.”¹⁴

The evidence indicates that the Committee did not necessarily intend for Courts to construe the term “adjudication” so narrowly. Indeed, the Committee Notes do not even use the term “adjudication.” In discussing the purpose of the superiority requirement in the 1966 amendments, the Committee noted that the court is to consider whether “*another method of handling* the litigious situation may be available which has greater practical advantages.”¹⁵ The Committee further noted that the purpose of the superiority requirement is “[t]o reinforce the point that the court with the aid of the parties ought to assess the relative advantages of *alternative procedures for handling the total controversy*.”¹⁶ A leading treatise elaborates:

The rule requires the court to find that the objectives of the class-action procedure really will be achieved in the particular case. In determining whether the answer to this inquiry is to be affirmative, the court initially must consider what other procedures, if any, exist for disposing of the dispute before it. The court must compare the possible alternatives to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court. It then must compare the possible alternatives

¹³ *Id.* at 26, 29, 34–35 (emphasis added).

¹⁴ Outside of Rule 23, courts have recognized at least one method of out-of-court resolution—arbitration— as “adjudication.” *See, e.g., St. Anthony Hosp. v. Eagleson*, 40 F.4th 492, 515 (7th Cir. 2022) (referring to “claim-by-claim adjudication” through arbitration); *Uniformed Fire Officers Ass’n v. Blasio*, 846 Fed.Appx. 25, 30 (2d Cir. 2021) (referring to “adjudication of [unions’] claims in arbitration”); *State v. United States*, 986 F.3d 618, 629 (6th Cir. 2021) (examining whether party “consented to adjudication before the federal arbitration panels”); *Tyler v. U.S. Dept. of Educ. Rehab. Servs. Admin.*, 904 F.3d 1167, 1184 (10th Cir. 2018) (discussing “agency adjudications” before the Federal Maritime Commission). Moreover, longstanding definitions of “adjudication” have broadly included an application of law to facts—but not necessarily by a judge in a court of law. *See, e.g., BENJAMIN W. POPE, LEGAL DEFINITIONS (1919–2015)* (defining “adjudication” as “[a]n application of the law to the facts and an authoritative declaration of result”).

¹⁵ Fed. R. Civ. P. 23, 1966 Committee Note (emphasis added).

¹⁶ *Id.* (emphasis added).

to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court.¹⁷

By hampering courts' ability to conduct this fulsome evaluation of alternatives for resolution, the "adjudication" language in Rule 23(b)(3) undermines the Rule's purpose of avoiding prejudice to class members.

III. RULE 23(B)(3), AS CURRENTLY WRITTEN, IS PREVENTING JUDGES FROM FULFILLING THEIR DUTY TO PROTECT THE CLASS BY LIMITING CONSIDERATION OF "OTHER AVAILABLE METHODS" ONLY TO IN-COURT PROCEDURES FOR "ADJUDICATING."

Rule 23 gives judges a broad responsibility to ensure fairness to class members. As the Committee Notes explain, the core of that duty is ensuring that the action delivers a meaningful result for class members, including when a court reviews a proposed settlement ("[t]he relief that the settlement is expected to provide to class members is a central concern"¹⁸) and when it determines attorneys' fees ("[o]ne fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members"¹⁹). This duty is highly important at the certification stage as well—arguably even more so given the high stakes of the certification decision.²⁰

¹⁷ CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1779 (3d ed. 1998) (footnotes omitted). Indeed, closer to the enactment of the 1966 amendments, at least one court—the 9th Circuit—did not strictly interpret the "adjudication" language. *See, e.g., Kamm v. Calif. City Dev't Co.*, 509 F.2d 205, 212 (1975) (where California Attorney General and Real Estate Commissioner had already reached settlement in state court requiring defendant to provide restitution to purchasers, federal class action not "superior" for several reasons: "(1) A class action would require a substantial expenditure of judicial time which would largely duplicate and possibly to some extent negate the work on the state level ... (3) Significant relief had been realized in the state action ... (7) Defending a class action would prove costly to the defendants and duplicate in part the work expended over a considerable period of time in the state action. These factors as a whole support the conclusion of the district court that the class action was not a superior method of resolving the controversy.")

¹⁸ Fed. R. Civ. P. 23, 2018 Committee Note.

¹⁹ Fed. R. Civ. P. 23, 2003 Committee Note.

²⁰ Once a class action is certified, it almost always settles. *See* Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 Cornell L. Rev. 1105, 1138 (2010) ("Settlements, not trials, have long comprised the dominant endgame for class actions . . ."); *see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC*, 31 F.4th 651, 685 (9th Cir. 2022) (*en banc*) (Lee, J., dissenting) ("If trials these days are rare, class action trials are almost extinct."), *pet. for cert. filed sub. nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc.*, No. 22-131 (U.S. Aug. 10, 2022). Certified class actions almost always end in settlement because of the potential exposure and uncertainty of a class action verdict. *Id.* (Lee, J., dissenting) ("If a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses."). The leverage created once a class is certified can "so increase the defendant's potential damages liability and litigation costs that [it] may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), superseded by rule on another ground as stated in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail").

Many courts have recognized that their responsibility to class members includes protecting them from class actions that add little if any value—or even cause them harm.²¹ This is especially true when available non-adjudicative remedies already provide class members with full and timely redress, and where litigation would delay recovery, impose significant court costs and attorneys’ fees, and consume judicial resources. As one court put it, class members, if asked, “would not choose to litigate a multiyear class action just to procure refunds that are readily available here and now.”²²

Cases driven by attorneys’ fees frequently fall in this category of no-value-added cases that harm rather than help class members. For example, in *Conrad v. Boiron, Inc.*²³—a consumer fraud case arising out of a homeopathic flu remedy where a refund was already available and label changes were already made—the court emphasized that “it is hard to see how the proposed class action benefits anyone but the attorneys who filed it” and observed that “[c]lass actions driven by attorney’s fees are notoriously troublesome.” Similarly, in considering a class action settlement in *In re Walgreen Co. Stockholder Litig.*,²⁴ the Seventh Circuit wrote that “[t]he type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket.... [A] class action that seeks only worthless benefits for the class should be dismissed out of hand.”). Indeed, there are many class actions where the result does not justify the attorneys’ fees²⁵—particularly when the remedy sought is already provided through out-of-court means. Courts have an obligation to protect class members from such

²¹ The idea that the Rule prohibits consideration of alternative methods has given rise to the further step, taken by some plaintiffs’ class action lawyers, of asking courts to *prohibit* defendants from informing consumers of a remedy outside of class action litigation, no matter how agreeable and efficient. See, e.g., *In re Apple Inc. Device Perf. Litig.*, No. 18-md-02827-EJD, 2018 WL 4998142, at *6 (N.D. Cal. Oct. 15, 2018) (plaintiffs in phone battery class action sought order prohibiting Apple’s battery-replacement program unless Apple notified recipients of class action); *Tolmasoff v. Gen. Motors, Inc.*, No. 16-11747, 2018 WL 3548219, at *2 (E.D. Mich. June 30, 2016) (plaintiff in fuel economy class action sought order preventing General Motors from notifying potential class members of reimbursement program); *Craft v. N. Seattle Comm. Coll. Found.*, No. 3:07-CV-132(CDL), 2009 WL 424266, at *1-2 (M.D. Ga. Feb. 18, 2009) (plaintiff in fee overcharge class action sought protective order preventing defendant from issuing refund checks to potential class members). Even if the voluntary remedy is permitted, plaintiffs’ counsel have encouraged their clients to *not* obtain repairs under their warranties, to forego relief available from a company’s voluntary programs, and to refuse to trade in their used vehicles, because doing so would undermine the lawyer’s theory of the class action case and their ultimate financial recovery. See, e.g., *Leonard v. Abbott Labs., Inc.*, 2012 WL 764199, at *26-27 (E.D.N.Y. Mar. 5, 2012) (noting plaintiff avoided recall program in order to bring class action).

²² *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012).

²³ 86 F.3d 536 (7th Cir. 2017).

²⁴ 832 F.3d 718, 724 (7th Cir. 2016).

²⁵ See, e.g., *Briseno v. Henderson*, 998 F.3d 1014, 1019, 1023 (9th Cir. 2021) (cautioning against approving settlements “when counsel receives a disproportionate distribution of the settlement”; in this case, “[c]lass counsel will receive seven times more money than the class members” and the “injunction touted by an expert as worth tens of millions of dollars appear worthless”); *Redman v. RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) (holding that, in assessing the reasonableness of the attorney’s fee in a proposed settlement, “the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation”); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 938 (9th Cir. 2011) (holding that class counsel should not have been awarded eight times the value of what the class received in the form of *cy pres* awards; “the disparity between the value of the class recovery and class counsel’s compensation raises at least an inference of unfairness, and [] the current record does not adequately dispel the possibility that class counsel bargained away a benefit to the class in exchange for their own interests”).

cases, and should not feel compelled by the Rules to certify them without understanding the class members' full panoply of options for resolution and remedy.

Of course, attorneys' fees are not the only costs of class actions.²⁶ Class actions—before any decision on the merits is ever made—require notice and administration, which can cost hundreds of thousands of dollars. Although such costs are often a necessary component to class actions and due process, they are unnecessary and therefore harmful when the class members already have a remedy outside of litigation. For example, in *Aqua Dots*, the putative class action involved an allegedly defective toy kit already subject to a broad recall and refund program. The Seventh Circuit observed that the class “[n]otice may well cost more, per kit, than the kits’ retail price—and could be ineffectual at any price, since most purchases were anonymous.”²⁷ The Court reasoned that, especially where a recall, refund, or reimbursement program has already been “widely publicized,” there is no need to “bear these costs a second time.”²⁸ This is particularly true where the product at issue is sold at a low price because any compensation to a class member would also be low. As the *Conrad* court observed, “[t]he combination of low-value claims and small class size is likely to make this another case in which ‘high transaction costs (notice and attorneys’ fees)’ will leave class members with a negligible award.”²⁹

Finally, redundant and duplicative litigation not only harms class members—it also takes a toll on the judiciary and defendants as well. Then-Circuit Judge Gorsuch recognized this a decade ago in a case where the court found moot a claim seeking notice and an equitable refund for repairs because an automaker had offered a voluntary recall (through NHTSA) for the same alleged defect.³⁰ As Judge Gorsuch explained for the Tenth Circuit, “affording a judicial remedy on top of one already promised by a coordinate branch risks needless inter-branch disputes over the execution of the remedial process[,] the duplicative expenditure of finite public resources[, and] ... the entirely unwanted consequence of discouraging other branches from seeking to resolve disputes pending in court.”³¹ Certifying a class action would discourage manufacturers from initiating recalls and add transaction costs, with only the lawyers—and not the consumers—benefiting from the additional “labor[ing] on through certification, summary judgment, and beyond.”³² Courts should not be constrained by Rule 23’s “adjudication” language from understanding and expressly considering these dynamics at the certification stage.

²⁶ See *In re Aqua Dots*, 654 F.3d at 751 (“The transactions costs of a class action include not only lawyers’ fees but also giving notice under Rule 23(c)(2)(B).”).

²⁷ *Id.*

²⁸ *Id.*

²⁹ 869 F.3d at 540.

³⁰ See *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208 (10th Cir. 2012).

³¹ *Id.* at 1211. See also *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1019 (7th Cir. 2002) (“Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of uninjured buyers for dealing with consumer products that are said to be failure-prone.”).

³² *Id.*

IV. FREQUENTLY, NON-JUDICIAL REMEDIES ARE AVAILABLE THAT PROVIDE FASTER, MORE COMPLETE RELIEF THAN THE PROPOSED CLASS ACTION

Putative class members often have access to direct, more efficient redress that is at least equal to and, in many cases, better than, the remedy that a class action can provide. Consumers frequently obtain redress through warranties, refund policies, remediation, voluntary recalls, free software patches or updates, and private claim resolution. These programs provide timely and efficient remedies directly to the customer. Automatic software updates provide quicker relief to impacted consumers than protracted litigation, and recall programs do not require potentially injured customers to split their refunds with attorneys.

Courts should be allowed to consider whether a company's policy of curing a customer's complaints is superior to what can be achieved with the proposed class litigation, which even in the best dockets will dramatically slow resolution as compared to the relief provided through the company's voluntary policies and programs.

In addition to voluntary refund and reimbursement programs put in place by manufacturers and retailers, consumers also often obtain relief from agency administrative action faster and with fewer transaction costs than class litigation,³³ including action by the FDA,³⁴ NHTSA,³⁵ CPSC, DOT, or State Attorneys General. For example, automotive manufacturers are required to notify the federal regulator, the National Highway Transportation Safety Administration (NHTSA), of safety-related defects within five days, and NHTSA publicly announces all field actions in a timely manner. NHTSA has statutory authority to order recalls to cure defects.

Yet many class actions are tagalong suits that follow such administrative actions but do not add value to class members. For example, putative class actions were filed after KB Homes entered a settlement with the Florida Attorney General that provided repairs and refunds to homeowners.³⁶ Similar class actions are routinely filed on behalf of car owners following a recall that provides for repair and compensation.³⁷ Not only do these suits typically fail to provide any added value to class members, but they harm consumers by delaying and reducing their remedies while also punishing the companies that provide meaningful alternative measures by burdening them with multiple redundant lawsuits.

³³ For government-supervised relief, there are concerns about “duplicat[ing] the[] efforts” of the government agency. *Winzler*, 681 F.3d at 1211.

³⁴ See, e.g., *In re Family Dollar Stores, Inc., Pest Infestation Litig.*, MDL No. 3032, 2022 WL 2129050, at *1 (J.P.M.L. June 2, 2022) (consolidating class actions filed in wake of FDA recall); *Coffelt v. Kroger Co.*, No. EDCV 16-1471 JGB (KKx), 2017 WL 10543343, at *2 (C.D. Cal. Jan. 27, 2017) (class action alleging overpayment for contaminated vegetables followed FDA investigation and subsequent recall).

³⁵ See, e.g., *Cohen v. Subaru of Am., Inc.*, No. 1:20-cv-08442-JHR-AMD, 2022 WL 714795, at *2 (D.N.J. Mar. 10, 2022) (class actions filed in wake of NHTSA-approved recalls of fuel pumps); *Zakikhani v. Hyundai Motor Corp.*, No. 8:20-cv-01584-SB (JDEx), 2022 WL 1740034, at *1-2 (C.D. Cal. Jan. 25, 2022) (class action filed in wake of NHTSA-approved recall of ABS systems).

³⁶ See, e.g., <https://topclassactions.com/lawsuit-settlements/closed-settlements/florida-kb-home-class-action-settlement/> (9/2/2016 announcement of stucco settlement); <https://www.clickorlando.com/news/2017/11/11/35-lawsuits-filed-against-kb-home-in-orlando/> (11/2017 discussion of raising same claims).

³⁷ <https://topclassactions.com/lawsuit-settlements/consumer-products/auto-news/vehicle-safety-defect-class-action-lawsuit-investigation/>

Non-“adjudication” alternatives often expedite remedies to class members while saving considerable transaction costs, including attorneys’ fees. Allowing judicial consideration of voluntary remedies at the certification stage places the incentives where they should be: on encouraging relief to class members in the quickest, most cost-effective and robust way.

V. CLASS MEMBERS’ PREFERENCE FOR NON-JUDICIAL REMEDIES IS DEMONSTRATED BY LOW PARTICIPATION RATES IN CLASS ACTION SETTLEMENTS

Objective evidence—consumer participation rates in class action settlements—demonstrates that class actions are often not the superior mechanism for delivering relief from an alleged injury. Two Jones Day white papers³⁸ examining claims rates in federal class action settlements³⁹ of cases containing allegations of consumer fraud found that: “(i) only a small fraction of class members receive any monetary benefit at all from the settlements; (ii) class counsel are often given very large attorneys’ fee awards even when class members receive little to no monetary recovery; and (iii) in claims-made settlements, class members as a whole receive on average only 23 percent of the settlement amount, with the remainder being consumed by attorneys’ fees, expenses, or cy pres distributions....”⁴⁰ Jones Day found that “the average participation rate in such settlements was only 4.91 percent and the median participation rate was only 3.90 percent” among settlements in which class members were required to submit a claim form, with only two cases with a claim rate of higher than 15 percent.⁴¹

The Federal Trade Commission’s data on claims rates is similar. In 2019, the FTC published a study of 149 class-action settlements from the years 2013–2015 that covered several types of consumer class actions, including privacy, defective products, debt collection, and banking practices.⁴² The study considered various aspects of class action settlement effectiveness, and found that even when direct notice of settlement is provided, claims rates are surprisingly low. The FTC reported that the median overall claims rate (across all industries and direct notice types) was 9 percent, and that the mean claims rate was 4 percent.⁴³ These findings are

³⁸ Jones Day, *Update: An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019–2020)* (July 2021) (“2021 Jones Day White Paper Update”), [https://www.jonesday.com/en/insights/2021/07/update-an-empirical-analysis-of-federal-consumer-fraud-class-action-settlements-\(20192020\)](https://www.jonesday.com/en/insights/2021/07/update-an-empirical-analysis-of-federal-consumer-fraud-class-action-settlements-(20192020)); Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)* (April 2020) (“2020 Jones Day White Paper”), <https://www.jonesday.com/en/insights/2020/04/empirical-analysis-consumer-fraud-class-action>.

³⁹ A total of 141 settlements were reviewed as an initial data set across the two White Papers, out of which 60 contained sufficient data to support the analysis.

⁴⁰ 2020 Jones Day White Paper at Cover page. The 2021 Jones Day White Paper Update reported that for settlements between 2019-2020, class members received only 30% of the total settlement amount in claims-made settlements. (2021 Jones Day White Paper Update at 1).

⁴¹ 2021 Jones Day White Paper Update at 1. The participation rate range is consistent when compared with the 2020 Jones Day White Paper, which found the only 6.99% of class members submitted a claim to participate in settlements, with a median participation rate of 3.40%, and only four cases having a claims rate higher than 15%. See 2020 Jones Day White Paper at 1.

⁴² FTC Staff Report, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns 10, 12* (Sept. 2019) (“FTC Notice Study”), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf

⁴³ *Id.* at 27. While the FTC ultimately made various recommendations to improve notice understandability and comprehension, it also noted that “several of these results suggest respondents may view class action settlement notices with skepticism.” *Id.* at 2.

corroborated by Jones Day, which found that, in cases with direct notice to consumers of settlements, the average claim rate from 2010 to 2020 was 8.32 percent, and the median was 4.45 percent.⁴⁴

These numbers reflect, at least in part, class members' lack of interest in class action lawsuits that force them to wait years for a remedy that they could have accessed immediately and that ultimately turns out to be severely diminished by litigation costs. Single-digit claims rates provide good reason for courts, at the certification stage, to consider whether a class action is "superior to other available methods" including money-back guarantees, product warranties, programs agreed to with regulators, remediation, and other customer satisfaction programs or government actions that offer consumers a direct, quick, and easy remedy.

These low claim rates also serve as a reason that simply relying on the named plaintiff's ability to opt out does not adequately protect the class members. At least one court has rejected concerns that many class members' "interests are better served otherwise (as by an individual lawsuit or by applying for a refund from [the defendant])," by stating that class members "are free to opt out" of the class action.⁴⁵ Although such a result might be appropriate to the facts of a particular case, the Committee should not rely on class members' ability to opt out as the reason not to fix Rule 23(b)(3)'s bar against judges' considering the class members' options before deciding whether to certify a class. That is, in the face of single-digit claim rates for those class members who *do not* opt out, the Committee should not conclude that the rule barring judges from considering non-litigation remedies as part of the superiority analysis is justified because class members can read the class notice and opt out if they prefer a no-questions-asked return policy to class litigation.

VI. JUDGES WHO WANT TO CONSIDER "AVAILABLE METHODS" OTHER THAN LITIGATION SHOULD NOT BE FORCED TO PERFORM RULE GYMNASTICS UNDER RULE 23(a)(4)'S "ADEQUACY" REQUIREMENT

Some judges who want to protect classes by considering non-litigation remedies when considering whether a class action is superior are getting around the "adjudication" problem by re-fashioning the "superiority" question to fit within Rule 23(a)(4)'s "adequacy" requirement. For example, the *Aqua Dots* court—after rejecting the district court's denial of class certification under the superiority test—upheld the denial of class certification on the grounds of adequacy of representation because "[a] representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on

⁴⁴ 2021 Jones Day White Paper Update at 4-5. This White Paper noted that one of the takeaways from low claims appears to be that "many class members may not consider themselves to have been injured" and "potential class members are simply uninterested in participating in settlements that promise only miniscule awards." *Id.* at 5. *See also id.* ("When potential awards are as low as \$0.60 per product purchased . . . the opportunity costs of participating may be too high. Where potential class members must locate proof of purchase, even where proof (such as receipts) may be available, the time required to locate that proof of purchase may be seen as far outweighing the sometimes-paltry awards. What is more, some manufacturers may already offer a money-back guarantee program, providing a full refund to dissatisfied customers. Many consumers may see this as a superior means of addressing their concerns, as they prefer to receive a refund by contacting the manufacturer directly rather than participate in a class action where relief may be delayed or less than a full refund.").

⁴⁵ *In re Hannaford*, 293 F.R.D. at 34-35. The court's holding reflects that "adequacy" is an ill-fitting test. *Id.* ("regardless of whether Hannaford customers are better advised to apply directly to Hannaford to reimburse the fees they paid, I find that the named plaintiffs are adequate under the language of the Rule").

offer is not adequately protecting the class members' interests."⁴⁶ Other courts have followed suit. In *Waller v. Hewlett-Packard Co.*,⁴⁷ the court denied class certification based on the "adequacy" of the named plaintiff because the named plaintiff "isn't fairly and adequately protecting the class's interests under Rule 23(a)(4) by pursuing litigation to obtain a restitution remedy that is already on offer in the form of the software update." Similar reasoning led the court in *Conrad*⁴⁸ to deny certification on adequacy grounds because "the remedies already in place for disappointed [] customers undermine [plaintiff's] ability to show that he can bring any significant extra value to the absentee class members." And in *Doster Lighting, Inc. v. E-Conolight, LLC*,⁴⁹ the court denied certification of a class action—where the defendant had already admitted the problem with its LED light bulbs, redesigned the bulbs, and offered a comprehensive refund and replacement program—due in part to the adequacy of the named plaintiff, who decided to pursue "litigation rather than a remedy already available for replacement or refund."⁵⁰

Despite the apparent logic of these holdings, the Committee should not conclude that the "adequacy" element is an appropriate work-around for the "adjudication"/superiority problem. Adequacy should remain a separate inquiry. Courts generally consider two questions in determining whether the class representative and class counsel are adequate: (1) do they have conflicts of interest with other class members, and (2) will they "prosecute the action vigorously on behalf of the class?"⁵¹ Adequacy thus focuses on the class representative and class counsel, not on the potential remedy.⁵² One court has found that denying class certification because non-litigation remedies render a class representative inadequate amounts to a conclusion that *no* class representative or counsel would be adequate to represent the alleged class. The *In re Hannaford Bros.* court explained that "[a] named plaintiff can represent a class *only* by filing a lawsuit; that is what the Federal Rules of Civil Procedure (and Rule 23 in particular) are for."⁵³ Starting from that premise, the court held that a plaintiff is "hardly [an] adequate representative[] of a class by *not* filing a lawsuit, because then they are not class representatives at all!"⁵⁴ Similarly, in *In re Scotts EZ Seed Litig.*, the court declined to hold that lead plaintiffs were inadequate representatives because they chose to litigate rather than take advantage of Scotts' "No Quibble Guarantee" refund program. "There are reasons a rational purchaser might choose litigation over a refund," the court stated, "including the availability of statutory and/or punitive damages."⁵⁵

⁴⁶ *In re Aqua Dots*, 654 F.3d at 752.

⁴⁷ 295 F.R.D. 472, 490 (S.D. Cal. 2013).

⁴⁸ 869 F.3d at 541.

⁴⁹ No. 12-C-0023, 2015 WL 3776491 (E.D. Wis. June 17, 2015).

⁵⁰ *Id.* at *8.

⁵¹ *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. LaBranche & Co.*, 220 F.R.D. 395, 413 (S.D.N.Y. 2004).

⁵² *See In re Scotts EZ Seed Litig.*, 304 F.R.D. at 405-07 (in determining adequacy, considering only whether there is a conflict between class members and named plaintiffs, the named plaintiffs' participation in discovery, and qualifications of class counsel).

⁵³ 293 F.R.D. at 29; *see also id.* at 26, 34-35.

⁵⁴ *Id.* at 29.

⁵⁵ 304 F.R.D. 397, 407 n.5, 415.

Thus, it is not sufficient to rely on the “adequacy” prong of Rule 23(a)(4) to solve the “adjudication” problem.⁵⁶ The Committee instead should disentangle these questions by amending Rule 23(b)(3) to make clear that courts may consider the superiority of the class action to “other available methods” separate from adequacy of class representation.

VII. CONCLUSION

Courts evaluating “superiority” under Rule 23(b)(3) should have the discretion to consider all “other available methods” of providing remedies to putative class members, whether or not that remedy results from an in-court “adjudication.” Allowing this discretion via express language in the rule would be consistent with the purpose of Rule 23, which is to ensure that a proposed class action is the superior avenue for protecting class members and resolving parties’ disputes, and would promote judicial efficiency and encourage companies to take swift, effective remedial efforts when there is an issue to address. The current language of the rule leads courts reluctantly to certify class actions that harm class members when other available methods for resolving disputes are superior.

The Committee should amend Rule 23(b)(3) along the lines of the attached suggestion to remove what is interpreted as a prohibition on courts’ consideration, at the certification stage, of whether available non-litigation alternatives offer class members more efficient and complete remedies than the proposed class litigation. Such an amendment would help judges meet their duty to protect the class, avoid needless drain on judicial resources, encourage the efficient administration of justice, and incentivize defendants to provide full and timely relief to consumers. Prohibiting judges from considering other means of redress leads to class action litigation that fails to protect class members, taxes judicial resources, delays access to remedies, and drives up the costs for those remedies, ultimately harming claimants and courts alike. Where non-“adjudication” alternatives provide faster, robust, and well-publicized remedies that are directly available to consumers, courts should be allowed to evaluate those alternatives—without performing rule gymnastics—when determining whether a class action is the superior method of resolving a particular dispute.

⁵⁶ Some courts deal with the “adjudication” problem by simply ignoring it. In *Berley v. Dreyfus & Co.*, 43 F.R.D. 397, 398-99 (S.D.N.Y. 1967), for example, the court recognized that although a defendant’s refund program was not an “adjudication,” the “broad policy of economy in the use of society’s difference-settling machinery” promotes “avoid[ing] creating lawsuits where none previously existed.” The *Berley* court ultimately denied certification based on superiority given the already-in-place refund program. *Id.* at 399. Similar findings were made in *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012), where the court held that “a class action is not a superior method” because there was a voluntary recall and refund program available. See also *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 699 (N.D. Ga. 2008) (class action did not meet superiority requirements because, in part, defendant had instituted a full refund program); *Webb v. Carter’s, Inc.*, 272 F.R.D. 489, 505 (C.D. Cal. 2011) (class actions were not superior because the defendant “already offers the very remedy sought in this suit” by “allow[ing] consumers to obtain refunds for the garments, even without a receipt, and reimburs[ing] consumers for out-of-pocket medical costs for treating skin irritation resulting from the tagless labels”); *Daigle v. Ford Motor Co.*, No. 09-3214, 2012 U.S. Dist. LEXIS 106172, at *14 (D. Minn. July 31, 2012) (Ford’s voluntary safety recall and refund provides the class with the relief it seeks and a class action is therefore not a superior method of adjudication); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (when a refund and recall program are already established “[i]t makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress”).

Suggestion for Rule 23 “Superiority” Amendment

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy or otherwise providing redress or remedy. The matters pertinent to these findings include:

(A) the class members’ interests in individually controlling the prosecution or defense of separate actions, including the potential for higher value remedies through individual litigation or arbitration and the potential risk to putative class members of waiver of claims through class proceedings;

(B) the extent and nature of any (i) litigation concerning the controversy already begun by or against class members, (ii) government action, or (iii) remedies otherwise available to putative class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; ~~and~~

(D) the likely difficulties in managing a class action; ~~and~~

(E) the relative ease or burden on claimants, including timeliness, of obtaining redress or remedy pursuant to the other available methods; and

(F) the efficiency or inefficiency of the other available methods.

TAB 14B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12344

D.C. Docket No. 9:17-cv-80393-RLR

CHARLES T. JOHNSON,
on behalf of himself and others
similarly situated,

Plaintiff-Appellee,

JENNA DICKENSON,

Interested Party - Appellant,

versus

NPAS SOLUTIONS, LLC,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 17, 2020)

Before MARTIN, NEWSOM, and BALDOCK,* Circuit Judges.

NEWSOM, Circuit Judge:

The class-action settlement that underlies this appeal is just like so many others that have come before it. And in a way, that’s exactly the problem. We find that, in approving the settlement here, the district court repeated several errors that, while clear to us, have become commonplace in everyday class-action practice.

First, the district court set a schedule that required class members to file any objection to the settlement—including any objection pertaining to attorneys’ fees—more than two weeks before class counsel had filed their fee petition. In so doing, we hold, the court violated the plain terms of Federal Rule of Civil Procedure 23(h).

Second, in approving the settlement, the district court awarded the class representative a \$6,000 “[i]ncentive [p]ayment,” as “acknowledgment of his role in prosecuting th[e] case on behalf of the [c]lass [m]embers.” In so doing, we conclude, the court ignored on-point Supreme Court precedent prohibiting such awards.

Finally, in approving class counsel’s fee request, overruling objections, and approving the parties’ settlement, the district court made no findings or

* Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

conclusions that might facilitate appellate review; instead, it offered only rote, boilerplate pronouncements (“approved,” “overruled,” etc.). In so doing, we hold that the court violated the Federal Rules of Civil Procedure and our precedents requiring courts to explain their class-related decisions.

We don’t necessarily fault the district court—it handled the class-action settlement here in pretty much exactly the same way that hundreds of courts before it have handled similar settlements. But familiarity breeds inattention, and it falls to us to correct the errors in the case before us. We will reverse in part, vacate in part, and remand for further proceedings.

I

This case began in March 2017, when Charles Johnson—on behalf of both himself and a putative class of similarly situated individuals—sued NPAS Solutions, LLC in the U.S. District Court for the Southern District of Florida, alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227. As relevant here, the TCPA makes it unlawful to “us[e] any automatic telephone dialing system” to call a person without his or her “prior express consent,” *id.* § 227(b)(1)(A); it also provides for statutory damages of “\$500 . . . for each . . . violation” and authorizes up to treble damages against anyone who “willfully or knowingly violate[s]” the law, *id.* § 227(b)(3). Johnson claimed that NPAS—an entity that collects medical debts—had used an automatic telephone-

dialing system to call his cell phone without his consent. In particular, Johnson challenged NPAS's practice of calling "wrong number[s]"—*i.e.*, phone numbers that had originally belonged to consenting debtors but had been reassigned to non-consenting persons.

The case quickly proceeded to the settlement phase. After some preliminary discovery and motions practice, the parties jointly filed a notice of settlement on November 2—less than eight months after Johnson had filed suit. Not long thereafter, Johnson moved to certify the class for settlement purposes; he argued that settlement was in the class members' best interest because, despite NPAS's possible defenses, he had obtained a meaningful recovery of \$1,432,000.

On December 4, the district court preliminarily approved the settlement and certified the class for settlement purposes.¹ The court appointed Johnson as the class representative and his lawyers as class counsel, and its order stated that Johnson could "petition the Court to receive an amount not to exceed \$6,000 as acknowledgment of his role in prosecuting this case on behalf of the class members." The district court set March 19, 2018 as the deadline for class members to opt out of the settlement and, more importantly for our purposes, to

¹ The defined class comprised "[a]ll persons in the United States who (a) received calls from NPAS Solutions, LLC between March 28, 2013 and [December 4, 2017] that (b) were directed to a phone number assigned to a cellular telephone service, (c) for which NPAS Solutions' records contain a 'WN' designation, and (d) were placed using an automatic telephone dialing system." NPAS acknowledged that 179,642 phone numbers fell within that class.

file objections to the settlement. The court set April 6, 2018—18 days after the opt-out/objection deadline—as the date by which Johnson and NPAS had to submit their motion for final approval of the settlement and their responses to objections, and (more importantly) by which class counsel had to submit their petition for attorneys’ fees and costs.

The following month, class members were notified about the settlement and informed that NPAS would establish a settlement fund, that class counsel would seek attorneys’ fees amounting to 30% of the fund, and that Johnson would seek a \$6,000 incentive award from the fund. In total, 9,543 class members submitted claims for recovery.

When the objection deadline of March 19 arrived, no class member opted out, and only one objected to the settlement—Jenna Dickenson, our appellant. As a procedural matter, Dickenson challenged the district court’s decision to set the objection deadline before the deadline for class counsel to file their attorneys’-fee petition, which she contended violated Federal Rule of Civil Procedure 23 and the Due Process Clause. On the merits, Dickenson (1) objected to the amount of the settlement, arguing that it should have been higher; (2) argued that the court should conduct a lodestar calculation in determining reasonable attorneys’ fees; and (3) contended that Johnson’s \$6,000 incentive award both contravened the Supreme Court’s decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and

Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885), and created a conflict of interest between Johnson and other class members.

On the parties' April 6 filing deadline, Johnson and NPAS opposed Dickenson's objection and urged the district court to approve the settlement as fair, reasonable, and adequate. Johnson also filed a motion for final approval of the settlement and requested attorneys' fees, costs and expenses of the litigation, as well as an incentive award, all of which he said were reasonable and in line with the amounts approved in similar settlements.

About a month later, the district court held a final fairness hearing. After class counsel, NPAS, and Dickenson had presented their arguments, the district court announced its intention to approve the settlement. The court explained that it "ha[d] carefully considered all of the submissions before the Court," including Dickenson's objection. The court stated that it was "going to overrule that objection, but nevertheless appreciate[d] the argument [Dickenson's] counsel ha[d] made."

The same day, the district court entered a brief, seven-page order approving the settlement. The court's evaluation of the fairness of the settlement consisted of the following sentence:

The Court finds that the settlement of this action, on the terms and conditions set forth in the Settlement Agreement, is in all respects fundamentally fair, reasonable, adequate, and in the best interest of the class members, when considering, in their totality, the following

factors: (1) the absence of any fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the Plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement.

Dist. Ct. Order at 4 (citing *Leverso v. SouthTrust Bank of Ala.*, 18 F.3d 1527, 1530 (11th Cir. 1994)).

The order specified that NPAS would create a non-reversionary \$1,432,000 settlement fund, from which the following would be deducted before class members received any payout: (1) costs and expenses disbursed in administering the settlement and providing notice to the class; (2) attorneys' fees in the amount of 30% of the fund (or \$429,600), as well as \$3,475.52 for class counsel's litigation costs and expenses; and (3) a \$6,000 "[i]ncentive [p]ayment" to Johnson, "as acknowledgment of his role in prosecuting this case on behalf of the [c]lass [m]embers." *Id.* at 5. After subtracting out those deductions, each of the potential 179,642 class members stood to receive only \$7.97. (Happily, because only 9,543 class members submitted claims, each stands to receive a whopping \$79.) The district court's order provided no analysis to accompany its approval of the attorneys'-fee percentage or the incentive award. The order also stated, without further explanation, that "[t]he objection of Jenna Dickenson is OVERRULED." *Id.*

This is Dickenson’s appeal.

II

Dickenson raises several challenges—three, as we categorize them—to the district court’s approval of the settlement. First, she contends that the district court erred when it required class members to file objections to the settlement—including to attorneys’ fees—before class counsel had filed their fee petition. Second, she insists that the district court’s approval of Johnson’s \$6,000 incentive award contravenes Supreme Court precedent. Finally, and more broadly, she maintains that the district court didn’t provide sufficient explanation to enable meaningful appellate review—either in awarding attorneys’ fees, in overruling her objections, or in determining that the settlement was fair. We consider Dickenson’s arguments in turn.²

A

1

Dickenson’s first challenge is procedural. In its order preliminarily

² “In reviewing the validity of a class action settlement, a district court’s decision will be overturned only upon a clear showing of abuse of discretion.” *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). A district court’s decision to award attorneys’ fees is also reviewed for abuse of discretion, although “that standard of review allows us to closely scrutinize questions of law decided by the district court in reaching the fee award.” *Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d 768, 770 (11th Cir. 1991). “A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in [reaching its decision], or makes findings of fact that are clearly erroneous.” *Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1282 (11th Cir. 2011) (alteration in original) (quotation omitted).

approving the settlement, certifying the class, and establishing a schedule, the district court required class members to file any objection to the settlement—including any objection pertaining to attorneys’ fees—by March 19, 2018. In the same order, the district court gave class counsel until April 6 to file their fee petition—eighteen days *after* class members’ objections were due. Dickenson contends that by ordering the deadlines in this manner, the district court inhibited her from objecting to the fee request, in violation of Federal Rule of Civil Procedure 23(h) and the Due Process Clause. As relevant here, Rule 23(h) provides as follows:

In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement. The following procedures apply:

(1) A claim for an award must be made by motion . . . at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

Fed. R. Civ. P. 23(h).³

We hold that Rule 23(h)’s plain language requires a district court to sequence filings such that class counsel file and serve their attorneys’-fee motion

³ While we generally review a district court’s approval of a settlement for abuse of discretion, “[i]nterpreting the Federal Rules of Civil Procedure presents a question of law subject to *de novo* review.” *Burns v. Lawther*, 53 F.3d 1237, 1240 (11th Cir. 1995).

before any objection pertaining to fees is due. By its terms, the Rule not only authorizes attorneys’-fee awards but also goes on to specify that “[n]otice” of any attorneys’-fee motion must be “directed to class members in a reasonable manner,” and then to state that a class member may “object *to the motion*.” *Id.* (emphasis added). As one treatise has explained, “[t]he logical extension of the class members’ right to object to class counsel’s fee request is that the fee petition itself must be filed prior to the class members’ objection deadline, particularly given the ease with which the petition papers can be made available to the class.” William B. Rubenstein, *5 Newberg on Class Actions* § 15:13 (5th ed. 2020).

Johnson asks us to disregard Rule 23(h)’s clear terms. He says that class members were adequately informed by the class *notice*, which preceded the objection deadline and which stated that class counsel planned to seek a 30% fee. But “[t]he plain text of the rule requires that any class member be allowed an opportunity to object to the fee ‘motion’ itself, not merely to the preliminary notice that such a motion will be filed.” *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993–94 (9th Cir. 2010); *see also* Fed. R. Civ. P. 23(h)(2), Advisory Committee Note to 2003 Amendment (“In setting the date objections are due, the

court should provide sufficient time *after the full fee motion is on file* to enable potential objectors to examine the motion.” (emphasis added).⁴

Reading Rule 23(h) in accordance with its plain text also happens to make good practical sense in at least two respects. First, it ensures that class members have full information when considering—and, should they choose to do so, objecting to—a fee request. While class members may learn from a class notice the all-in amount that counsel plan to request, they would be “handicapped in objecting” based on the notice alone because only the later-filed fee *motion* will include “the details of class counsel’s hours and expenses” and “the rationale . . . offered for the fee request.” *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014); *see also Mercury*, 618 F.3d at 994 (“Allowing class members an opportunity thoroughly to examine counsel’s fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members.”); *Keil v. Lopez*, 862 F.3d 685, 705 (8th Cir. 2017) (raising similar concerns).

Second, a plain-language reading of Rule 23(h) ensures that the district court is presented with a fee petition that has been tested by the adversarial process.

While, in theory, class counsel act as fiduciaries for the class as a whole, once a

⁴ *See Horenkamp v. Van Winkle and Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005) (explaining that, while “not binding,” Advisory Committee Notes “are nearly universally accorded great weight in interpreting federal rules” (quotation omitted)).

class action reaches the fee-setting stage, “plaintiffs’ counsel’s understandable interest in getting paid the most for its work representing the class” comes into conflict “with the class’ interest in securing the largest possible recovery for its members.” *Mercury*, 618 F.3d at 994. Accordingly, “the district court must assume the role of fiduciary for the class plaintiffs” and “ensure that the class is afforded the opportunity to represent its own best interests.” *Id.* (quotation omitted). The district court cannot properly play its fiduciary role unless—as in litigation generally—class counsel’s fee petition has been fully and fairly vetted.

For all these reasons, we have no difficulty concluding that by requiring class members to object to an award of attorneys’ fees before class counsel had filed their fee petition, the district court violated Rule 23(h).⁵

⁵ In so holding, we have plenty of company. At least three other circuits have reached this conclusion explicitly, *see, e.g., Keil*, 862 F.3d at 705 (holding “that the district court erred by setting the deadline for objections on a date before the deadline for class counsel to file their fee motion”); *Redman*, 768 F.3d at 637–38 (holding that class counsel’s filing of an attorneys’-fee motion “after the deadline set by the court for objections to the settlement had expired” violated Rule 23(h) and stating that “[t]here was no excuse for permitting so irregular, indeed unlawful, a procedure”); *Mercury*, 618 F.3d at 993 (“We hold that the district court abused its discretion when it erred as a matter of law by misapplying Rule 23(h) in setting the objection deadline for class members on a date before the deadline for lead counsel to file their fee motion.”), and at least one has suggested as much in dicta, *see In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 446 (3d Cir. 2016), *as amended* (May 2, 2016) (stating that the court “ha[d] little trouble agreeing that Rule 23(h) is violated in th[e] circumstances” presented in *Redman* and *Mercury*).

2

The more difficult question is whether, in the circumstances of this case, the district court’s Rule 23(h) error was harmless. Unsurprisingly, the parties disagree. Johnson contends that class members were advised in the class notice that counsel would seek a 30% award and, further, that Dickenson wasn’t totally prevented from objecting—not only did she submit written objections before the fee petition was filed, but she also presented oral objections afterwards, at the fairness hearing. For her part, Dickenson responds that the error can’t be deemed harmless because the district court didn’t allow for supplemental briefing after the Rule 23(h) violation was brought to its attention, “gave no serious consideration to the objections that [she] filed,” and further, that “other unnamed class members” might have offered “additional cogent arguments that [she] did not.” Reply Br. of Appellant at 5–6.

Although we haven’t yet applied the harmless-error doctrine to a Rule 23(h) violation, at least one other circuit has. In *Keil*, the Eighth Circuit held that a similar Rule 23(h) error was harmless because “there [wa]s no reasonable probability that it affected the outcome of the proceeding”—in particular, it said, “even if class members had an opportunity to object to the fee motion, there [wa]s no reasonable probability that their objections would have resulted in the court awarding a lower fee.” 862 F.3d at 705–06. The court explained that the objectors

“had an ample opportunity on appeal to respond to the specific arguments contained within class counsel’s fee motion” and “[d]espite raising a number of objections, none of their arguments [were] meritorious.” *Id.* at 705.

The *Keil* court’s analysis mirrors how we ordinarily conduct harmless-error review—that is, by asking whether the complaining party’s substantial rights have been affected. *See, e.g., Vista Mktg., LLC v. Burkett*, 812 F.3d 954, 979 (11th Cir. 2016) (explaining that “the challenging party must establish that the error affected substantial rights to obtain reversal and a new trial”); *see also* 28 U.S.C. § 2111 (“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”).⁶ We have explained that errors “affect a substantial right of a party if they have a ‘substantial influence’ on the outcome of a case or leave ‘grave doubt’ as to whether they affected the outcome of a case.” *United States v. Frazier*, 387 F.3d 1244, 1266 n.20 (11th Cir.

⁶ Additionally, Federal Rule of Civil Procedure 61 states: “Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.” Although Rule 61 “in a narrow sense . . . applies only to the district courts, it is well-settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61.” *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (citation omitted); *see also id.* (explaining that “Congress has further reinforced the application of Rule 61 by enacting the harmless error statute, 28 U.S.C. § 2111, which applies directly to appellate courts and which incorporates the same principle as that found in Rule 61”).

2004) (en banc) (quoting *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946)).

In a similar context, we have held that if a district court’s misapplication of a Federal Rule doesn’t deny a party the opportunity to present arguments that would have changed the outcome, the error is harmless. In *Restigouche, Inc. v. Town of Jupiter*, we considered a district court’s potential violation of Federal Rule of Civil Procedure 56(c), which at the time required that “the non-moving party must be given 10-day advance notice that a summary judgment motion will be taken under advisement.” 59 F.3d 1208, 1213 (11th Cir. 1995). We emphasized, though, that the non-moving party there “had ample opportunity to marshal facts and arguments, and d[id] not assert on appeal that there exist[ed] additional evidence . . . which would create material issues of fact.” *Id.* “Because [the non-moving party] ha[d] not been deprived of the opportunity to present facts or arguments which would have precluded summary judgment,” we held that “any violation of the 10-day notice rule [wa]s harmless.” *Id.*

For similar reasons, we conclude that although the district court here violated Rule 23(h), its error was harmless. While a Rule 23(h) error can undoubtedly “handicap[]” class members who oppose an attorneys’-fee award—because, without the fee petition itself, they lack the requisite information to formulate a compelling objection, *see Redman*, 768 F.3d at 638—it doesn’t appear

that such harm materialized here. Before class counsel filed their fee petition, Dickenson lodged a detailed objection to the attorneys’-fee award, challenging it on several grounds, including (1) that the district court should conduct a lodestar analysis and (2) that Johnson’s incentive award was prohibited by law and otherwise excessive. Then, at the fairness hearing—having had an opportunity to review the fee petition—Dickenson’s counsel reiterated her objection but didn’t raise any new arguments. Even now, on appeal—with the benefit of time to consider the fee petition even more carefully—Dickenson’s objections remain essentially the same. Given the consistency of Dickenson’s position in response to class counsel’s attorneys’-fee request—both before and after receipt of their fee petition—we can’t see how she was “deprived of the opportunity to present” additional objections. *Restigouche*, 59 F.3d at 1213; *cf. Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that a “notice error” was harmless because the respondent “ha[d] not explained to the Veterans Court, to the Federal Circuit, or to us how the notice error to which he points could have made any difference”); Rubenstein, *supra*, § 15:13 (stating that “failure to comply with fee notice procedures does not automatically require reversal” and that “[a]bsent some prejudice to the objectors, notice failure is considered harmless error and generally excused”).

To be sure, Dickenson argues that “[s]he had no way of knowing what rationale or record class counsel would offer as a basis for their motion, let alone any way to frame an objection responsive to their application.” Br. of Appellant at 24. The problem, it seems to us, is that by the time of the fairness hearing—let alone proceedings in this Court—she knew exactly class counsel’s “rationale [and] record,” and yet she hasn’t offered any new arguments in opposition to their fee request. Because Dickenson makes essentially the same arguments before us that she did when filing her written pre-petition objection, we cannot conclude that the district court’s procedural error was harmful—*i.e.*, that it “affected the outcome of the proceeding.” *Keil*, 862 F.3d at 705.⁷

B

Dickenson next challenges the district court’s approval of a \$6,000 “[i]ncentive [p]ayment” to Johnson as the class representative. She contends that

⁷ Dickenson separately argues that the district court’s actions in setting the deadlines violated her due-process rights. We can’t imagine (and Dickenson hasn’t explained) how the Due Process Clause would be any more protective of her right to be heard than our interpretation of Rule 23. In any event, we needn’t address the precise interaction between Rule 23 and due-process requirements here because there was no due-process violation. “Due process requires notice ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). Under the circumstances presented here, the notice provided to class members—although insufficient to satisfy Rule 23(h)—informed class members the percentage of the fund that class counsel would seek and, in fact, enabled Dickenson to file an objection. Although Dickenson wasn’t given the opportunity to submit another *written* filing after class counsel filed their fee petition, her lawyer appeared at the fairness hearing and presented her objections to the settlement and fee request. It seems to us that Dickenson received the baseline notice and opportunity to be heard that due process requires.

the Supreme Court’s decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), prohibit incentive awards like Johnson’s and, more generally, that the award creates a conflict of interest between Johnson and the other class members. In short, we agree with Dickenson that Supreme Court precedent prohibits incentive awards like the one earmarked for Johnson here. To explain why, we will (1) review *Greenough* and *Pettus*, (2) demonstrate their application to modern-day incentive awards, and (3) respond to Johnson’s counterarguments.

1

Greenough and *Pettus* are the seminal cases establishing the rule—applicable in so many class-action cases, including this one—that attorneys’ fees can be paid from a “common fund.” *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“Since the decisions in [*Greenough*] and [*Pettus*], this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”). Importantly for our purposes, *Greenough* and *Pettus* also establish limits on the types of awards that attorneys and litigants may recover from the fund. Because of their significance to our decision—and because they seem to have been largely overlooked in modern class-action practice—we will explain the cases in some detail.

First, and most importantly, *Greenough*. In that case, Francis Vose, who held bonds of the Florida Railroad Company, sued the trustees of the Internal Improvement Fund of Florida (and others) on behalf of himself and other bondholders. *Greenough*, 105 U.S. at 528. Vose argued “that the trustees were wasting and destroying the fund by selling at nominal prices” land that had been earmarked to service the bonds that he and the other bondholders held. *Id.* at 528–29. He was successful. After “[t]he litigation was carried on with great vigor and at much expense, . . . a large amount of the trust fund was secured and saved.” *Id.* at 529. As a result, “a considerable amount of money was realized, and dividends [were] made amongst the bondholders, most of whom came in and took the benefit of the litigation.” *Id.* Vose “bore the whole burden of this litigation” himself, and he “advanced most of the expenses which were necessary for the purpose of rendering it effective and successful.” *Id.* Accordingly, he filed a petition seeking “an allowance out of the fund” to cover “his expenses and services.” *Id.*

A special master recommended that Vose be granted an award from the fund. First, the master recommended that Vose receive an award for “necessary expenditures,” including what amounted to attorneys’ fees and litigation expenses. *Id.* at 530 (“fees of solicitors and counsel,” “costs of court,” “sundry small incidental items for copying records and the like,” “sundry fees paid in maintaining other suits in New York,” fees paid in appealing to the Supreme Court, “attorneys’

fees for resisting fraudulent coupons,” and “expenses paid to attorneys and agents to investigate fraudulent grants of the trust lands”). Second, and separately, the master “reported in favor of an allowance to Vose for his personal services and expenditures”—in particular, “an allowance of \$2,500 a year for ten years of personal services” and reimbursement for Vose’s “personal expenditures” for “railroad fares and hotel bills.” *Id.*

The lower court approved the master’s recommendations in the main, “allowing generally the fees of the officers of the court, and those of the attorneys and solicitors employed in the cause, including charges as between attorney and client,” as well as “sundry expenses for looking after and reclaiming the trust lands.” *Id.* at 531. The court also approved an award “for the personal expenses and services of Vose.” *Id.* The court disallowed, however, “certain fees paid to advisory counsel and other items not directly connected with the suit.” *Id.*

On appeal, the Supreme Court approved of some of the payments to Vose but disapproved of others. It held that it was proper for the lower court to reimburse Vose for “his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund.” *Id.* at 537. The Court explained that Vose had sued on “behalf of the other bondholders having an equal interest in the fund,” who “ha[d] come in and participated in the benefits resulting from his proceedings.” *Id.* at 532. “There is

no doubt,” the Court said, that Vose “expended a large amount of money for which no allowance has been made” and that he gave “his time for years almost exclusively to the pursuit” of the action. *Id.* If Vose wasn’t compensated out of the fund for these expenses, the Court explained, the other bondholders would be unjustly enriched. *See id.*

Importantly for our analysis of modern-day incentive awards, however, the Court went on to hold that “there [was] one class of allowances” that was “decidedly objectionable”—namely, “those made for [Vose’s] personal services and private expenses.” *Id.* at 537. The Court explained that “[t]he reasons which apply to his expenditures incurred in carrying on the suit, and reclaiming the property subject to the trust”—*i.e.*, those that it approved—“do not apply to his personal services and private expenses.” *Id.* The Court reasoned that while there might be reasons to award *trustees* “for their personal services”—*e.g.*, “to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee”—such “considerations have no application to the case of a creditor seeking his rights in a judicial proceeding.” *Id.* at 537–38. In the case of a creditor, like Vose, “the allowance of a salary for [his] time and . . . [his] private expenses” in carrying on litigation “would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of

creditors.” *Id.* at 538. The Court thus concluded that “[s]uch an allowance has neither reason nor authority for its support.” *Id.*

To sum up, then, the Supreme Court in *Greenough* upheld Vose’s award of attorneys’ fees and litigation expenses but rejected as without legal basis the award for his “personal services and private expenses”—in particular, the yearly salary and reimbursement for the money he spent on railroad fares and hotel bills.

Pettus came just three years later. In some respects, *Pettus* broke new ground. We have described *Pettus*, for instance, as “the first Supreme Court case recognizing that attorneys”—as distinct from the lead plaintiff—“had a claim to fees payable out of a common fund which has been created through their efforts,” and noted that, in *Pettus*, “a fee was awarded based upon a percentage of the fund recovered for the class.” *Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991). But as relevant to our analysis of incentive awards, *Pettus* is significant principally as a reiteration of the dichotomy drawn in *Greenough*: While a class representative’s claim for “the expenses incurred in carrying on the suit and reclaiming the property subject to the trust” is proper, his “claim to be compensated, out of the fund or property recovered, for his personal services and private expenses” is “unsupported by reason or authority.” *Pettus*, 113 U.S. at 122.

2

We take the rule of *Greenough*, confirmed by *Pettus*, to be fairly clear: A plaintiff suing on behalf of a class can be reimbursed for attorneys’ fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses. It seems to us that the modern-day incentive award for a class representative is roughly analogous to a salary—in *Greenough*’s terms, payment for “personal services.” See, e.g., *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 468 (10th Cir. 2017) (“[C]ourts regularly give incentive awards to compensate named plaintiffs for the work they performed—their time and effort invested in the case.”); *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015) (similar); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (similar).

If anything, we think that modern-day incentive awards present even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*. Incentive awards are intended not only to compensate class representatives for their time (*i.e.*, as a salary), but also to promote litigation by providing a prize to be won (*i.e.*, as a bounty). As our sister circuits have described them—even while giving them general approval—incentive awards are designed “to induce [a class representative] to participate in the suit,” *Matter of Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992), *as amended on denial of*

reh'g (May 22, 1992), and “to make up for financial or reputational risk undertaken in bringing the action” and “to recognize [a class representative’s] willingness to act as a private attorney general,” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009); *see also, e.g., Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003) (explaining that “applications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain”).⁸

The incentive award that Johnson seeks, it seems to us, is part salary and part bounty. Class counsel’s fee petition asserted that Johnson was entitled to the \$6,000 incentive payment because he “took critical steps to protect the interests of the class, and spent considerable time pursuing their claims”—*e.g.*, by “frequently communicat[ing] with his counsel,” “ke[eping] himself apprised of th[e] matter,” “approving drafts before filing,” and “respond[ing] to NPAS Solutions’ discovery

⁸ So far as we can tell, the only circuit to have directly confronted whether *Greenough* and *Pettus* prohibit incentive awards summarily dismissed the cases as “inapposite” because they presented a different “factual setting[.]” *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir.), *cert. denied sub nom. Bowes v. Melito*, 140 S. Ct. 677 (2019). We are unpersuaded by the Second Circuit’s position. Other circuits have recognized the continuing vitality of *Greenough* as prohibiting awards for “private” and “personal” expenses in common-fund cases, although they haven’t applied the decisions specifically to incentive awards. *See, e.g., Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1208 (6th Cir. 1992) (explaining that costs awarded to the shareholders’ representative in derivative litigation “related to advancing the litigation” and were “not ‘private’ in the sense found objectionable in *Greenough*”); *Matter of Cont’l Ill. Sec. Litig.*, 962 F.2d at 571 (citing *Greenough* for the proposition that expenses other than attorneys’ fees can be awarded out of a common fund, “provided they are not personal”).

requests.” In other words, he wants to be compensated for the time he spent litigating the case, or his “personal services”—an award that the Supreme Court has deemed “decidedly objectionable.” *Greenough*, 105 U.S. at 537. In his brief to us, Johnson also suggests that he is requesting a bonus for bringing the suit, inasmuch as he has “subjected himself to scrutiny from NPAS Solutions, class members, and the public at large,” “successfully brought a class action that provides meaningful cash benefits to thousands of persons,” and “provided an important public service by enforcing consumer protection laws.” Br. of Appellee Johnson at 48. Whether Johnson’s incentive award constitutes a salary, a bounty, or both, we think it clear that Supreme Court precedent prohibits it.⁹

⁹ We note, in addition, that our holding that *Greenough* and *Pettus* prohibit incentive awards accords with our precedent carefully scrutinizing settlements that give class representatives preferred treatment. We have explained that, “by choosing to bring their action as a class action . . . named plaintiffs ‘disclaim[] any right to a preferred position in the settlement.’” *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 506 n.5 (5th Cir. 1981) (quotation omitted); see also *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding that all decisions of the former Fifth Circuit handed down before October 1, 1981 are binding precedent). We can’t see why paying an incentive award isn’t tantamount to giving a “preferred position” to a class representative “simply by reason of his status.” *Kincade*, 635 F.2d at 506 n.5. Other circuits have likewise viewed the preferential treatment of some class members with skepticism. See, e.g., *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 755 (6th Cir. 2013) (holding that “the district court abused its discretion in finding that the settlement was fair, reasonable, and adequate” because “the named plaintiffs receive ‘preferential treatment,’ while the relief provided to the unnamed class members [was] ‘perfunctory’” (quotation omitted)); *Staton v. Boeing Co.*, 327 F.3d 938, 976 (9th Cir. 2003) (“Such special rewards for counsel’s individual clients are not permissible when the case is pursued as a class action. Generally, when a person ‘join[s] in bringing [an] action as a class action . . . he has disclaimed any right to a preferred position in the settlement.’” (alterations in original) (quotation omitted)).

3

To *Greenough* and *Pettus*, Johnson offers two responses. As an initial matter, he argues that those decisions aren't binding here because neither "discusses incentive awards to class representatives, as both pre-date Rule 23 by decades." Br. of Appellee Johnson at 47. Two problems. First, Johnson fails to engage with the logic of *Greenough*, which, while not directed to class representatives per se, involved an analogous litigation actor—*i.e.*, a "creditor seeking his rights in a judicial proceeding" on behalf of both himself and other similarly situated bondholders. 105 U.S. at 538. Second, Johnson's argument implies that Rule 23 has something to say about incentive awards, and thus has some bearing on the continuing vitality of *Greenough* and *Pettus*. But it doesn't—and so it doesn't: "Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards." Rubenstein, *supra*, § 17:4.¹⁰ The fact that Rule 23 post-dates *Greenough* and *Pettus*, therefore, is irrelevant.

¹⁰ For example, Rule 23(h) states, in relevant part, that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." One could argue that this suggests that, by implication, that items other than "attorney's fees and nontaxable costs" can't be awarded. *Cf. Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1327 (11th Cir. 2001) (explaining that under "the interpretive canon of *expressio unius est exclusio alterius* . . . the expression of one thing implies the exclusion of another" (quotation omitted)).

Separately, Johnson appeals to ubiquity. “[I]ncentive awards are routine in class actions,” he contends, so *Greenough* and *Pettus* can’t possibly prohibit them. Br. of Appellee Johnson at 47. Johnson is partly right; incentive awards do seem to be “fairly typical in class action cases.” *Berry*, 807 F.3d at 613 (quotation omitted). But, so far as we can tell, that state of affairs is a product of inertia and inattention, not adherence to law. The uncomfortable fact is that “[t]he judiciary has created these awards out of whole cloth,” and “few courts have paused to consider the legal authority for incentive awards.” Rubenstein, *supra*, § 17:4; *see also In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) (“[T]o the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design.”).¹¹ Needless to say, we are not at liberty to sanction a device or practice, however widespread, that is foreclosed by Supreme Court precedent. *Cf. Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (“Our decisions remain binding precedent until we see fit to reconsider them, regardless

¹¹ It is perhaps unsurprising that inertia has taken over, because challenges to incentive awards are so few and far between. And understandably so. Because “most class suits settle, the parties typically agree to pay the class representatives some incentive award,” and “[t]he only adversarial challenge to this would come from objectors.” Rubenstein, *supra*, § 17:4. “Absent class members,” for their part, are “unlikely to object to such awards because even if they were successful, the money would simply remain in the common fund to be distributed to the class and the single member’s share of it would be negligible.” *Id.* Consider that redistribution of Johnson’s \$6,000 among all 9,543 claimants would increase each person’s take by only \$.63. Needless to say, this set of circumstances has “created few occasions in which courts have been required to consider seriously the legal basis” for incentive awards. *Id.*

of whether subsequent cases have raised doubts about their continuing vitality.”

(quotation omitted)).¹²

* * *

In conclusion, we hold that *Greenough* and *Pettus* prohibit the type of incentive award that the district court approved here—one that compensates a class representative for his time and rewards him for bringing a lawsuit. Although it’s true that such awards are commonplace in modern class-action litigation, that doesn’t make them lawful, and it doesn’t free us to ignore Supreme Court precedent forbidding them. If the Supreme Court wants to overrule *Greenough*

¹² We note that the Supreme Court recently alluded to incentive awards in footnoted dicta. In *China Agritech, Inc. v. Resh*, the Court addressed the question whether, following denial of class certification, a putative class member could commence a new class action “beyond the time allowed by the applicable statute of limitations.” 138 S. Ct. 1800, 1804 (2018). The Court held that while the limitations period is tolled “during the pendency of a putative class action” such that an unnamed class member can file an *individual* suit following a denial of class certification, he may not file “a follow-on class action past expiration of the statute of limitations.” *Id.* In the course of its opinion, the Court observed that, as a practical matter, would-be lead plaintiffs have “little reason to wait in the wings, giving another plaintiff first shot at representation,” noting (among other things) the “attendant financial benefit” of being the lead dog. *Id.* at 1810–11. To the “attendant financial benefit” language, the Court appended a footnote citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998), in which the Seventh Circuit had “affirm[ed] [a] class representative’s \$25,000 incentive award.” *China Agritech*, 138 S. Ct. at 1811 n.7. While Supreme Court dicta are not “to be lightly cast aside” and can be “of considerable persuasive value,” *F.E.B. Corp. v. United States*, 818 F.3d 681, 690 n.10 (11th Cir. 2016) (quotations omitted), *China Agritech* doesn’t impact our holding or analysis here, for two reasons. First, it is clear in context that the Court there was simply acknowledging a reality of modern class-action practice in response to policy arguments that the parties had put before it, rather than endorsing the legality of incentive awards. *See China Agritech*, 138 S. Ct. at 1810–11. Second, and even more importantly, the Court didn’t cite or consider—let alone overrule—*Greenough* and *Pettus*. The Supreme Court has told us that it “does not normally overturn, or so dramatically limit, earlier authority *sub silentio*,” *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), and so we, as a lower court, remain bound to apply *Greenough* and *Pettus*.

and *Pettus*, that's its prerogative. Likewise, if either the Rules Committee or Congress doesn't like the result we've reached, they are free to amend Rule 23 or to provide for incentive awards by statute. But as matters stand now, we find ourselves constrained to reverse the district court's approval of Johnson's \$6,000 award.¹³

C

Finally, we consider Dickenson's argument that the district court didn't sufficiently explain itself to enable meaningful appellate review. In particular, she contends that the district court failed to adequately explain (1) its award of attorneys' fees, (2) its denial of her objections, and (3) its approval of the settlement. As we will explain, we agree.

1

First, the district court's approval of the attorneys'-fee award. Federal Rule of Civil Procedure 23(h)(3) states that when awarding "reasonable attorney's fees

¹³ Rather than contesting our reading of *Greenough* and *Pettus*, our dissenting colleague asserts that we have "disregard[ed]" *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), which she says is "binding in our Circuit." Dissenting Op. at 37–38. *Holmes* is binding, to be sure, but only with respect to the issue that it addressed and decided. *Holmes* had nothing to do with incentive awards; instead, the question there was whether an apparent inequity in the distribution of a settlement fund—half to eight named plaintiffs, half to the remaining 118 class members—rendered the settlement itself unfair. See 706 F.2d at 1147–50. And the answer to that question didn't turn on whether any of the named plaintiffs were entitled to a salary or bounty, but rather on whether (as the settlement proponents contended and the objectors denied) the "disparities in money payments were justified by the value of the unique, individual claims of the named plaintiffs." *Id.* at 1148. Unsurprisingly to us, the *Holmes* panel never even mentioned—let alone saw a need to explain away or distinguish—either *Greenough* or *Pettus*.

and nontaxable costs,” the court “must find the facts and state its legal conclusions under Rule 52(a).” *See also* Fed. R. Civ. P. 52(a)(1) (requiring that a court “must find the facts specially and state its conclusions of law separately”). Although “a district court has ample discretion in awarding fees,” its order “must allow meaningful review—the district court must articulate the decisions it made, give principled reasons for those decisions, and show its calculation.” *In re Home Depot Inc.*, 931 F.3d 1065, 1088–89 (11th Cir. 2019); *see also Camden I*, 946 F.2d at 775 (“The district court’s reasoning should identify all factors upon which it relied and explain how each factor affected its selection of the percentage of the fund awarded as fees.”). “In other words, the court must ‘provide a concise but clear explanation of its reasons for the fee award.’” *Home Depot*, 931 F.3d at 1089 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)); *see also Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 558 (2010) (explaining that even in “a matter that is committed to the sound discretion of a trial judge . . . [i]t is essential that the judge provide a reasonably specific explanation for all aspects” of its determination because otherwise “adequate appellate review is not feasible”).

The district court here didn’t make the required findings or conclusions. In its final order, the district court didn’t explain its approval of the attorneys’-fee award, the litigation costs, or the incentive payment; instead, it merely said that class counsel’s request with respect to each was “approved.” Under these

circumstances, the appropriate disposition is to remand for additional findings on the fees and costs issues. *See, e.g., Compulife Software Inc. v. Newman*, 959 F.3d 1288, 1309 (11th Cir. 2020) (“Rule 52 violations require us to vacate and remand for new findings and conclusions because ‘[w]e are . . . a court of review, not a court of first view.’” (alterations in original) (quoting *Callahan v. U.S. Dep’t of Health & Human Servs.*, 939 F.3d 1251, 1266 (11th Cir. 2019))); *Complaint of Ithaca Corp.*, 582 F.2d 3, 4 (5th Cir. 1978) (“When, because of absence of findings of fact or conclusions of law, an appellate court cannot determine whether the record supports the trial court decision, it should remand the action for entry of findings of fact and conclusions of law.”).¹⁴

2

Second, the district court’s denial of Dickenson’s objections. When a class member objects to a settlement, “the trial judge must assume additional

¹⁴ We briefly address—and reject—Dickenson’s argument that the district court’s fee award is unlawful because the Supreme Court’s decision in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), overruled *Camden I Condominium Ass’n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), which instructs courts to calculate a common-fund award as a percentage of the fund using a 12-factor test. As we recently explained, *Perdue* didn’t abrogate *Camden I*. *See Home Depot*, 931 F.3d at 1084–85 (stating that “[t]here is no question that the Supreme Court precedents stretching from *Hensley* to *Perdue* are specific to fee-shifting statutes” and that “Supreme Court precedent requiring the use of the lodestar method in statutory fee-shifting cases does not apply to common-fund cases”). *Camden I* therefore remains good law, and the district court should apply it in the first instance on remand. *Cf. Piambino v. Bailey*, 610 F.2d 1306, 1329 (5th Cir. 1980) (explaining that it “is not our normal practice” to “independently evaluate the reasonableness of” attorneys’ fees because “the District Court is infinitely better situated to conduct the factual inquiry necessary”).

responsibilities”—most notably, to “examine the settlement in light of the objections raised and set forth on the record a reasoned response to the objections including findings of fact and conclusions of law necessary to support the response.” *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *see also Home Depot*, 931 F.3d at 1089 (explaining that “[t]he level of specificity required by district courts is proportional to the specificity of the fee opponent’s objections”).

Here, the district court gave no “reasoned response” whatsoever to Dickenson’s objections in its final order, instead stating simply that “[t]he objection of Jenna Dickenson is OVERRULED.” True, at the fairness hearing, the district court summarized Dickenson’s objections and stated that it had “carefully considered” them, but it proceeded to dismiss them without further explanation. Nothing else in the record gives any indication that the district court meaningfully considered or responded to Dickenson’s objections. Because the district court didn’t “set forth on the record a reasoned response to [Dickenson’s] objections” and provide “findings of fact and conclusions of law necessary to support [its] response,” we conclude that a remand is necessary so that the district court can do so. *Cotton*, 559 F.2d at 1331.

3

Third, the district court’s approval of the settlement. Before approving a class-action settlement, a district court must “determine that it [is] fair, adequate,

reasonable, and not the product of collusion.” *Leverso*, 18 F.3d at 1530. In so doing, “[a] threshold requirement is that the trial judge undertake an analysis of the facts and the law relevant to the proposed compromise.” *Cotton*, 559 F.2d at 1330. “A ‘mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law’ will not suffice.” *Id.* (quoting *Protective Comm. v. Anderson*, 390 U.S. 414, 434 (1968)). We have also recognized that a district court must “support [its] conclusions by memorandum opinion or otherwise in the record” because appellate courts “must have a basis for judging the exercise of the trial judge’s discretion.” *Id.*; see also *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) (“Appellate courts ‘must have a basis for judging the exercise of the district judge’s discretion.’” (quoting *Cotton*, 559 F.2d at 1330)).

The district court’s final order approving the settlement agreement falls far short of what our precedents require. There, the court recited the factors that we identified in *Leverso v. SouthTrust Bank of Alabama*, 18 F.3d 1527 (11th Cir. 1994), and then, without any accompanying analysis, conclusorily asserted that the settlement “is in all respects fundamentally fair, reasonable, adequate, and in the

best interest of the class members, when considering” the factors “in their totality.”

Dist. Ct. Order at 4.¹⁵

While there may be cases in which we can look past the district court’s lack of reasoning to conduct our own review, *see, e.g., Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 678 F.3d 1199, 1201 (11th Cir. 2012), this isn’t one of them. From the record before us, we can’t tell whether the district court abused its discretion. “[W]ere we at this juncture to affirm the approval of the settlement[], we would not be reviewing the district court’s exercise of discretion but, rather, exercising our own discretion on the basis of the record before us.” *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 218 (5th Cir. 1981). We must therefore remand to the district court for a fuller explanation. *See id.* at 206–07 (stating that “we are, under these circumstances, compelled to remand to the district court for findings of fact sufficient for us to determine whether its approval of the settlements was a proper exercise of discretion”).¹⁶

¹⁵ The district court’s order preliminarily approving the settlement provided no additional analysis and, in fact, recited the same conclusory statement. Nor does the fairness-hearing transcript enlighten us as to the district court’s reasoning. There, the court simply recounted the case’s procedural history and summarized the settlement and Dickenson’s objections to it, heard argument from the parties, concluded that it had “carefully considered all of the submissions before the Court,” and announced that it was “going to enter the proposed final order and judgment that has been proposed by the Plaintiff and Defense.”

¹⁶ Even if we were to conclude that the record was sufficient for us to review the district court’s approval of the settlement, we would still be obliged to remand. Federal Rule of Civil Procedure 23(e)(2)(C) requires district courts to consider “the terms of any proposed award of attorney’s fees” in determining whether “the relief provided for the class is adequate.” Accordingly, it

* * *

As with the district court’s approval of Johnson’s incentive award, it is no answer to say, “That’s just how it’s done.” The law is what the law is, and the law requires more than a rubber-stamp signoff. We must conclude, therefore, that the district court failed to adequately explain its award of attorneys’ fees, its denial of Dickenson’s objections, or its approval of the settlement. Accordingly, we vacate the district court’s order and remand so that the court can make the required on-the-record findings and conclusions.

III

In sum, we hold that the district court violated Rule 23(h) by setting the deadline for class members to object to the settlement—including its attorneys’-fees provisions—before the due date for class counsel’s fee petition, but we conclude that, on the record here, that error was harmless. We reverse the district court’s approval of Johnson’s \$6,000 incentive award, as it is prohibited by the Supreme Court’s decisions in *Greenough* and *Pettus*. Finally, we conclude that we must remand the case so that the district court can adequately explain its fee award

seems to us that the district court will in any event have to re-do its adequacy-of-the-settlement analysis after it explains its attorneys’-fees decision.

to class counsel, its denial of Dickenson's objections, and its approval of the settlement.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

MARTIN, Circuit Judge, concurring in part and dissenting in part:

This is Jenna Dickenson's appeal of the District Court order approving, over her objections, the settlement agreement of this class action brought under the Telephone Consumer Protection Act. Ms. Dickenson also objected to the District Court's award of attorneys' fees and the incentive award to named plaintiff Charles Johnson. Those awards are challenged in this appeal as well.

I write separately because I disagree with the majority's decision to take away the incentive award approved by the District Court for the named plaintiff. See Maj. Op. at 23–25. In reversing this incentive award, the majority takes a step that no other court has taken to do away with the incentive for people to bring class actions. For class actions, the class must be represented by a named plaintiff, who incurs costs serving in that role. Those costs may include time and money spent, along with all the slings and arrows that accompany present day litigation. By prohibiting named plaintiffs from receiving incentive awards, the majority opinion will have the practical effect of requiring named plaintiffs to incur costs well beyond any benefits they receive from their role in leading the class. As a result, I expect potential plaintiffs will be less willing to take on the role of class representative in the future.

The majority's analysis also disregards the analysis set forth in this Court's ruling in Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983), which is

binding in our Circuit. I understand Holmes to have required our panel to determine whether the incentive award to Mr. Johnson is fair. That is, we were charged with deciding whether the award creates a conflict between Mr. Johnson and other class members like Ms. Dickenson. I respectfully dissent from the majority's failure to conduct this analysis.

I.

My review of class action treatises makes clear that incentive awards (also referred to as service awards or case contribution awards) are routine. As the majority seems to observe, courts have not generally addressed their legal basis for approving incentive awards. See William B. Rubenstein, 5 Newberg on Class Actions §§ 17:2 & n.1, 17.4 (5th ed., June 2020 Update) [hereinafter Newberg]. But a review of the history of incentive awards provides worthwhile background for our discussion here. In the 1980s and 1990s, courts began to approve awards for named plaintiffs and to develop tests to determine the appropriate conditions for granting an award. See Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1310–11 (2006) [hereinafter Incentive Awards]. In discussing the first case to use the term “incentive award,” Newberg says “although labeling the payment an ‘incentive award,’ the rationale that the court employs speaks more to compensation than incentive, suggesting that the class representatives are being

paid for their service to the class, not so as to ensure that class members will step forward in the future.” § 17:2 (discussing Re Cont’l/Midlantic S’holders Lit., Civ. A. No. 86-6872, 1987 WL 16678 (E.D. Pa. Sept. 1, 1987) (unreported)).

This viewpoint sparked debate. “Even as incentive awards were achieving recognition, however, the pendulum had begun to swing against them.” Incentive Awards, 53 UCLA L. Rev. at 1311. The arguments centered around whether incentive awards create a conflict between the named plaintiff’s interests and those of the class members she is representing. See id. at 1312–13; see also Newberg § 17:1. Courts across the country discuss the reasons for and against incentive awards, but few have “paused to consider the legal authority for incentive awards.”¹ Newberg § 17:4. Rule 23 does not make (and has never made) any

¹ Newberg posits two possible bases for incentive awards. First, in common fund cases, “restitution supports a fee award” because “the presence of a fund under the court’s supervision serves as both the source of the award and, in a sense, as the source of authority for an award.” Newberg § 17:4 (emphasis omitted); see also Incentive Awards, 53 UCLA L. Rev. at 1313 (“From a doctrinal perspective, incentive awards have been justified as a form of restitution for a benefit conferred on others.”). The theory is that “if the class representative provides a service to the class without the class paying for it, the class members will be unjustly enriched by virtue of receiving these services for free, and/or the class representatives are not realizing the full value of their services.” Newberg § 17:4.

But the restitution analogy doesn’t fit squarely within the unjust enrichment doctrine because a person who does not seek services does not generate any entitlement to payment. Id. Rather, the traditional attorneys’ fee award in common fund cases can be viewed as an “exception” to the traditional unjust enrichment rule, which is “typically justified by the fact that class counsel are providing professional (legal) services to the class.” Id. In other words, a person providing professional services should be compensated so that the person receiving services is not unjustly enriched. Yet even this possible basis for incentive awards does not typically apply to a named plaintiff, because the class representative generally is not providing professional services. See id. (“If you dive into a lake and save a drowning person, you are entitled to no fee.” (quotation marks omitted)).

reference to incentive awards. See id. Indeed, Newberg recognizes that, as of June 2020, no court has addressed its authority to approve incentive awards head on. Id. Instead, courts have “created these awards out of whole cloth.” Id. The few scattered references in reported case law “suggest that courts generally treat incentive awards as somewhat analogous to attorney’s fee awards.” Id. In effect, courts have treated class representatives as providing professional services to the class, despite a named plaintiff not engaging in traditional—i.e., legal—services. See id. (explaining there is an exception to the unjust enrichment rule that provides a legal basis for incentive awards). Courts gradually expanded the application of this rule in common fund cases like this one.

Around the 1990s, courts “tended to limit incentive awards to cases where the representative plaintiff had provided special services to the class—for example, providing financial or logistical support to the litigation or acting as an expert consultant.” Incentive Awards, 53 UCLA L. Rev. at 1310. For instance, the Seventh Circuit upheld the District Court’s rejection of a proposed \$10,000 award to a named plaintiff “for his admittedly modest services.” Matter of Cont’l Ill. Sec. Litig., 962 F.2d 566, 571–72 (7th Cir. 1992), as amended on denial of reh’g (May 22, 1992).

But over time, circuits began to endorse the sort of incentive awards we see today. Courts recognized that incentive awards serve the purposes of Rule 23 even

in circumstances in which the plaintiff did not provide special services. The principal inquiry became not whether there is any legal basis for an incentive award, but whether such an award is fair.

II.

Many other circuits, including this one, look to the fairness of an award to a named class representative. If it does not appear that an incentive award “compromise[s] the interest of the class” for the class representative’s personal gain, courts routinely uphold them. See Hadix v. Johnson, 322 F.3d 895, 897 (6th Cir. 2003); see id. at 898 (holding that “this case is clearly not a case where an incentive award is proper”). This Court has approved of this analysis. In Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983), we recognized that courts routinely “refuse[] to approve settlements on the ground that a disparity in benefits” between the named plaintiffs and the absent members of the class “evidenced either substantive unfairness or inadequate representation.” Id. at 1148. Therefore, “[w]hen a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness.” Id. at 1147; see id. at 1146–1147 (explaining that eight named plaintiffs were not entitled to receive approximately one-half of the common fund based on their meritorious individual claims). The “inference of unfairness” associated with such unequal

distributions “may be rebutted by a factual showing that the higher allocations to certain parties are rationally based on legitimate considerations.” Id. at 1148.

Our approach tracks the case law of our sister circuits. For example, the Ninth Circuit requires district courts to “individually” evaluate the award to each named plaintiff, “using relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation” See Staton v. Boeing Co., 327 F.3d 938, 977 (9th Cir. 2003) (alterations adopted and quotation marks omitted). In In re U.S. Bancorp Litigation, 291 F.3d 1035 (8th Cir. 2002), the Eighth Circuit relied on similar factors to approve as fair \$2,000 payments to five named plaintiffs out of a class potentially numbering more than 4 million in a settlement of \$3 million. Id. at 1038 (citing, *inter alia*, Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)). Several other circuits have also recognized the proper inquiry as being whether the incentive award is fair. See, e.g., Chieftain Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P., 888 F.3d 455, 468–69 (10th Cir. 2017) (rejecting percentage-based incentive award because, among other things, it encouraged a class representative to favor monetary remedy over injunctive relief, “creating a potential conflict between the interest of the class representative and the class”); Berry v. Schulman, 807 F.3d 600, 613–14 (4th Cir. 2015) (rejecting objector’s

argument that incentive award created a conflict of interest and upholding award); Cobell v. Salazar, 679 F.3d 909, 922 (D.C. Cir. 2012) (holding that incentive award was fair and did not create “an impermissible conflict” because the settlement agreement “provided no guarantee” that class representatives would receive incentive payments; agreement left it to discretion of the district court); Sullivan v. DB Invs., Inc., 667 F.3d 273, 333 n. 65 (3d Cir. 2011) (holding that district court did not abuse its discretion in approving incentive award because it “discussed the role played by the several class representatives and the risks taken by these parties in prosecuting this matter”).

This fairness-to-ensure-no-conflict analysis goes to the heart of Ms. Dickenson’s stated concerns, and its application would dispel her fear of collusion here. See Br. of Appellant at 53 (“Johnson . . . did nothing to dispel the presumption of unfairness.”). Our court adopted this analysis in Holmes. And it addresses the concerns about incentive awards raised by at least one member of the Supreme Court. In Frank v. Gaos, 586 U.S. ___, 139 S. Ct. 1041 (2019), a majority of the Supreme Court acknowledged that a proposed settlement award included incentive payments for the named plaintiffs, and did not question the viability of those incentive awards.² Id. at 1045. The majority of the Court

² One year earlier, the Supreme Court similarly recognized the viability of a “financial benefit” to a class representative that goes “above and beyond her individual claim.” China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1810–11 & n.7 (2018). The majority calls this dicta, Maj. Op. at 28

remanded the case to the Ninth Circuit for that court to decide standing. Id. at 1046. Again, the majority did not address the merits of the settlement award. Id. Justice Thomas dissented, however, and in doing so, took issue with the cy pres payments to non-party nonprofits on behalf of the class as well as the incentive awards to the named plaintiffs. Justice Thomas noted that the cy pres-only arrangement did not obtain any relief for the class, while securing “significant benefits” for class counsel and the named plaintiff. Id. at 1047 (Thomas, J., dissenting). Justice Thomas said this “strongly suggests that the interests of the class were not adequately represented.” Id. I read Justice Thomas’s brief dissent in Frank to address his concern about whether the cy pres arrangement in that case was fair, as opposed to whether disparate awards in class actions are legally permissible as a general matter. I continue to have confidence that the fairness analysis developed by many circuit courts, including our own, can protect against conflicts between a class representative and absent class members.

Based on this Court’s precedent in Holmes, and in keeping with the approach taken by other circuits, I believe it was the job of our panel to determine, in light of the totality of the circumstances, whether the District Court abused its discretion in finding the \$6,000 award to Mr. Johnson was fair in this case. See

n.12, but it cannot seriously dispute that the Supreme Court acknowledged that a class representative may be entitled to compensation in his or her role as the person bringing suit.

Holmes, 706 F.2d at 1147; Hadix, 322 F.3d at 897–98. And I do not believe the District Court abused its discretion in finding that the \$6,000 award was fair.

The settlement agreement here was not contingent on Mr. Johnson receiving an incentive award. It merely allowed him to seek one. If the District Court had denied Mr. Johnson an incentive award, the class still would have had the benefit of his representation under the terms of the settlement fund set out in the agreement. I think this arrangement mitigates any concern that the settlement was unfair to the class. Cf. Holmes, 706 F.2d at 1146–47 (scrutinizing a settlement agreement that required, rather than merely allowed, the court to approve disparate treatment of class members); In re Dry Max Pampers Litig., 724 F.3d 713, 722 (6th Cir. 2013) (reversing a settlement approval where the settlement required \$1,000 payments to named plaintiffs). The record also contains class counsel’s affidavit attesting to the fact that Mr. Johnson invested his own time and effort in litigating the action, including by regularly conferring with his counsel and responding to the defendant’s written discovery requests. Thus there was a factual basis for the District Court’s decision to give Mr. Johnson an incentive award. Under the fairness analysis, I would uphold the District Court’s ruling.

III.

Now back to the majority’s holding. The majority opinion observes that Trustees v. Greenough, 105 U.S. 527 (1881), and Central Railroad & Banking Co.

v. Pettus, 113 U.S. 116 (1885), “seem to have been largely overlooked in modern class-action practice.” Maj. Op. at 18. It holds that the “modern-day incentive award” is equivalent to a salary and is barred by Greenough and Pettus. Id. at 23, 25. At the same time, the majority opinion recognizes that no other court has directly confronted the issue here: whether Greenough and Pettus prohibit awards like the \$6,000 awarded to Mr. Johnson in this case. See id. at 24 n.8.

I believe the majority’s decision goes one step too far in deciding this issue and does so in the face of our binding precedent that recognizes a monetary award to a named plaintiff is not categorically improper. See Holmes, 706 F.2d at 1147 (setting standards for what an appropriate award looks like). True, Holmes mentioned that the proposed preferential treatment was based on the named plaintiffs’ meritorious individual claims, id., but the analysis itself matters. This approach from Holmes has been adopted by several other circuits and applied to awards that look to me more like salaries than awards for litigation expenses. Indeed, one legal basis for an incentive award is the services performed by a named plaintiff, which may include “their time and effort invested in the case.” Chieftain Royalty, 888 F.3d at 468. And that is the basis on which Mr. Johnson sought compensation here. I don’t think the majority opinion does enough to directly grapple with why it is not sufficient for us, like other circuits, to determine whether there is evidence of a conflict between Mr. Johnson and class members

like Ms. Dickenson.³ See Maj. Op. at 8, 33 (citing Holmes for the abuse of discretion standard); see also id. at 29 n.13 (acknowledging that Holmes, which answered the question of whether there was “an apparent inequity” between named plaintiffs and the remaining class members in the distribution of a settlement fund, “is binding”). I would not reverse the award to Mr. Johnson based on Greenough and Pettus. Because the \$6,000 award to Mr. Johnson seems to provide “for preferential treatment” for a named plaintiff, I believe our Circuit precedent binds us to determine whether Mr. Johnson has demonstrated the settlement agreement is fair. See Holmes, 706 F.2d at 1147. I think he has.

* * *

The majority’s decision to do away with incentive awards for class representatives in class actions takes our court out of the mainstream. To date, none of our sister circuit courts have imposed a rule prohibiting incentive awards. Indeed, none has even directly addressed its authority to approve incentive awards. But upon deciding to undertake this issue here, the majority skips any analysis about our modern authority to approve these awards. It goes straight to decisions from the 1880s that do not reflect the current views of the Supreme Court or other

³ The majority opinion calls the \$6,000 awarded to Mr. Johnson “part salary and part bounty.” Maj. Op. at 24. The majority expresses concerns about a bounty compromising the interests of the class, see id. at 24–25, but it fails to take any step to alleviate those concerns. It bears repeating that Holmes’s fairness analysis would eliminate any apprehension that the incentive award created a conflict between Mr. Johnson’s interests and the interests of the absent class members.

circuits. The majority never properly addresses the main issue before us: whether the incentive award created a conflict between Mr. Johnson and absent class members. I would answer this question by engaging in the fairness analysis called for by our precedent. And that analysis leads me to say the District Court did not abuse its discretion in approving an award of \$6,000 to Mr. Johnson.

I respectfully dissent.

TAB 15

1338 **15. Standards and procedures for use in deciding ifp status**

1339 During the March 2022 meeting, there was an update about ongoing attention to in forma
1340 pauperis practice. One example is Professor Hammond’s article Pleading Poverty in Federal
1341 Court, 128 Yale L.J. 1478 (2019). Professor Hammond (Indiana U.) and Professor Clopton
1342 (Northwestern) have submitted 21-CV-C, raising various concerns about divergent treatment of
1343 ifp petitions in different district courts.

1344 There is strong evidence of divergent practices regarding ifp applications that seem
1345 difficult to justify. But it is far from clear this is a rules problem, or that there is a ready solution
1346 to this problem. For example, the stark disparities in cost of living in different parts of the
1347 country make articulating a national standard (at least in dollar terms) a major challenge. And in
1348 terms of court operations, there may be significant inter-district differences that bear on how ifp
1349 petitions are handled. But one might have difficulty explaining significant divergences between
1350 judges in the same district in resolving such applications.

1351 At least some districts have recently paid substantial attention to their handling of ifp
1352 petitions, sometimes involving court personnel with particular skills in resolving such
1353 applications. Those efforts may yield guidance for other districts.

1354 Though the case can be made for action on this front, the content of the action and the
1355 source for directions are not clear. The Administrative Office has reportedly convened a working
1356 group examining these issues. It may well emerge that the Court Administration and Case
1357 Management Committee is the appropriate vehicle for addressing these issues rather than the
1358 somewhat cumbersome Rules Enabling Act process. Presently, for example, there is some
1359 concern about the varying application of different Administrative Office forms that are used in
1360 different districts to review ifp applications. Those forms do not emerge from the Enabling Act
1361 process.

1362 For the present, the topic has remained on the agenda pending further developments.
1363 There was no significant discussion of this topic during the October 2022 Committee meeting. It
1364 is not clear that the submission from Professors Hammond and Clopton can be suitably dealt
1365 with in the Civil Rules. The basic starting point is likely the pertinent statute. See
1366 28 U.S.C. § 1915.

TAB 15A

Zachary D. Clopton
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January 19, 2021

Rebecca A. Womeldorf, Esq.
Secretary, Standing Committee and Rules Committee Chief Counsel
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room 7-300
Washington, DC 20544

Dear Ms. Womeldorf,

We write to recommend that the Advisory Committee on Rules of Civil Procedure consider adding to its agenda the issue of petitions to proceed *in forma pauperis* (IFP).

This letter makes three points. First, there is wide variation in the procedures used by the 94 federal districts with respect to IFP petitions. Second, there is wide variation in the grant rates for IFP petitions across and within districts. Third, IFP is a proper subject of study for this committee.

[1] There is wide variation in IFP procedures.

In *Pleading Poverty in Federal Court*, 128 YALE L. J. 1478 (2019), Professor Andrew Hammond at the University of Florida cataloged IFP procedures for the 94 district courts. At the time of writing, Hammond found that 22 districts accept form AO 239, 37 districts accept AO 240, and 46 districts have developed their own forms. *Id.* at 1496. Among the bespoke forms, there is substantial variation in information requested and depth required. Simple explanations such as geography do not account for this variation. *Id.* at 1496-1500.

Federal judges receive little guidance on how to evaluate the data included on these forms. According to Hammond, “All the forms currently in use in the federal courts—the AO 239 form, the AO 240 form, and the district-court-specific forms—leave judges with no benchmark for deciding how much income is sufficiently low, how many expenses or debts are sufficiently high, and how many assets are sufficiently few. With no articulated threshold on any *in forma pauperis* form, judges must identify some means test (such as the federal poverty guidelines) or create their own. Few federal courts provide any guidance for judges presented with an *in forma pauperis* motion.” *Id.* at 1500 (internal notes omitted). This status quo makes IFP determinations labor intensive for judges and unpredictable for litigants.

[2] There is wide variation in IFP results.

Professor Adam Pah and colleagues have used data-science algorithms to evaluate the IFP grant rates for districts and judges. Two findings merit attention here.

First, Pah and colleagues found wide variation in the grant rate for IFP petitions across districts. Looking at cases filed in 2016, Pah and colleagues found that federal district courts that received at least 25 IFP petitions had a mean grant rate of 78%, with a standard deviation of 15% and a range of 68 percentage points. *See* Email from Pah to Clopton, Jan. 15, 2021 (on file). This inter-district variation could be justified on any number of bases. We present it without judgment for this Committee’s information.

Second, Pah and colleagues also found wide variation in the IFP grant rate *within districts*. According to their recent article, “At the 95% confidence level, nearly 40% of judges—instead of the expected 5%—approve fee waivers at a rate that statistically significantly differs from the average rate for all other judges in their same district. In one federal district, the waiver approval rate varies from less than 20% to more than 80%.” *See* Adam R. Pah, et al., *How to Build a More Open Justice System*, SCIENCE (July 10, 2020), <https://science.sciencemag.org/content/369/6500/134.full>.

[3] IFP procedure should be on this Committee’s agenda.

The ability to have one’s day in court is a fundamental aspect of the American justice system. Filing fees put a price tag on that right, but the right to petition to proceed *in forma pauperis* should ensure that those who cannot pay can still access our federal courts.

The administration of the IFP procedure is within the mandate of this committee. First, this Committee could propose a Federal Rule of Civil Procedure related to IFP, consistent with the Rules Enabling Act of 1934. Second, without adopting a rule amendment, this Committee could offer guidance to local rules committees in hopes of encouraging convergence on a consistent approach. Third, this Committee could work with the Administrative Office to revise the existing forms to provide guidance to federal judges.

When considering these tasks, we would encourage this Committee to keep in mind two sets of considerations. First, we think there is value in standardization across and within districts. A Federal Rule or guidance from this Committee would go a long way in that direction. Second, we encourage this committee to consider the procedural and substantive values at stake when proposing national IFP standards. IFP standards should be respectful of the dignity and privacy of litigants; they should be clear and easy for litigants to understand; they should be administrable for judges; and they should reflect the importance of access to the federal courts. *See generally* Hammond, *supra* (describing these values and offering potential standards).

* * *

For the foregoing reasons, we encourage this committee to add IFP to its agenda. If we can be helpful, we would be delighted to assist this Committee on its work on this and other important issues. Please direct any correspondence to Professor Clopton at zclopton@law.northwestern.edu.

Sincerely,

Zachary D. Clopton
Professor of Law
Northwestern Pritzker School of Law

Andrew Hammond
Assistant Professor of Law
University of Florida Levin College of Law

cc: Hon. Robert M. Dow, Civil Rules Committee Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

TAB 16

1367 **16. Rule 53 – 22-CV-Q**

1368 Senators Tillis and Leahy wrote to Chief Justice Roberts concerning “abusive
1369 appointment of special masters which is occurring in a single federal district court.” This concern
1370 was evidently raised by a witness at a hearing of the Senate Intellectual Property Subcommittee.
1371 A copy of the senators’ letter is in this agenda book.

1372 The senators’ letter cites Scott Graham, How a Former Law Clerk Earned \$700K This
1373 Year as a Court-Appointed Technical Adviser, Texas Lawyer (Aug. 26, 2021). The article
1374 reports on “the exploding number of patent cases” before a judge in the Western District of
1375 Texas. The story says this judge was “an accomplished patent litigator” before appointment to
1376 the bench, and that he “has been a frequent presence at IP bar functions, letting attorneys know
1377 that – unlike some judges who dread patent cases – he welcomes them.”

1378 Perhaps as a result, the story suggests, this judge says he can’t keep up with the patent
1379 filings in his court without the help of his “technical advisers,” who have hard science
1380 backgrounds in addition to law degrees. With that assistance, according to the story, the judge is
1381 able to preside over as many as six or seven *Markman* hearings per week. The story says this
1382 court now has “about 25% of the nation’s patent cases.”

1383 There may be advantages to the method adopted by this judge. Prof. Sapna Kumar, for
1384 example, published an article entitled Judging Patents, 62 Wm. & Mary L. Rev. 871 (2021),
1385 contrasting the American approach to such disputes to the method used in several European
1386 patent courts, which rely on technically qualified judges who work side-by-side with their legally
1387 trained counterparts to decide patent cases. In Prof. Kumar’s view, Congress should designate
1388 about a dozen district courts across the country to take on the nation’s patent cases.

1389 There may be forceful objections to the American method of adjudicating patent cases.
1390 Holding jury trials in patent cases might well be sub-optimal. But that possibility would not be a
1391 rules matter. *Markman* itself drew a line between the role of the judge and the jury in
1392 adjudicating patent disputes, not something controlled by the Civil Rules.

1393 Rule 53 was extensively revised over several years leading to the adoption of the current
1394 rule (later restyled) in 2003. As Senators Tillis and Leahy recognize in their letter, Rule
1395 53(a)(1)(B)(i) authorizes appointment of a master only when warranted by “some exceptional
1396 condition.” Rule 53(b) prescribes procedures for appointment of a master and other subdivisions
1397 of the rule govern the master’s authority (Rule 53(c)) and the procedures for court action on the
1398 master’s report (Rule 53(f)).

1399 Rule 53(a)(1)(C) authorizes appointment of a master to “address pretrial and posttrial
1400 matters that cannot be effectively and timely addressed by an available district judge or
1401 magistrate judge of the district.” The Committee Note addresses the possible role of a master in
1402 patent litigation:

1403 The court’s responsibility to interpret patent claims as a matter of law, for example, may
1404 be greatly assisted by appointing a master who has expert knowledge of the field in
1405 which the patent operates. Review of the master’s findings will be de novo under Rule

1406 53(g)(4), but the advantages of initial determination by a master may make the process
1407 more effective and timely than disposition by the judge acting alone.

1408 It appears that efficient methods of resolving patent disputes are important to our legal
1409 and economic system. But it is not clear that revising Rule 53 would be a promising way to
1410 achieve that goal. And it is not clear that Senators Tillis and Leahy believe that the provisions of
1411 the current rule are deficient. Instead, it seems that they are concerned about the actions of a
1412 single judge or single district that might not be consistent with what the rule says. Thus, the
1413 senators' letter asks for an investigation of "abuses relating to the appointment of technical
1414 advisors" to determine whether the rules permit "this frequent use of technical advisors."

1415 Considering further revisions to Rule 53 focused on patent infringement cases would
1416 likely require considerable work on the current handling of those cases, and in particular the use
1417 of Rule 53 masters in them. An FJC study could probably shed light on current practice. The
1418 2003 amendments were supported by such a report. See Willging, Hooper, Leary, Miletich,
1419 Reagan & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). Whether the instances
1420 cited by the senators in their letter warrant that level of effort could be debated. At the same time,
1421 it is likely that such a rulemaking effort could generate considerable controversy.

1422 Since this problem does not seem to relate to what Rule 53 says, and may concern a
1423 single district judge, a three- to four-year rule-amendment process does not appear warranted. It
1424 is recommended that this topic be dropped from the agenda.

TAB 16A

**VIA ELECTRONIC TRANSMISSION**

July 5, 2022

The Honorable Chief Justice John Roberts
Presiding Officer
Judicial Conference of the United States
One Columbus Circle, NE
Washington, D.C. 20544

Dear Chief Justice Roberts:

We appreciate your attention to our last letter, of November 2, 2021, regarding forum shopping in patent litigation. We look forward to an answer to that letter as soon as possible. We write you today to raise concerns about the abusive appointment of special masters which is occurring in a single federal district court. Our understanding—raised by a witness in a recent hearing for the Senate Intellectual Property Subcommittee—is that a single judge is unilaterally appointing special masters in patent cases to act in the capacity of “technical advisors” and has delegated a major portion of his patent caseload to these private attorneys.

As you know, the use of private attorneys as special masters in civil litigation has long been an object of scrutiny and concern. As a U.S. Court of Appeals noted 80 years ago, “it is a matter of common knowledge that references [to special masters] greatly increase the cost of litigation and delay and postpone the end of litigation.”¹ In addition, there is “greater confidence in the outcome of the contest and more respect for the judgment of the court arise when the trial is by the judge”² rather than a special master.

Because of these concerns, Rule 53 restricts the appointment of special masters for trial proceedings to “exceptional condition[s],” and it restricts such references for pre-trial proceedings to issues “that cannot be effectively and timely addressed by an available district court judge or magistrate judge.” As the Advisory Committee notes make clear, Rule 53 embraces the understanding that appointment of a special master “shall be the exception and not the rule.”

Similarly, the U.S. Court of Appeals for the Federal Circuit, which exercises exclusive review over patent cases, has emphasized that district courts should use their authority to appoint technical advisers in patent cases “sparingly and then only in exceptionally technically complicated cases.”³ The court noted that there is a risk that some of the judicial decision-making function will be delegated to the technical advisor, and that “district court judges need to be extremely sensitive to this risk and minimize the potential for its occurrence.”⁴

¹ *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942).

² *Id.*

³ *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1378 (Fed. Cir. 2002).

⁴ *Id.* at 1379.

According to press accounts, in this single federal district court, one of these technical advisors—who is also a former clerk to this judge—was assigned to at least 29 separate matters and earned over \$700,000 in just the first half of 2021.⁵ Under the rules governing special masters, these amounts are billed directly to the parties to the cases. In one case in this court, the technical advisor has billed the parties over \$100,000.⁶

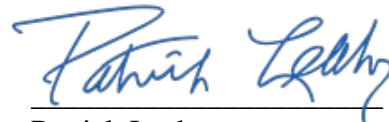
This district court’s practices appear to clearly exceed the boundaries of Rule 53. It is plain that the court’s use of technical advisors is not “the exception rather than the rule” and that judicial functions are being broadly delegated to private attorneys. It is also clear that these appointments are not driven by the “exceptional technical complexity” of particular cases. In fact, one technical advisor is appointed frequently to cases involving many different technologies and cannot actually be an expert in the technology relevant to each particular case. Rather, the frequent use of technical advisors appears to be necessitated by this single court’s open solicitation of a massive patent caseload.

The rules governing the use of special masters seem clear to us. We ask that you investigate abuses relating to the appointment of technical advisors, particularly in the practices described above. We ask that you address whether the rules permit this frequent use of technical advisors. If so, we ask that you amend or clarify the rules to avoid this practice. If not, we ask that you address any judge’s misapplication of the rules. Thank you for your prompt attention to this very important matter. If you have any questions, please do not hesitate to contact us.

Sincerely,



Thom Tillis
United States Senator



Patrick Leahy
United States Senator

Cc: Chief Judge Orlando Luis Garcia, Chief Judge, U.S. District Court for the Western District of Texas

⁵ See Scott Graham, *How a Former Law Clerk Earned \$700K This Year as a Court-Appointed Technical Adviser*, National Law Journal (Aug. 26, 2021).

⁶ See *id.*

TAB 17

1425 **17. Rule 11**

1426 Andrew Straw (who also submitted a comment on the published Rule 12(a) amendment
1427 proposal) has submitted 22-CV-R, urging that Rule 11 be amended.

1428 Some rulemaking background may be useful in regard to Rule 11. In 1983, the rule was
1429 rewritten in a way that provoked much controversy. For a review of these developments, see
1430 Richard Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 *Brook. L.*
1431 *Rev.* 761, 794-800 (1993); Stephen Burbank, *The Transformation of American Civil Procedure:*
1432 *The Example of Rule 11*, 137 *U. Pa. L. Rev.* 1925 (1989). That experience led the Advisory
1433 Committee to issue an unprecedented “call” for comments on the rule in 1991, followed in 1993
1434 by amendments that modified the changes made in 1993. See *Stove Builder Int’l, Inc. v. GHP*
1435 *Group, Inc.*, 280 F.R.D. 402, 403 (N.D. Ill. 2012) (referring to the “fang-drawing 1993
1436 amendments”).

1437 Those amendments drew a Supreme Court dissent. See dissent by Justice Scalia, 146
1438 F.R.D. 507, 508 (“The Rules should be solicitous of the abused (the courts and the opposing
1439 party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless,
1440 reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If
1441 objection is raised, they can retreat without penalty”). From time to time bills are introduced in
1442 Congress to undo parts of the 1993 amendments to Rule 11, often under the title “Lawsuit Abuse
1443 Reduction Act.”

1444 The Advisory Committee has not considered significant changes to the rule since 1993,
1445 though it was restyled in 2007. Past experience with amending Rule 11 may counsel caution.

1446 Mr. Straw introduces his proposal as prompted by his personal experience:

1447 My former employer, the Indiana Supreme Court, has taken mere words of criticism from
1448 several federal lawsuits I filed to vindicate disability rights and imposed nearly 6 years of
1449 suspension on 5 law licenses (4 federal via reciprocal discipline with NO HEARING),
1450 absolutely ruining my legal career.

1451 He objects to Indiana’s imposition of sanctions in the absence of Rule 11 sanctions in the
1452 underlying federal actions. He therefore proposes that “Rule 11 must absolutely prohibit any
1453 other court from using ‘harsh words’ without a Rule 11 sanction as being an ethical violation by
1454 the person who filed the lawsuit and pursued it.” In his view, “Indiana took the lack of any
1455 sanction in 4 federal cases and took this to mean that it has free reign [sic] under its own Rule 3.1
1456 alone to retaliate against those cases after I made an ADA complaint about the Indiana Supreme
1457 Court TO the Indiana Supreme Court.”

1458 Research indicates that Mr. Straw has already pursued his objections to his treatment by
1459 the Indiana state courts in federal court. He sued the Indiana Supreme Court in U.S. district court
1460 in Indiana, and appealed to the Seventh Circuit when that case was dismissed. *Straw v. Indiana*
1461 *Supreme Court*, 2018 WL 1309802 (7th Cir., Jan. 29, 2018). He then petitioned for certiorari in
1462 the U.S. Supreme Court, but the Court denied the petition. *Straw v. Supreme Court of Indiana*,
1463 138 S.Ct. 1598 (2018).

1464 In addition, some other online research appears to disclose the following: Mr. Straw sued
1465 the U.S. District Court for the Southern District of Indiana for \$5 million, but that suit was
1466 dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B). He also sought to have the federal courts
1467 reinstate his right to litigate in federal court. See *In re Andrew Straw*, No. 17-2523 (7th Cir.,
1468 Dec. 21, 2017). He also sued the State of Indiana to challenge his discipline, but that suit was
1469 dismissed for failure to state a claim. *Shaw v. State of Indiana*, Court of Appeals of Indiana no.
1470 22A-PL-766 (June 22, 2022). In addition, in 2020 the S.D.N.Y. dismissed his suit alleging
1471 defamation against the law firm Dentons and Thomson Reuters, seemingly for blog posts and
1472 publishing the official reports of the Indiana Supreme Court decisions about him), including also
1473 a claim against his law school alma mater, Indiana University School of Law. *Straw v. Dentons*
1474 *US LLP*, S.D.N.Y. 20-CV-3312 (June 11, 2020). In dismissing this case, Judge Stanton noted
1475 that other courts had rejected Straw’s efforts to challenge the discipline imposed by the Indiana
1476 courts. A Westlaw search suggests there may be additional actions brought by Mr. Straw.

1477 The main change Mr. Straw proposes to Rule 11 is to add a new subdivision (e), entitled
1478 “Containment of Discipline and Prevention of State Court Abuse.” The thrust of his argument
1479 seems to be that no state bar discipline may be imposed for actions taken in regard to federal-
1480 court litigation unless the federal court first imposes sanctions.

1481 Mr. Straw seems to have things backwards. By and large, the federal courts leave bar
1482 discipline to state bar authorities. On occasion, a federal court may impose discipline on a lawyer
1483 for action taken in the federal court (such as suspension from practice before the federal court),
1484 but more often federal courts may refer questions of discipline to state bar authorities.

1485 In the 1990s, there was brief consideration of possible adoption of Federal Rules of
1486 Attorney Discipline (partly due to urging from the Department of Justice), but that idea soon
1487 proved unworkable. So most district courts adopt the professional responsibility rules of the
1488 states in which they sit as applicable in their courts as well.

1489 The notion that a Civil Rule could prevent state bar authorities from imposing discipline
1490 seems to fly in the face of this experience and misunderstand the relationship of state bar
1491 discipline and federal court admission to practice. And even if this idea had some promise, it
1492 would be odd that it should apply only to proceedings governed by the Civil Rules; it surely
1493 could happen that attorney misconduct could occur in criminal cases, bankruptcy cases, or before
1494 the appellate courts. So a rule of this nature would be an odd addition to the Civil Rules only.

1495 It is recommended that this proposal be dropped from the agenda.

TAB 17A

From: Andrew Straw 22-CV-R
To: RulesCommittee Secretary
Cc: Andrew Straw; Adrienne Meiring; Angie Ordway; Alexander.Carlisle@atg.in.gov; "Olivia Covington"; MOdendahl@IBJ.com; Tom Harton; KStancombe@ibj.com; kaitlin.lange@indystar.com; kathryn.dolan@courts.in.gov; Amy Allbright; VSB Diversity Conference; VSB Membership; clerk@vsb.org; lawrev@law.harvard.edu; IU Maurer School of Law Dean's Office; Aebr Coe; Lisa Ryan; mkeyes@IndianaDisabilityRights.org; ali_ali.org
Subject: Suggested Changes to FRCP Rule 11 to Avoid State Court Criminal Acts
Date: Sunday, December 04, 2022 4:08:14 PM

Dear U.S. Courts Rules Committee:

My former employer, the Indiana Supreme Court, has taken mere words of criticism from several federal lawsuits I filed to vindicate disability rights and imposed nearly 6 years of suspension on 5 law licenses (4 federal via reciprocal discipline with NO HEARING), absolutely ruining my legal career, causing me massive reputational injury, and no federal courts would let me oppose it.

FRCP Rule 11 needs to make perfectly clear that without a Rule 11(c) due process, a case may not be considered "frivolous" and any words of criticism must be deemed *dicta* without more. Rule 11 must absolutely prohibit any other court from using "harsh words" without a Rule 11 sanction as being an ethical violation by the person who filed the lawsuit and pursued it.

This is just common sense, but Indiana took the **lack of any sanction in 4 federal cases** and took this to mean it had a free reign under its own **Rule 3.1 alone** to retaliate against those cases after I made an ADA complaint about the Indiana Supreme Court TO the Indiana Supreme Court.

SUGGESTED LANGUAGE CHANGES IN YELLOW

FRCP Rule 11.

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the

signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(5) merely criticizing a pleading or dismissing a lawsuit without more shall not be considered any sort of ethical violation or sanction by the court.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee. **In the absence of**

notice and opportunity to respond, no criticism of a pleading or entire case shall be considered an ethical violation by the person who filed it. Any mere criticism or dismissal with no formal sanction and separate order shall be considered the normal functioning of the court and at most *dicta* with no ethical consequence.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b). **If such attorney, law firm, or party makes a good faith attempt to explain the conduct, no sanction beyond a public reprimand at a maximum shall be imposed.**

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation. **Without a separate sanction order after due process, notice and opportunity to respond, no sanction of any kind may be imposed.**

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction. Without a separate order imposing sanctions, no sanction must be considered to have been imposed. **Mere words of criticism in a dismissal or denial are not a sanction and no punishment may be imposed without a separate order and the due process that goes with it.**

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

(e) Containment of Discipline and Prevention of State Court Abuse.

(1) If no discipline is imposed in a federal lawsuit with a separate order and due process, no other federal or state court may impose any discipline based upon what happened in that case. There is no such thing as informal ethical sanctions in a federal court. No ethical violation may be *inferred* from *dicta* in a case and without a formal sanction and separate order under this rule, no ethical violation may be inferred.

(2) If *dicta* occurs in a dismissal or other denial order and no separate sanction order appears in the case, no other court, state or federal, may consider this to be anything more than *dicta*, and no ethical violation may be inferred from such *dicta*. It is critically important for no state court to attempt to impose a sanction on what happens in a federal lawsuit based on the merits without there being any formal federal sanction.

(3) If a state court does impose sanctions based only on the *dicta* in a federal lawsuit in which no formal sanction was issued, this violates federal criminal law, namely 18 U.S.C. §

245(b)(1)(B) because there must be no interference with the right to use the federal courts. This right exists due to the First Amendment and Article III, which guarantees that courts will exist and will accept filings. The right to use the federal courts exists independent of whether the user of a federal court wins or loses. It is inconceivable that in the absence of a formal sanction with a separate order, a user of the federal court loses that First Amendment right simply by losing. It is thus a crime on the part of a state court to attempt to usurp the power of a federal court to control when sanctions are imposed under this rule.

(4) If a state court imposes a suspension on an attorney who was not formally sanctioned with a separate order in a federal court or an attorney who used the court *pro se* without a separate and formal sanction, that state court must be found in contempt and full damages must be immediately awarded to the person injured as a retaliation for exercising the right to use the federal courts, win or lose.

(5) Given the deliberate and purposeful nature of imposing a sanction to go around the power of a federal court to control the parties before it, there can be no statute of limitations on punishing a state that violates the sanctity of a federal court. All consequential damages shall be awarded to the party injured by attorney discipline in such a state court. Further, if a suspension beyond 30 days is imposed, punitive damages shall be awarded to the attorney so unlawfully disciplined at 10x the compensatory damages.

(6) For clarity, even an accusation of "frivolous" in a federal order does not and cannot be considered an ethical violation on the part of the filer without a separate sanction order after due process.

ANDREW U. D. STRAW: ILLEGALLY SUSPENDED

I was suspended by the Indiana Supreme Court for nearly 6 years for what happened in federal lawsuits with no formal sanction by those federal courts. *In re Straw*, 68 N.E.3d 1070 (Ind. 2/14/2017)

After letting a 180 day suspension drag on for nearly 6 years, I have also been denied constitutional property rights compensation on **5 law licenses suspended because of the Indiana Supreme Court.**

Straw v. Indiana, 53C01-2110-PL-2081 (Monroe Cty. Cir. Ct. #1 4/4/2022); *Straw v. Indiana*, 22A-PL-766 (Ind. Ct. App. 2022)

And now I am being denied *IFP* status even when it has been granted over and over again to me at the state and federal level over the past 2 years. *Straw v. Indiana*, 22A-PL-2352 (Ind. Ct. App.). This devious imposition of poverty on me is being used now to prevent me from even being paid for **property taken by the state.**

The **Virginia State Bar** saw right through this and called using a court ADA coordinator to file a complaint in response to my own and attack me for my ADA work and cases, "**having all the grace and charm of a drive-by shooting.**"

VSB 100% exonerated me with no sanction imposed.

<https://www.vsb.org/docs/Straw-062217.pdf>

Straw VSB Edits-1 - Virginia State Bar

1 v i r g i n i a: before the virginia state bar disciplinary board in the matter of vsb docket no.: 17-000-108746 andrew u.d. straw order of dismissal

www.vsb.org

As my suggested rule changes show, the Indiana Supreme Court committed a federal crime several times over, but no prosecutor had the guts to go against a state supreme court (my former employer) that was turning me into a crime victim simply **because I used the federal courts with some criticism the first few times I used them.**

The same principle applies under the ADA, Title V, but I was not allowed the benefit of the ADA in any way.

Rule 11 must exclude state courts from second-guessing federal courts

using their inferior Rule 3.1 rules because federal courts operate at a superior level and status under the Constitution. State courts may not add or subtract from the Constitution or federal laws **or attempt to hurt those who use the federal courts.**

I rely on my assumption that the federal courts will make these changes promptly to protect the integrity of federal courts from state court meddling. My legal career has been ground to a pulp because Indiana has interfered.

Thank you for the opportunity to make these suggestions.

Sincerely,

A handwritten signature in black ink that reads "Andrew U. D. Straw". The signature is written in a cursive, flowing style.

Andrew U. D. Straw
712 H ST NE
PMB 92403
Washington, D.C. 20002
Mobile Phone: (847) 807-5237
andrew@andrewstraw.com
<http://www.andrewstraw.com>

TAB 18

1496 **18. Mandatory Initial Discovery Project**

1497 In 2016, the Standing Committee authorized the initiation of the Mandatory Initial
1498 Discovery Pilot, and the Federal Judicial Center has produced a thorough report on the results of
1499 that project. It was designed to explore the impact of what might be called a more aggressive use
1500 of initial discovery/disclosure requirements. In particular, the pilot project focused on non-MDL
1501 cases that would be subject to initial disclosure under Rule 26(a)(1)(A) (i.e., not excluded from
1502 that rule’s disclosure requirements under Rule 26(a)(1)(B)). The resulting report (sans
1503 appendices) is included in this agenda book.

1504 In approaching this report, it may be helpful to recall some rulemaking history. In 1991,
1505 this committee proposed adoption of a new Rule 26(a) disclosure requirement. That proposal
1506 prompted considerable resistance. Ultimately Rule 26(a)(1)(A) was adopted, but with an opt-out
1507 feature permitting districts to elect whether to follow the “national” rule. The rule was not
1508 limited to disclosure of favorable information, but instead required disclosure of information
1509 relevant to matters alleged with particularity, even if unfavorable to the disclosing party. Three
1510 Supreme Court Justices dissented from adoption of the disclosure rule, largely on the ground that
1511 it was out of step with the American adversarial litigation system. See Amendments to the
1512 Federal Rules of Civil Procedure, 146 F.R.D. 401, 507-09 (1993) (dissenting opinion of Justice
1513 Scalia, joined by Justices Thomas and Souter). The disclosure rule went into effect in 1993.

1514 Considerable diversity among districts emerged, prompting preparation of a thorough
1515 study of divergent practices in various districts. See D. Stienstra, Implementation of Disclosure
1516 in United States District Courts, With Specific Attention to Courts’ Responses to Selected
1517 Amendments to Federal Rule of Civil Procedure 26 (FJC 1998). During the same general period
1518 of time, districts were obliged to develop cost and delay plans pursuant to the Civil Justice
1519 Reform Act, and the RAND Corporation intensely studied the results of those projects. Finally,
1520 in 1997, at the request of the Advisory Committee, the FJC did a very thorough study of a variety
1521 of discovery issues, including several affected by rule amendments that went into effect in 1993.
1522 See T. Willging, J. Shapard, D. Stienstra & D. Mieltich, Discovery and Disclosure Practice,
1523 Problems, and Proposals for Change (FJC 1997).

1524 In 1998, the Advisory Committee proposed amendments to Rule 26(a)(1) that would
1525 remove the opt-out provision for district courts and restore national uniformity, but also limit
1526 initial disclosure to information the disclosing party “may use to support” its claims or defenses.
1527 There was considerable resistance to the national uniformity features of this amendment
1528 proposal, including some from district court judges, but it was adopted and went into effect in
1529 2000. The rule has remained essentially unchanged since then. From time to time, there have
1530 been expressions of satisfaction and dissatisfaction with the present rule.

1531 The MIDP was a careful effort to investigate the potential effect of more demanding
1532 initial requirements. It was implemented on a voluntary basis by judges in the District of Arizona
1533 and the Northern District of Illinois. Some judges elected not to participate. Among other things,
1534 it did not limit required initial discovery to information on which the party providing discovery
1535 would rely, and it also required the filing of responsive pleadings even from parties intending to
1536 file Rule 12(b) motions (something not explicitly required in the 1991 proposed rule or the 1993
1537 rule as adopted).

1538 The FJC study focused on cases filed between Jan. 1, 2014, and March 12, 2020 (the day
1539 before the pandemic emergency declaration). “Comparison” districts were selected for purposes
1540 of comparison – the S.D.N.Y. for the N.D. Ill. and the E.D. Cal. for the D. Ariz. The attached
1541 report has very detailed information about the study, and deserves close study. But some overall
1542 reactions may provide a useful introduction.

1543 One important take away is that the project had a statistically significant effect on case
1544 duration – “the pilot shortened disposition times for cases subject to the MIDP.” (p. 9)

1545 As was done in the 1997 FJC study mentioned above, this study included an extensive
1546 attorney survey of attorneys about closed cases. The study got a good response rate
1547 (approximately one third of those asked to respond). These responses are presented in figures in
1548 the study that may warrant an initial review. Here are some generalizations about the responses:

1549 The MIDP process was rated as fair much more frequently than rated unfair, and in
1550 particular the discovery procedures were rated as fair. (Figures 7-10)

1551 The MIDP procedure provided relevant information earlier. (Figures 17 and 18)

1552 But the attorney responses did not endorse the MIDP procedures regarding other points
1553 that may be regarded as important. Thus, attorneys did not find that the program resulted
1554 in disclosure of information that would not have been requested otherwise (Figures 19-
1555 20), or that it focused discovery on the important issues in the case (Figures 21-22), or
1556 that it enhanced settlement negotiations (Figures 23-24), or that it expedited settlement
1557 negotiations (Figures 25-26).

1558 In summary, “to the extent the pilot did result in shorter disposition times, neither
1559 attorneys for plaintiffs nor attorneys for defendants were particularly enthusiastic about it.” (p.
1560 95) It might be added that clients were (understandably) not surveyed.

TAB 18A

Mandatory Initial Discovery Pilot (MIDP)
Final Report

Prepared for the Judicial Conference Advisory Committee on Civil Rules

Emery G. Lee III and Jason A. Cantone

October 2022

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

This report was produced at U.S. taxpayer expense.

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Executive Summary

Judges in the District of Arizona and Northern District of Illinois volunteered to participate in the Mandatory Initial Discovery Pilot (MIDP) project in new civil cases initiated in district court from May/June 2017 through April/May 2020. The MIDP replaces the initial disclosures required by the Federal Rules of Civil Procedure with broader disclosure requirements. At the request of the Advisory Committee on Civil Rules, Federal Judicial Center researchers conducted this study of the MIDP. Findings include:

- 5,078 pilot cases were initiated from May 1, 2017, through April 30, 2020, in Arizona, and 12,133 pilot cases were initiated from June 1, 2017, through May 31, 2020, in Illinois Northern (“pilot case” is defined as one in which the MIDP notice was docketed).
- Regression analysis shows that pilot cases had shorter disposition times than non-pilot cases, controlling for case type, district, and the effects of the coronavirus pandemic.
- Surveys of attorneys in closed pilot cases show that respondents tended to rate the MIDP most positively in terms of providing the parties with information earlier in the case. Survey respondents were more neutral or negative toward the MIDP on a broader range of its potential effects.
 - Plaintiff attorneys tended to rate the MIDP’s effects more positively than defendant attorneys, and Arizona attorneys tended to rate the MIDP’s effects more positively than Illinois Northern attorneys.
 - When provided the opportunity to respond to open-ended survey questions, attorneys in Illinois Northern were more likely to express negative views, and attorneys in Arizona were more likely to express positive views, about the MIDP. In both districts, attorneys with more years of practice experience were more likely to express positive views about the MIDP.
- The MIDP participation rate (defined as at least one party making MIDP responses) was higher in Arizona than in Illinois Northern. Based on the study’s docket analysis, the participation rate in Arizona was 65% for pilot cases compared to 44% in Illinois Northern. Based on its closed-case surveys, the participation rate in Arizona was about 65%, compared to 55% in Illinois Northern.
- The 30-day pilot deadline for MIDP responses (after the filing of a responsive pleading) appears to have been manageable in at least half of participating cases in the sample. The docket analysis shows that the median time in both pilot districts from first responsive pleading to first MIDP responses, when docketed, was 32 days for both plaintiffs and defendants.
- In an analysis of Rule 26(f) reports in pilot cases, disputes over the MIDP were brought to the court’s attention in 7% of Arizona participating cases and 3% of Illinois Northern participating cases.
- There appears to have been little satellite litigation resulting from disputes over MIDP obligations. Motions to compel MIDP responses, for example, were filed in less than 1% of Arizona participating cases and in 3% of Illinois Northern cases.

Background

In June 2016, the Judicial Conference Committee on Rules of Practice and Procedure (Committee) approved the Mandatory Initial Discovery Pilot (MIDP) for use in the district courts.¹ Judges in two districts, the Northern District of Illinois and the District of Arizona, volunteered to participate in the pilot. The MIDP is based on the expectation that “civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice.”² The mandatory initial discovery replaces the initial disclosures otherwise required by Rule 26(a)(1). However, MIDP disclosures are broader than those under the existing rule because they require disclosure of both favorable and unfavorable information; the existing rule requires a party to disclose only favorable information. In contrast to the current rule, the MIDP “sweeps broadly.”³

The MIDP was modeled in part on substantial mandatory disclosure requirements in some states, including Arizona, and the Canadian judicial system.⁴ As noted in the Mandatory Initial Discovery User’s Manual for the District of Arizona, “[i]t has been reported that lawyers and their clients manage this obligation faithfully, at first because of the consequences of failing to do so and eventually because of a change in culture among litigation practitioners.”⁵

At the request of the Committee, researchers at the Federal Judicial Center (Center) have studied the MIDP since its inception.⁶ Early on, Center researchers worked with staff in the participating districts to develop case events in the courts’ docketing systems, enabling MIDP cases to be readily identified and tracked. This front-end work made it possible to, among other things, survey attorneys of record in closed MIDP cases on a regular basis since the fall of 2017.

The rest of the report is organized as follows. The next section addresses the goals of the MIDP, providing both historical context and information on the formulation of the pilot. That section is followed by an analysis of disposition times of pilot cases in the two participating districts. The

1. See Report of the Proceedings of the Judicial Conference of the United States, Sept. 2016, at 30, available at https://www.uscourts.gov/sites/default/files/2016-09_0.pdf; Report of the Judicial Conference Committee on Rules of Practice and Procedure, Sept. 2016, at 20, available at https://www.uscourts.gov/sites/default/files/st09-2016_0.pdf. The MIDP was developed by the Advisory Committee on Civil Rules and its Pilot Projects Working Group. See Video: Introduction to the Mandatory Initial Discovery Pilot (Federal Judicial Center 2017), available at <https://www.fjc.gov/content/321101/midpp-introduction-video>. This 22-minute video, narrated by Judge Paul Grimm, then-chair of the Pilot Projects Working Group, is very clear as to the intended aims of the MIDP and worth watching for an overview of the MIDP’s requirements.

2. Advisory Comm. on Civil Rules, Report to the Standing Committee, May 12, 2016, at 27, available at <https://www.uscourts.gov/sites/default/files/2016-06-standing-agenda-book.pdf>.

3. Salt River Project Agric. Improvement & Power Dist. v. Trench France SAS, 303 F. Supp. 3d 1004, 1008 (D. Ariz. 2018) (Campbell, J.).

4. <https://www.fjc.gov/content/320224/midpp-standing-order>; Mandatory Initial Discovery Users’ Manual for the District of Arizona, at 3–4, available at https://www.azd.uscourts.gov/sites/default/files/documents/Arizona_MIDP_Users_Manual.pdf.

5. *Id.*

6. Our Center colleagues George Cort, Margaret S. Williams, Carly Giffin, and Vashty Gopinpersad provided invaluable assistance on this multiyear project, as did three Center interns, Danielle Rich, Annmarie Khairalla, and Mustafa Almusawi. Judges and court staff in the Northern District of Illinois and District of Arizona were generous with their time and attention throughout the pilot. Judges Amy St. Eve, Robert Dow, David Campbell, and Paul Grimm were instrumental in implementing the MIDP.

bulk of the report then summarizes findings from surveys sent to attorneys of record in recently closed MIDP cases. The survey section includes attorneys' evaluations of the MIDP's effects, with a focus on the issue of discovery costs, and a detailed analysis of their open-ended responses. After the survey section, the results from an intensive study of sampled pilot case dockets in both participating districts are presented. The body of the report concludes with a brief section discussing the findings as a whole. Additional information is provided in two appendices.⁷

The Goals of the MIDP

In requiring “early, substantial disclosures” of relevant information before commencement of party-driven discovery,⁸ the MIDP builds on the disclosure-and-discovery model of information exchange that has been part of the Federal Rules of Civil Procedure since the early 1990s. In this model, the parties are required, at the outset of the litigation, to provide each other with certain types of information specified in the rule including disclosure of the names of persons likely to have discoverable information and copies of documents in the disclosing party's possession. These mandatory initial disclosures are *in addition to* party-driven discovery. The receiving side is not required to request the disclosure information, but the producing side is required to produce it.

The disclosure-and-discovery model was controversial in the 1990s and is, to a somewhat lesser extent, controversial today. Initial disclosures are clearly in tension with a purely party-driven discovery model. Critics of initial disclosures have long argued that requiring litigants, on their own initiative, without so much as a discovery request, to reveal information to their opponents is contrary to the adversarial nature of the system, the attorney's duty of zealous advocacy, and evidentiary rules regarding privilege and attorney work-product—especially when determining relevance is necessary to comply with the rule.⁹ There is, traditionally, a “sporting theory of justice”¹⁰ that a party should not be willing or eager to turn over information to the opposing side. The resulting gamesmanship can take many forms, from narrowly parsing discovery requests to withhold documents the requesting party would likely have considered included in the request or producing a less-than-ideal organizational deponent when a Rule 30(b)(6) deposition is noticed, to even more blatant forms of stonewalling and obstruction. Particularly obstreperous attorneys may even defend this conduct as zealous advocacy of their clients.

There is a contrary view that, while litigation may be adversarial, the parties and especially their attorneys should act in a more cooperative manner throughout the discovery process.¹¹

7. In addition to analyzing court data and conducting the closed-case surveys, FJC researchers interviewed judges and court staff in the participating districts to better understand the pilot's operations. Material from these interviews is presented at various points in the report.

8. See Video: Introduction, *supra* note 1.

9. Notably, Justice Scalia, joined by Justices Thomas and Souter, raised these exact concerns in his dissent from the Supreme Court's approval of the amendments to Rule 26. See Amendments to the Federal Rules of Civil Procedure and Forms, *reprinted in* 146 F.R.D. 402, 507–13 (1993).

10. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 *Baylor L. Rev.* 1, 14 (1956), *reprinted from* 40 *Am. L. Rev.* 729 (1906). Pound suggested, in the early years of the 20th century, that “our exaggerated contentious procedure,” *id.* at 15, was “probably only a survival of the days when a lawsuit was a fight between two claimants in which change of venue had been taken to the forum,” *id.* at 14.

11. See, e.g., The Sedona Conference, Cooperation Proclamation, 10 *Sedona Conf. J.* 331 (2009 Supp.). The influence of the Sedona Conference on current rulemaking efforts is obvious.

Proponents of cooperativeness argue that the purpose of discovery, as envisaged by the drafters of the federal rules, is full exchange of information between the parties: “the overriding objective civil discovery was designed to accomplish was the location and disclosure of all the unprivileged evidentiary data that might prove useful in resolving a given dispute.”¹² Gamesmanship distorts the discovery process, concealing information for tactical advantage,¹³ making adjudication of cases on their merits more difficult and costly. As early as the 1970s, Wayne Brazil was pointing to the “fundamental antagonism between the goal of truth through disclosure and the protective and competitive impulses that are at the center of the traditional adversary system of dispute resolution.”¹⁴ Proponents have long argued that a more cooperative model of discovery is an important part of the solution to many problems perceived as plaguing civil litigation—especially cost and delay.

Greater cooperation in the discovery process could, in theory, achieve the goals of its proponents without initial disclosures. But *robust* initial disclosures, as conceived by the proponents of cooperative discovery, are seen as a way to accelerate (“front-load”) the shared search for truth at the heart of the discovery process, providing litigants with relevant information early in a case without the need to make and respond to formal discovery requests. A judge participating in the MIDP described the pilot to us as working on a belt-and-suspenders model—the two tools, disclosure and discovery, work together, even if in most cases, either one would perform the task. Under the MIDP, a party can always seek information that is not disclosed (disclosures serving as the belt) using the discovery methods found in the Rules (serving as suspenders). The point of the MIDP disclosures is not, in most cases, to replace party-driven discovery, but instead to empower the parties *in every case* to make an early case assessment of the strengths and weaknesses of their positions before incurring the costs of discovery. The expectation is that parties will, as a result, be better equipped to participate in case-management conferences at an early point in the case. Even though party-driven discovery will still be necessary in many cases to provide the litigants with the information needed to resolve the dispute, an early case assessment and effective case management may focus discovery on key issues in the case, potentially reducing costs.

12. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand. L. Rev. 1295, 1298–99 (1978).

13. The opposite of the disclosure-and-discovery approach is to hide information until it can be sprung on an unsuspecting opponent, possibly at trial. “One of the MIDP’s purposes is to avoid surprise at trial by providing fair notice to each side of the facts and theories underlying the other side’s claims and defenses.” Final Pretrial Order at 9, *Cramton v. Grabbagreen Franchising LLC*, No. 2:17cv4663 (D. Ariz. Oct. 2, 2020) (Lanza, J.). In the words of one party moving for sanctions in an MIDP case, “The MIDP seeks to eliminate litigation by ambush.” Plaintiff’s Motion for Sanctions at 2, *BBK Tobacco & Foods LLP v. Skunk, Inc.*, No. 2:18cv2332 (D. Ariz. Feb. 2, 2021). See also Report & Recommendation, *Leland v. Yavapai County*, No. CV-17-8159-PCT-SPL (DMF) (D. Ariz. Aug. 8, 2017), 2019 WL 1547016, at *4 (“The MIDP . . . eliminates such gamesmanship.”) (Fine, M.J.). One of the judges interviewed for this report agreed that the MIDP “eliminates the game playing of rule 34 requests parsed by the producing party. That’s a good thing.”

14. Brazil, *supra* note 12, at 1299. Brazil was a vocal critic of common discovery practices: “[S]ome lawyers might argue that a thoroughgoing adversarial professionalism commands the use of such obstructive devices whenever they appear to promise significant advantages for a client.” *Id.* at 1331.

Mandatory Initial Discovery Pilot Final Report

The courts participating in the MIDP adopted a general or standing order¹⁵ explaining the parties' obligations under the pilot and setting forth the initial discovery requests to which the parties must respond.¹⁶ All civil cases subject to mandatory initial disclosures under Fed. R. Civ. P. 26(a)(1), except those categories of cases exempted by the order, were included in the pilot program and subject to the order.¹⁷ Some of the requirements set forth in the pilot standing order are:

- At the Rule 26(f) conference, parties must discuss the mandatory initial discovery listed in the Standing Order and describe their discussions (including limitations invoked and disputes) in their Rule 26(f) report.
- Parties must provide the requested information as to facts that are relevant to the parties' claims and defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims and defenses.
- Parties must file answers, counterclaims, cross-claims, and replies within the time set forth in Rule 12(a)(1)–(3), even if they have filed or intend to file a motion to dismiss or other preliminary motion.
- Parties must serve their initial discovery responses by the deadlines described in the Standing Order unless modified by the court.
- Parties must address certain issues relating to electronically stored information (ESI) and produce ESI by the deadline set in the Standing Order.
- Pilot judges should hold initial case-management conferences within the time set in Rule 16(b)(2) and discuss the parties' compliance with the mandatory discovery obligations.¹⁸

The MIDP provides for limited exemptions. For example, the Users' Manual for the District of Arizona provides two exemptions but states that “[c]ourts should not excuse parties from their obligation to provide timely discovery responses under the MIDP.”¹⁹ At the same time, experience with the pilot has proven that judges applying the MIDP must do so in a flexible way suited to the needs of each case. Most notably, judges in both districts have worked to balance the need for

15. With respect to nomenclature, Arizona usually refers to the order as a general order, *see* “Mandatory Initial Discovery Pilot,” available at <https://www.azd.uscourts.gov/attorneys/mandatory-initial-discovery-pilot>, and Illinois Northern as a standing order, *see* “Mandatory Initial Discovery Pilot Standing Order,” available at <https://www.ilnd.uscourts.gov/assets/documents/MIDP%20Standing%20Order.pdf>.

16. *See also* “Mandatory Initial Discovery Pilot Project Model Standing Order,” available at <https://www.fjc.gov/content/320224/midpp-standing-order>.

17. For example, in Arizona, “Mandatory initial discovery responses are required for all cases other than (a) those exempted from initial disclosures by Rule 26(a)(1)(B); (b) cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation; and (c) actions under the Private Securities Litigation Reform Act (“PSLRA”).” Mandatory Initial Discovery Users’ Manual for the District of Arizona, at 2, available at <https://www.azd.uscourts.gov/sites/default/files/documents/Arizona%20MIDP%20Users%20Manual.pdf>. Patent cases governed by local rules are also exempted from the MIDP.

18. <https://www.fjc.gov/content/320224/midpp-standing-order>.

19. “Mandatory initial discovery responses may be excused or deferred in two circumstances. First, no responses are required if the Court approves a written stipulation by the parties that no discovery will be conducted in the case. Second, responses may be deferred once, for 30 days, if the parties jointly certify to the Court that they are seeking to settle their dispute and have a good-faith belief that the dispute will be resolved within 30 days of the due date for their responses.” Mandatory Initial Discovery Users’ Manual for the District of Arizona, at 2, available at <https://www.azd.uscourts.gov/sites/default/files/documents/Arizona%20MIDP%20Users%20Manual.pdf>.

prompt MIDP responses against the possibility that some cases might be resolved on the pleadings alone. The difficulty of managing the discovery process while Rule 12 motions are pending is not, of course, unique to the MIDP, but the pilot shines a bright light on the difficulty by accelerating the parties' exchange of discovery. In Illinois Northern, especially, “[m]any lawyers objected to the need to make initial discovery responses in actions that might well be dismissed on the pleadings.”²⁰ In response to these concerns, in December 2018, “the rules were altered to give judges more discretion to pause [the MIDP] pending disposition of a motion to dismiss.”²¹

Disposition Times Analysis

This report uses multivariate regression to compare the disposition times of pilot cases and non-pilot cases. A simple bivariate comparison is not possible due to the way districts assigned cases to the pilot and the fact that some pilot cases were still pending at the conclusion of the study

Because the pilot responses supersede Rule 26(a)(1)(A) disclosures,²² this report sought to compare pilot and non-pilot cases in which Rule 26(a)(1)(A) would ordinarily apply (bivariate comparisons). This report refers to case types in which Rule 26(a)(1)(A) disclosures would typically be required as “civil-heartland” cases. The civil-heartland category includes the kinds of cases (defined by nature-of-suit code) in which one would typically expect disclosure and discovery to proceed pursuant to Rules 26–37. Rule 26(a)(1)(B) includes a list of case types excluded from the initial-disclosure requirement, including most prisoner cases, administrative appeals including Social Security disability appeals, and forfeiture actions. Such cases are outside the civil heartland, as defined here.

Arizona assigned a higher percentage of its civil-heartland cases to the pilot than Illinois Northern because a higher percentage of district judges in Arizona opted to participate in the pilot than in Illinois Northern, where several judges opted to not participate or to participate in a limited fashion. Even so, pilot cases account for a lower share of Arizona’s total civil docket compared to Illinois Northern because the caseload in Arizona includes a much higher percentage of non-heartland cases, especially prisoner cases, than that in Illinois Northern. In terms of the number of pilot cases in each district:

- In Arizona, 5,078 pilot cases were initiated from May 1, 2017, through April 30, 2020, accounting for
 - 28% of all civil cases in the district during the pilot period

20. Agenda Book, Advisory Committee on Civil Rules, Apr. 1, 2020, at 99 (Minutes of October 2019 Meeting), https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf. Similar negative assessments of the MIDP were prominent in the survey results released by the Chicago chapter of the Federal Bar Association released in May 2018. See Report of the Advisory Committee to the Northern District of Illinois on Mandatory Initial Discovery Pilot Project: Survey Results, available at https://www.ilnd.uscourts.gov/_assets/_news/MIDP%20Advisory%20Committee%20Report%20FINAL.pdf.

21. Agenda Book, Apr. 2020, *supra* note 20. See also Agenda Book, Advisory Committee on Civil Rules, Oct. 29, 2019, at 124 (Minutes of April 2019 Meeting), https://www.uscourts.gov/sites/default/files/2019-10_civil_rules_agenda_book.pdf (“The court has come to recognize a judge’s discretion to not require that discovery go forward pending a motion to dismiss.”).

22. See Mandatory Initial Discovery Pilot Model Standing Order, available at <https://www.fjc.gov/sites/default/files/2017/MIDPP%20Model%20Standing%20Order.pdf>.

- 89% of all non-MDL civil-heartland cases during the pilot period
- In Illinois Northern, 12,133 pilot cases were initiated from June 1, 2017, through May 31, 2020, accounting for
 - 46% of all civil cases in the district during the pilot period
 - 63% of non-MDL civil-heartland cases during the pilot period

The civil-heartland classification does not perfectly capture the courts' assignment of cases to the MIDP, and this is the source of the difficulty in making bivariate comparisons. Both participating districts assigned non-heartland cases to the pilot in relatively small but not negligible numbers:

- In Arizona, 687 pilot cases (14%) were not in a civil-heartland nature-of-suit category. More than a third of these cases were prisoner civil-rights cases. Even though most prisoner civil-rights cases filed during the pilot period were excluded from the pilot, some were included in the pilot.
- In Illinois Northern, 1,112 pilot cases (9%) were not in a civil-heartland nature-of-suit category. More than a third of these cases were immigration actions included in the pilot.

That not all pilot cases are civil-heartland cases (and that not all civil-heartland cases are pilot cases) complicates making bivariate comparisons pre- and post-pilot. An apples-to-apples comparison of cases assigned to the pilot (including non-heartland cases) to similar cases not assigned to the pilot is practically impossible without multivariate analysis. That analysis includes controls for nature-of-suit categories and can control for the effects of case type on processing times in a more nuanced way.

The number of pilot cases still pending as of April 2022 further complicates a direct comparison of disposition times. About 5% of pilot cases in Arizona and about 10% in Illinois Northern were still pending at the time the dispositions data was last extracted from the courts' electronic records. Still-pending cases are a common problem when using filing cohorts (and the pilot cases are, by definition, a three-year filing cohort). Until all cases in a filing cohort have terminated (for the first time) in the district court, the average disposition times will change (grow longer) with each data extraction, as more cases (with longer disposition times) terminate. In other words, more recent filing cohorts have more missing data than less recent ones, making it difficult to compare disposition times. The pilot cases still pending as of our most recent data extraction in April 2022 could not be factored into a bivariate comparison of disposition times, pre- and post-pilot.

Regression Analysis

The regression model presented in this section includes all civil cases filed in or removed to federal court from January 1, 2014, through March 12, 2020, the day before President Trump declared a national emergency to address the coronavirus pandemic. The model includes more than three years of pre-pilot filings and removals in the participating districts and more than six years of filings and removals overall. Given our focus on the disclosure-and-discovery process, the analysis is limited to original proceedings and removals, excluding reopened cases, appellate remands, cases originating from interdistrict and multidistrict litigation (MDL) transfers, and directly filed MDL cases.

The cases were drawn from four districts—the two participating districts, Arizona and Illinois Northern, and two districts included for comparison purposes, California Eastern (for Arizona) and New York Southern (for Illinois Northern). The choice of comparison district for Illinois Northern is limited to a handful of districts because of the district’s large and complex caseload; New York Southern is the best, and arguably the only, option. Arizona presents a more difficult, if less limited, choice in terms of comparison district. But California Eastern is a similar district in terms of size and nature of caseload; both districts manage a relatively high volume of prisoner cases; and both are in the Ninth Circuit. The choice of these two comparison districts is discussed at more length in Appendix 1.

The **dependent variable** is the number of days from filing or removal to (first) termination in the district court, for terminated cases, or the number of days from filing or removal to the date of the data extraction, for cases still pending as of April 2022. Cox proportional-hazards regression analysis is commonly used to estimate the effects of a treatment (here, the pilot) on survival (here, filing to disposition time after adjusting for other explanatory variables (usually called covariates)). Often used in medical fields, the typical event of interest is death.²³ But survival need not mean time until death.²⁴ In this study, a civil case “survives” from its initiation in federal district court (filing or removal) until it is closed in the same court (for present purposes, the first time, excluding reopened cases). The pilot can be thought of as the treatment, and the model examines how the treatment affected the survival (time to event).²⁵

Covariates

Pilot: The value of the pilot variable is 1 if the pilot standing order appears in the case’s docket and 0 otherwise. (This kind of variable is commonly referred to as a “dummy variable.”) Pilot cases only appear in the participating districts. Note that the regression model uses the same definition of “pilot case” as the rest of the study. The regression model does not account for whether any MIDP responses were, in fact, made in the pilot cases.²⁶ Indeed, we know that in many pilot cases, no MIDP responses were made—for example, in cases assigned to the pilot that

23. See David G. Kleinbaum & Michael Klein, *Survival Analysis: A Self-Learning Text* (3d ed. 2012).

24. This method is also commonly used in the social sciences. See, e.g., Nicole Asmussen, *Female and Minority Judicial Nominees: President’s Delight and Senators’ Dismay?*, 36 *Legis. Studs. Q.* 591, 606 (2011) (using Cox proportional-hazards regression to show that the confirmation of female and minority candidates does not take longer once gridlock is controlled for); Sarah A. Binder & Forrest Maltzmann, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 *Am. J. Pol. Sci.* 190, 192 (2002) (using a Cox proportional-hazards regression to analyze sources of delay in judicial confirmations).

25. Survival analysis can also account for the still-pending pilot cases. Using this approach, it is common practice to include cases in the regression in which the event of interest has not yet occurred. See Kleinbaum & Klein, *supra* note 23, at 28, 37–41. In a clinical setting, for example, there may be patients who have not yet died at the time of the study and thus for whom time-to-event (i.e., death) information is incomplete. This kind of data is referred to as “right censored” (if one thinks of the timeline as running from left-to-right, these cases do not have a right terminus). The post-treatment survival of the censored cases still provides (incomplete) information that is included in the analysis—for example, a case that had been pending 12 months at the time of the analysis without closing had survived at least 12 months. The regression model included 6,052 still-pending cases in the four districts, about 4% of the total.

26. As discussed in the survey section, about half of attorneys in both participating districts stated that all required exchanges were made; about 8–9% of attorneys stated that one side, but not both, made MIDP responses. The docket section provides a higher rate: MIDP responses were provided in 77% of sampled cases with a responsive pleading in Arizona; 62% in Illinois Northern.

were resolved before the filing of a responsive pleading. But in some subset of pilot cases in which no responsive pleading was filed, the obligation to make MIDP responses factored into the parties' decision to settle early. In other words, the existence of the MIDP obligations likely affected litigants' decisions even in some cases in which the MIDP responses were not made.

District Variables: The regression model includes dummy variables for three of the four districts; different specifications of the models were performed changing the baseline district, without any substantive change in the pilot coefficient. The model includes non-pilot cases from the participating districts as well as all cases from comparison districts filed or removed from January 1, 2014, through March 12, 2020, to provide estimates of the effects of covariates on survival times. In **Table 1** the baseline district (for which a dummy variable was not included) is New York Southern.

Controlling for Case Types: The regression model includes controls for case types based on the broad nature-of-suit categories on the civil coversheet (listed in **Table 1**). The baseline case type for purposes of the regression models is "Other." The model also includes a dummy variable coded 1 if the court's electronic case record includes an MDL docket number. Many MDL cases are screened from the analysis based on case origin, but this variable should control for any MDL effects; MDL cases in general are excluded from the MIDP.

Controlling for the Effects of the Coronavirus Pandemic: The coronavirus pandemic struck in the third year of the pilot period. Many pilot cases were pending on the date of the declaration of the national emergency, and several hundred pilot cases were filed on or after that date. Given the impact of the pandemic on court operations and litigants, not to mention life in general, it is necessary to attempt to control for its effects. The regression analysis is limited to cases filed before the date of the declaration of the national emergency. This simplifies the analysis because it requires only controlling for the effect of the pandemic on pending cases and not, in addition, for effects on cases filed after its onset. The control variable included in the model is the natural log of the number of days a case had been pending on the date of the national emergency. (The variable is coded zero for cases terminating prior to the date of the national emergency.)

Results

Table 1 summarizes the results of the regression analysis. The model as a whole is statistically significant at the $p < .001$ level, meaning that the model performs better than a model including none of the covariates. In terms of the covariates, a positive coefficient means that an increase in the variable increases the likelihood of case termination (results in a higher risk of failure); a negative coefficient means that an increase in the variable decreases the likelihood of case termination (a lower risk).²⁷ Positive coefficients are associated with shorter disposition times; negative coefficients with longer disposition times.

Most of the variables in the model are dummy variables, which only take the values 0 or 1, making them relatively simple to interpret. (The log of days pending on the date of the coronavirus national emergency is the exception.) Note that, except for one nature-of-suit category

27. See Binder & Maltzmann, *supra* note 24, at 193 ("An increase (decrease) in the hazard rate means that the variable has the effect of speeding up (slowing down) a confirmation decision.").

(“Bankruptcy,” the category including bankruptcy appeals, in *italics* in **Table 1**), all the coefficients are significant at the $p < .001$ level.

Most importantly for this report, the pilot coefficient is positive and statistically significant, meaning that the regression indicates that pilot cases had shorter dispositions than non-pilot cases, all else equal. The Cox-regression coefficients can be used to calculate the change in the hazard ratio, comparing pilot to non-pilot cases, all else equal; that calculation indicates that pilot cases had a 33% higher risk of terminating than non-pilot cases, all else equal. **Figure 1** shows the survival curves for pilot versus non-pilot cases in Illinois Northern based on the regression analysis. The pilot curve is to the left of the non-pilot curve, showing that the model predicts pilot cases have a greater risk of terminating than non-pilot cases, which translates to a shorter disposition time, all else equal.

As expected, the control variable for the effects of the coronavirus pandemic has a negative and statistically significant coefficient—cases pending on the date of the declaration of the national emergency had longer disposition times, all else equal, than other cases. It is important to note that, if a regression model like this one is run without including a coronavirus control variable, the pilot variable takes a negative coefficient, reflecting the overlap of the pilot period and the coronavirus pandemic.²⁸ The occurrence of the coronavirus pandemic certainly complicates interpretations of the study’s results. But the regression results are consistent with the conclusion that the pilot shortened disposition times for cases subject to the MIDP, despite the pandemic, for cases filed before the declaration of the national emergency.

For the most part, the remaining covariates are of limited substantive interest. The district dummy variables must be interpreted against the baseline district—in this case, New York Southern (i.e., the district for which a dummy variable is not included). The model indicates that civil cases in Arizona have shorter disposition times than those in New York Southern, all else equal, but that civil cases in Illinois Northern and California Eastern have longer disposition times than those in New York Southern, all else equal. The substantive difference between New York Southern and Illinois Northern is very small, however—the hazard ratio is only about 4% lower in Illinois Northern than in the baseline district.

The nature-of-suit category control variables must be interpreted against the baseline category, which here is “Other.” One nature-of-suit category is not different from the baseline category—bankruptcy. Four nature-of-suit categories have shorter disposition times, all else equal, than the baseline category: immigration, forfeiture, real property, and intellectual property.²⁹ All the other nature-of-suit categories have longer disposition times, all else equal, than the baseline category.

28. That is, because so many pilot cases were pending when the coronavirus pandemic struck, pandemic-related delays in case processing times coincide with the pilot (without a pandemic control variable).

29. The inclusion of the intellectual property category here may seem counter-intuitive, as patent cases are often complex and protracted; but the category includes less complex trademark and copyright cases, as well. Moreover, the model includes first terminations, and many patent cases are closed initially (stayed) in the district court pending administrative review. *See* Margaret S. Williams & Rebecca J. Eyre, Federal Judicial Center, Patent Pilot Program: Final Report 10–11 (2021) (finding 9% of patent cases overall terminated by administrative closing in the district court).

As one might have suspected, MDL cases had particularly long disposition times (the coefficient translates to a 28% lower risk of termination than non-MDL cases, all else equal).

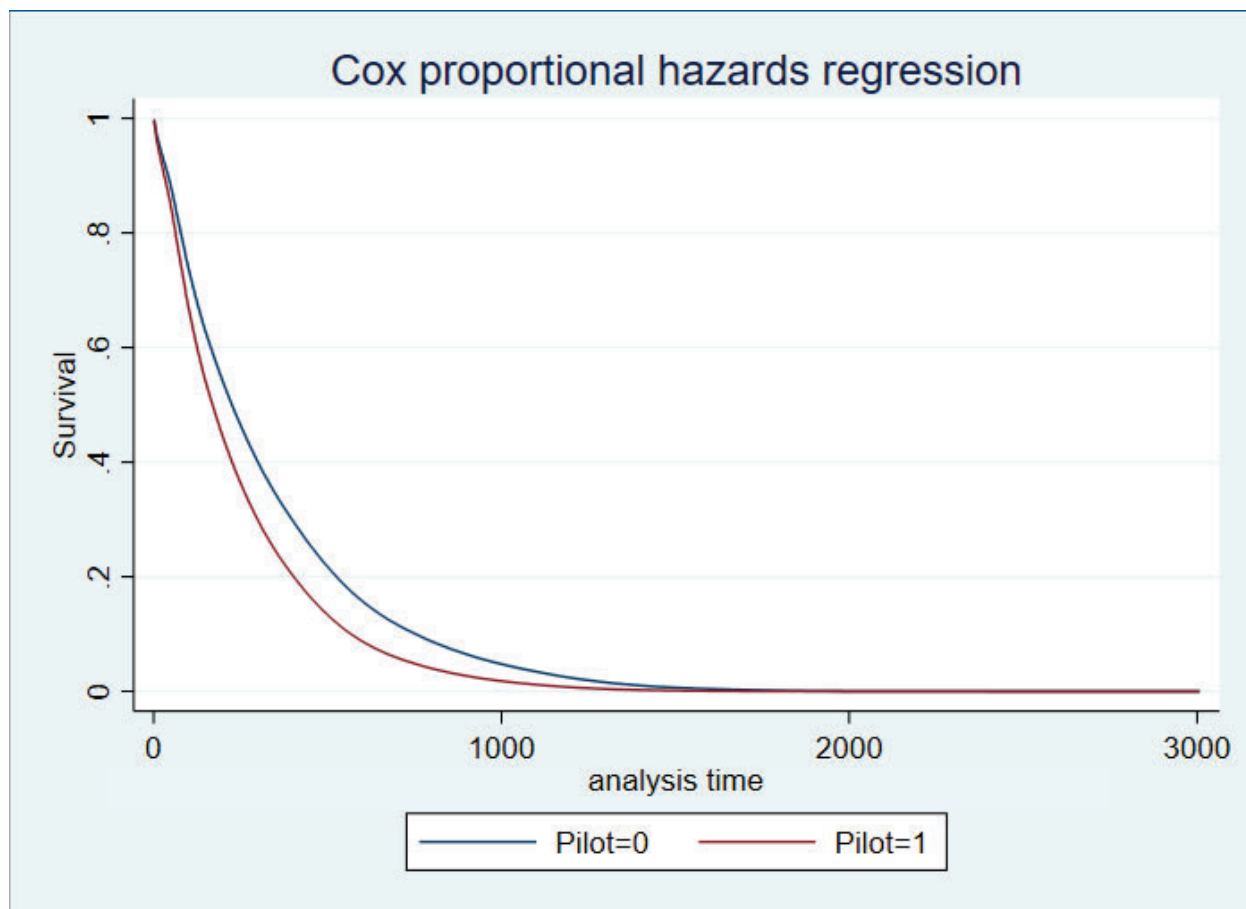
Table 1: Cox Proportional-Hazard Regression Results, Days to Disposition

Covariate (β)	Coefficient	Robust Standard Error	95% Confidence Interval
Pilot	.2885368	.0083698	.2721323 – .3049413
Log COVID days	-.2281492	.0012065	-.2305139 – -.2257845
Illinois Northern	-.0478062	.0071304	-.0617817 – -.0338308
Arizona	.0955787	.0089757	.0779868 – .1131707
California Eastern	-.1216502	.0082796	-.1378778 – -.1054225
Tort-personal injury	-.2415724	.0133737	-.2677845 – -.2153603
Tort-property damage	-.2631303	.0238847	-.3099435 – -.2163171
Civil rights	-.2234253	.0102447	-.2435046 – -.2033459
Prisoner-habeas corpus	-.2048721	.0141974	-.2326985 – -.1770458
Prisoner-other	-.1525257	.0115884	-.1752386 – -.1298128
Forfeiture	.097084	.0474754	.0040339 – .190134
Labor	-.2368965	.0114217	-.2592827 – -.2145103
Immigration	.4739206	.0199447	.4348297 – .5130115
<i>Bankruptcy</i>	-.0466798	.0241887	-.0940888 – .0007292
Intellectual property	.1111934	.0132205	.0852817 – .1371051
Social Security	-.3810319	.010386	-.4013881 – -.3606757
Tax	-.4071609	.0507852	-.5066981 – -.3076237
Contract	-.2527188	.0121528	-.2765379 – -.2288997
Real property	.0717456	.025094	.0225622 – .1209289
MDL	-1.273546	.024181	-1.32094 – -1.226152

$n = 166,324$ (including 6,052 pending cases as of April 1, 2022)

Log likelihood = 1,810,341.8

Wald $\chi^2 = 41,567.22$ ($p < .001$)

Figure 1: Survival Curves, Pilot Versus Non-Pilot, Controlling for Covariates (Illinois Northern)

Closed Case Attorney Surveys

As part of the MIDP study, Center researchers surveyed attorneys of record in recently closed pilot cases to measure participation in the pilot as well as participants' evaluations of it. Pilot cases were identified by searching each district's electronic records for closed cases in which the standing order was docketed. Cases with dispositions in which discovery was unlikely to have occurred, such as default judgments, were excluded when possible.

Starting in October 2017,³⁰ attorneys in both districts received surveys each October and April until the final (tenth) survey round in April 2022, with one exception: Due to the coronavirus pandemic, instead of a survey in April 2020, surveys were sent in August 2020. The cycle then resumed in October 2020. Each round included cases closed since the last round. For example, the final April 2022 survey round included cases closed between October 1, 2021, and March 31, 2022.

30. Arizona began applying the MIDP in civil cases filed on or after May 1, 2017, and Illinois Northern did so in civil cases filed on or after June 1, 2017.

Across the 10 survey rounds, 9,040 Illinois Northern attorneys were invited to complete the survey; 3,306 did, an overall response rate of 36.6%. Response rates varied from 28% to 49% across the 10 rounds. In Arizona, 4,434 attorneys were invited to complete the survey and 1,485 did, an overall response rate of 33.5%. Response rates varied from 25% to 42% across the 10 rounds. These response rates are consistent with those obtained in similar FJC studies. Although the email lists were deduplicated each round so no attorney in either district received more than one survey per round, some attorneys responded to more than one round of surveys.³¹

Results are reported separately for attorneys representing plaintiffs in the closed case (“plaintiff attorneys” in the figures) and attorneys representing defendants in the closed case (“defendant attorneys”). For each closed case included in the study, a survey was distributed, if possible, to both a plaintiff attorney and a defendant attorney; surveys were not distributed to self-represented parties. In each round of surveys, then, some closed cases are represented by two responses (one for each side). Reporting responses separately in this way eliminates any double counting of cases that may occur. Reporting the responses separately can also reveal meaningful differences in evaluations of the pilot between plaintiff attorneys and defendant attorneys; these differences will be discussed where appropriate.

Survey Questions

Survey respondents were first asked to complete a series of questions about their experience litigating in Illinois Northern or Arizona, and in the Arizona state courts (Arizona respondents only); whether they primarily represent plaintiffs, defendants, or both equally; how many years they had practiced law; and how the closed case was ultimately resolved in the district court. All respondents were also asked to rate, on a five-point scale, the fairness of the procedures used in the closed case as well as the substantive fairness of its outcome.

Respondents were then asked how they first became aware of the MIDP (communication from the court prior to filing; notice of standing order after filing; bar program or publication; communication with colleague/in-office training; other). Respondents then selected from five options whether, if in the recently closed case named in the invitation email, parties made MIDP responses. If the attorneys selected “I do not recall,” they were directed to the final survey question, which allowed them to provide comments about the MIDP program. If the attorneys selected “No”, they were asked why the required mandatory initial discovery was not provided from four options (“The parties stipulated that no discovery would be conducted in the case”; “The parties certified that they believed the case would be resolved in 30 days after the responsive pleading”; “The case was dismissed, transferred, or otherwise resolved before mandatory initial discovery was required”; or “Other. Please explain”). They were then directed to the final open-ended question. Attorneys in closed cases in which MIDP responses were made by one or both sides—“participating cases,” as defined in this report—were then directed to additional questions about the MIDP.

31. The 3,306 Illinois Northern attorney responses came from 2,356 different attorneys. The 1,485 Arizona attorney responses came from 1,111 different attorneys.

Attorneys in participating cases were asked to rate their agreement or disagreement (on a five-point scale from “strongly agree” to “strongly disagree” with an “I don’t know” option) with 12 statements related to the goals of the MIDP. They were asked if the exchange of initial discovery, as provided for in the standing order:

- provided relevant information earlier in the case
- led to disclosure of information that would not likely have been requested otherwise
- focused subsequent discovery on the important issues in the case
- enhanced the effectiveness of settlement negotiations
- expedited settlement discussions among the parties
- reduced the number of discovery requests that would have otherwise been made in the case
- reduced the volume of discovery required to resolve the case
- reduced the number of motions filed in the case
- reduced the number of discovery disputes that would have otherwise been made in the case
- reduced the discovery costs in the case for my client
- reduced the overall costs in the case for my client
- reduced the time from filing to resolution in the case

In later rounds of the surveys, respondents were also asked whether there were discovery disputes in the named case brought to the attention of the presiding judge and whether the issue of sanctions was raised in the named case, in relation to discovery issues.

The closed-case surveys also included two open-ended questions to better understand the attorneys’ evaluations of the pilot. The two open-ended prompts were:

- “Please provide any additional comments you have regarding the initial discovery in the above-named case.”
- “Please provide any comments you have about the district’s mandatory initial discovery pilot program.”

The second prompt was added to the survey starting in the Spring 2019 round.³² Appendix 2 provides all responses to these prompts, edited only for spelling and to remove identifying information (e.g., name of the case or client).

Attorney Characteristics

The survey respondents were an experienced group of attorneys. In both participating districts, the typical survey respondent had practiced law for more than two decades. In Arizona, the average was 21.6 years, the median 20 years, with a range from 1 to 57 years. In Illinois Northern, the average was 22.4 years, the median 22 years, with a range of 1 year to 60 years. In terms of attorney

32. In earlier rounds of the closed-case surveys, respondents who answered that neither side made MIDP responses, or they could not recall, were not provided with the opportunity to respond to an open-ended question. Starting in the Spring 2019 surveys, however, these respondents were also directed to the final open-ended question so they could provide comments about the MIDP program. In all survey rounds, respondents who answered “Yes, all required exchanges were made,” “Yes, my side did but all sides did not,” or “Yes, other sides did but my side did not” received both open-ended question prompts.

role, Arizona respondents stated they primarily represented defendants (42%), plaintiffs (32%), or both plaintiffs and defendants equally (26%). The Illinois Northern respondents stated they primarily represented plaintiffs (41%), defendants (35%), or both plaintiffs and defendants equally (24%). In most of this section, attorney role will be defined by the respondent's role in the closed case.

Respondents reported substantial experience litigating in the participating districts. Arizona plaintiff attorneys (see **Figure 2**) most often reported a great deal of experience (35%) or some experience (36%) litigating in that district, as did defendant attorneys (47% and 34%, respectively). Relatively few plaintiff attorneys (11%) or defendant attorneys (7%) reported no prior experience in the District of Arizona prior to the closed MIDP case. Because of the long-standing use of mandatory initial disclosures in state courts, Arizona attorneys were also asked how often they practiced before Arizona state courts (see **Figure 3**). About half of plaintiff and defendant attorneys (52% and 51%, respectively) answered that they had a great deal of experience in Arizona state courts, with 16% and 19%, respectively, answering some, and 15% and 12%, respectively, a little, and 17% and 18%, respectively, that they had no Arizona state court experience.

Illinois Northern attorneys also tended to report a great deal of prior experience litigating in that district (see **Figure 4**). Fully 54% of plaintiff attorneys and 61% of defendant attorneys reported a great deal of experience litigating in Illinois Northern, 33% and 29%, respectively, some experience, 10% and 7%, respectively, a little experience, and only 4% and 3%, respectively, no prior experience in the district prior to the closed MIDP case.

In interpreting the survey results, it is useful to know how the respondents' cases were resolved. In both districts, most respondents indicated that the closed cases were resolved by settlement. In Arizona (**Figure 5**), 71% of plaintiff attorneys and 60% of defendant attorneys reported that the closed case settled. In Illinois Northern (**Figure 6**), the comparable rates were 71% for plaintiff attorneys and 68% for defendant attorneys.

Figure 2: Arizona Respondent Experience Litigating in the District of Arizona (n = 1,426)

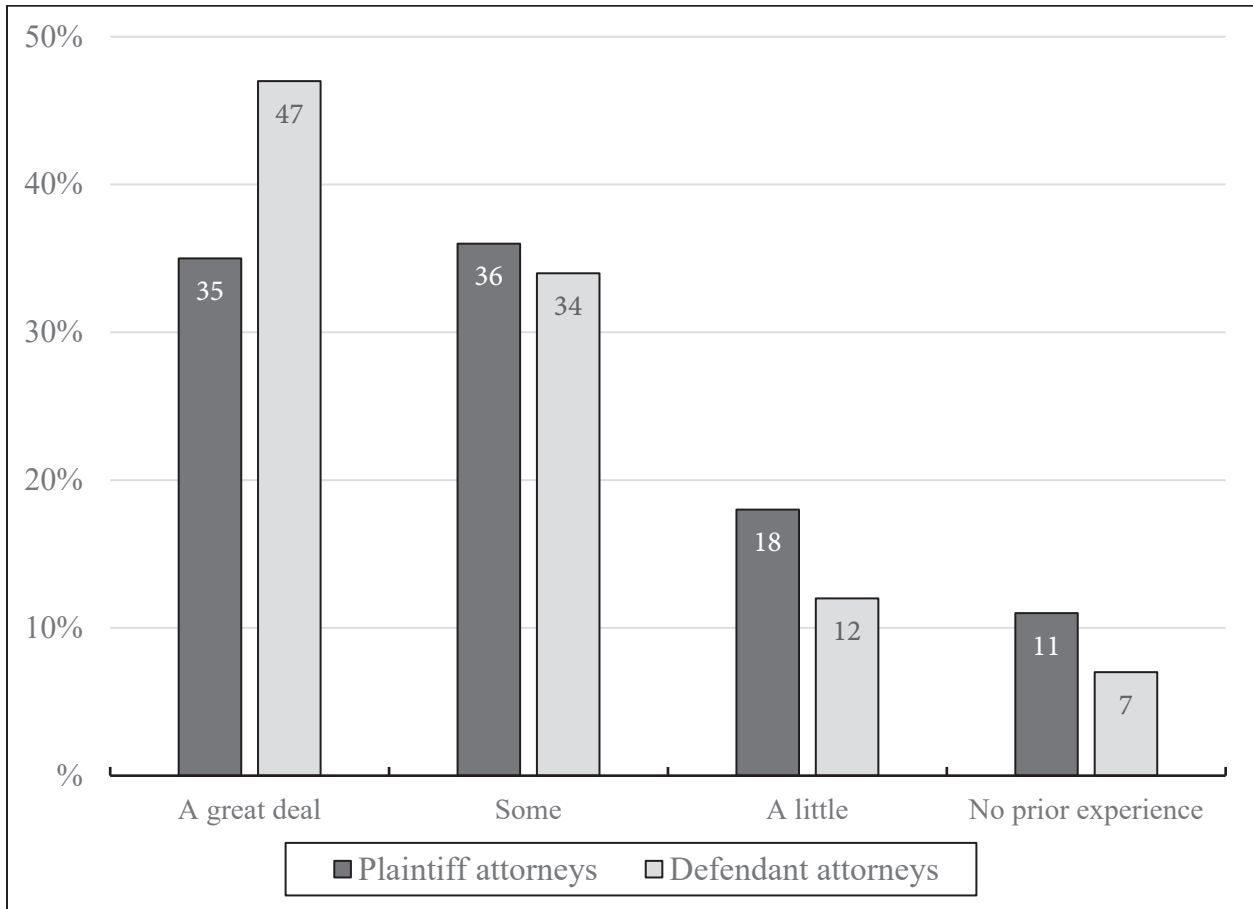


Figure 3: Arizona Respondent Experience Litigating in Arizona State Courts (n = 1,472)

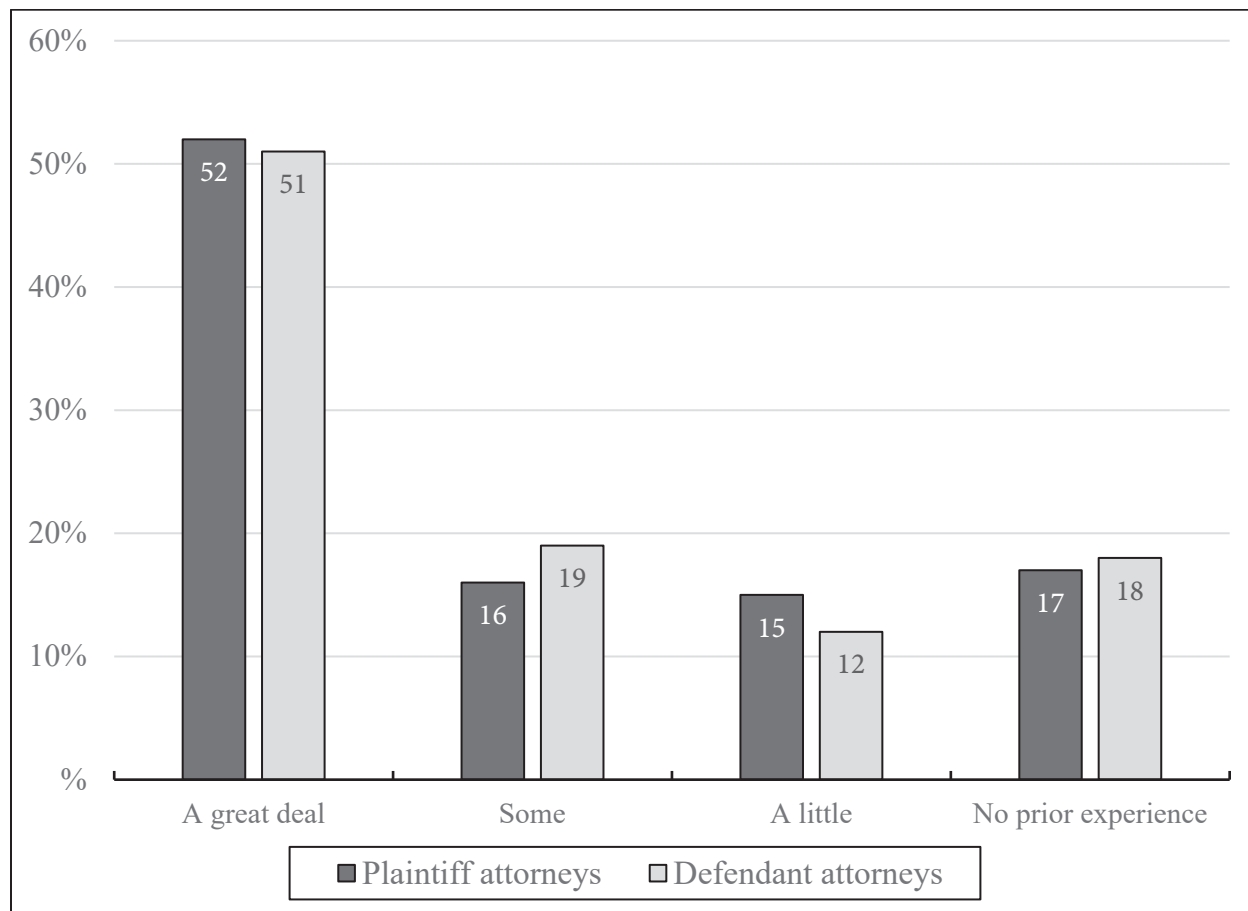


Figure 4: Illinois Northern Respondent Experience Litigating in the Northern District of Illinois
 (n = 3,260)

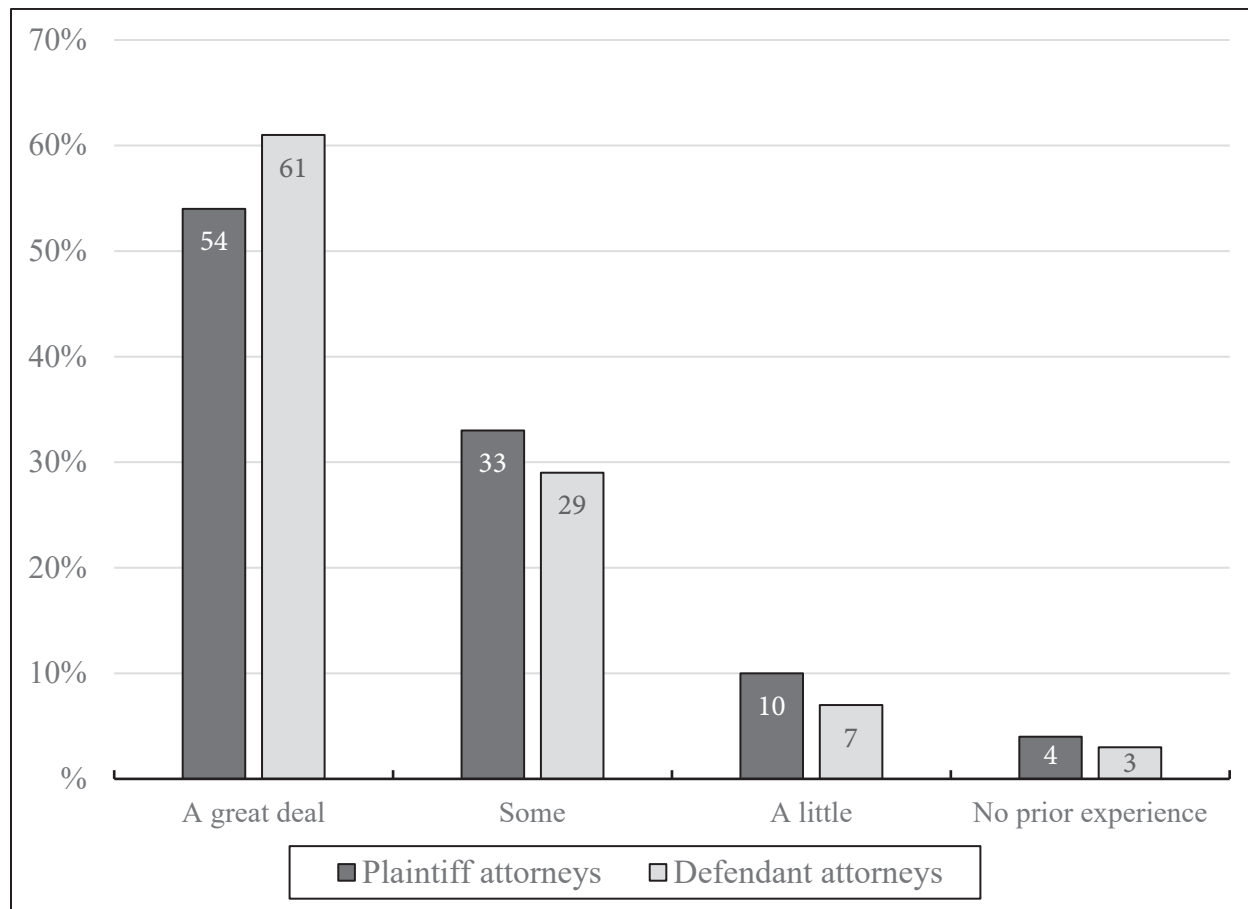


Figure 5: Arizona Closed-Case Resolutions (n = 1,477)

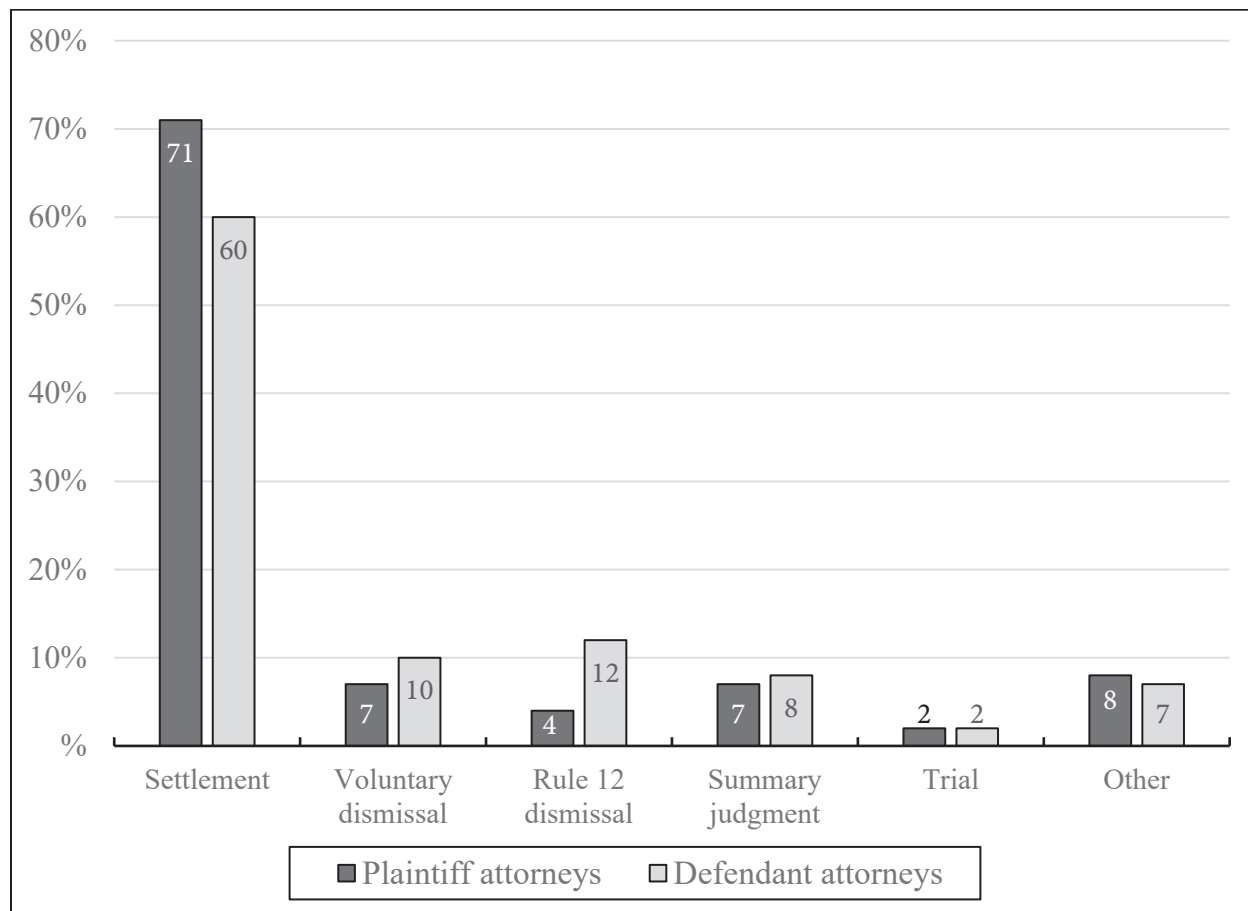
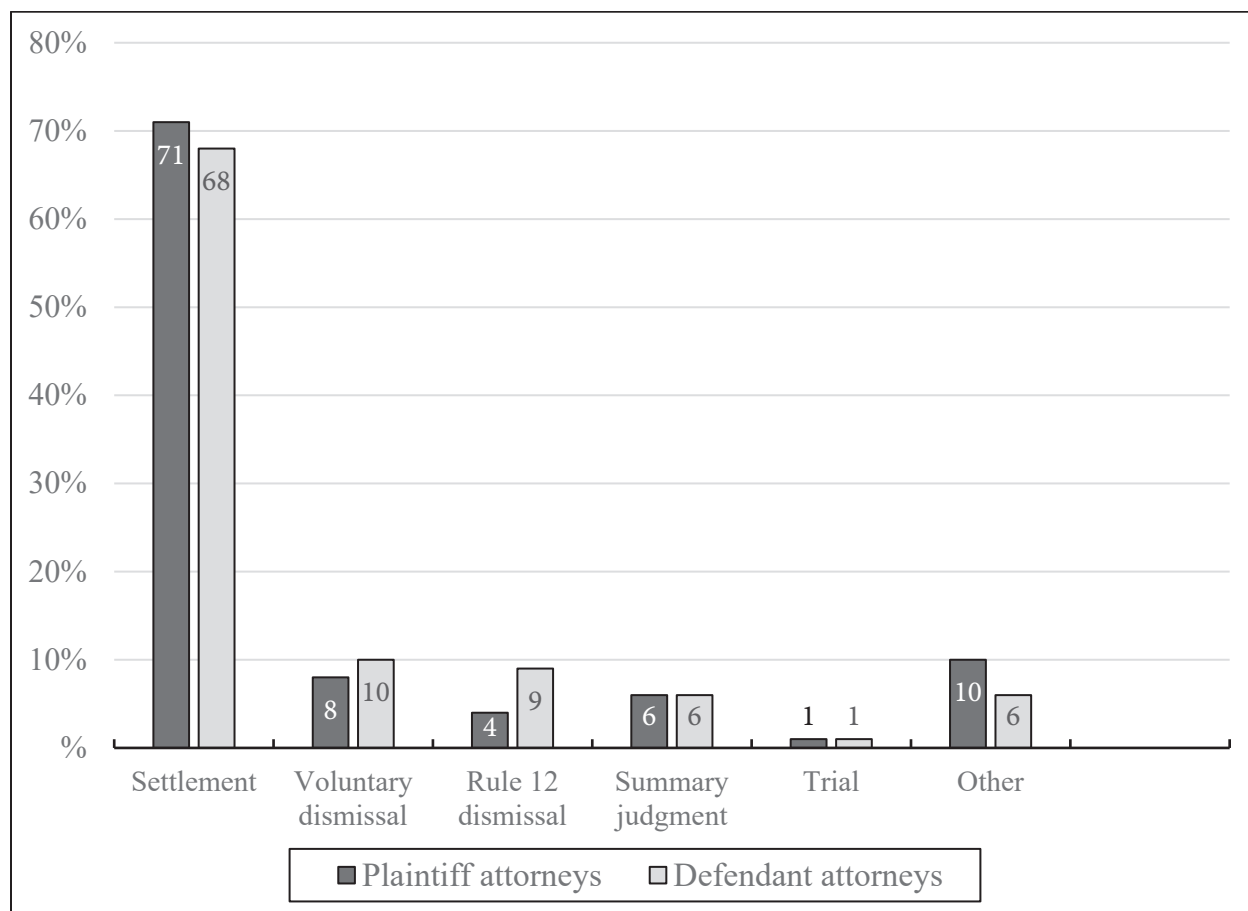


Figure 6: Illinois Northern Closed-Case Resolutions ($n = 3,266$)

Respondents' Evaluations of Fairness

To assist the advisory committee in considering whether the MIDP is consistent with the goals of Federal Rule of Civil Procedure 1, the survey asked all respondents to rate their agreement with whether “The discovery procedures followed in the case were fair” and “The substantive outcome of the case was fair” on five-point scales from “strongly agree” to “strongly disagree.” In both districts, respondents in cases participating in the MIDP tended to rate both the procedures and substantive outcomes as fair. Respondents in cases in which no MIDP responses were made, however, tended to rate the procedures in a more neutral fashion—likely because attorneys were unable to evaluate procedural fairness in cases resolved with minimal procedure.

Procedural fairness. In Arizona (**Figure 7**), 80% of plaintiff attorneys in participating cases either strongly agreed (26%) or agreed (54%) that “the discovery procedures followed in the case were fair,” and 73% of defendant attorneys either strongly agreed (22%) or agreed (51%). Only 8% of plaintiff attorneys in participating cases either disagreed (5%) or strongly disagreed (3%), and only 9% of defendant attorneys either disagreed (7%) or strongly disagreed (2%). Relatively few attorneys in participating cases were neutral with respect to the fairness of the discovery procedures: 12% of plaintiff attorneys and 18% of defendant attorneys. But in non-participating

cases in Arizona (**Figure 8**), both plaintiff attorneys (63%) and defendant attorneys (67%) were more likely to be neutral, neither agreeing nor disagreeing with the statement, “the discovery procedures followed in the case were fair.” The remaining respondents in non-participating cases were more likely to agree than disagree with the statement.

Similarly, in cases participating in the MIDP in Illinois Northern (**Figure 9**), 79% of plaintiff attorneys either strongly agreed (29%) or agreed (50%) with the statement, “the discovery procedures followed in the case were fair,” and 73% of defendant attorneys either strongly agreed (21%) or agreed (52%). Only 8% of plaintiff attorneys either disagreed (6%) or strongly disagreed (2%), and only 12% of defendant attorneys either disagreed (9%) or strongly disagreed (3%). Among respondents in participating cases, relatively few tended to be neutral with respect to the fairness of the procedures followed: 14% of plaintiff attorneys and 15% of defendant attorneys. But in non-participating cases in Illinois Northern, respondents tended to be more neutral (**Figure 10**). More than half of both plaintiff attorneys (58%) and defendant attorneys (60%) neither agreed nor disagreed with the statement, “The discovery procedures followed in the case were fair.” Again, the remaining respondents in non-participating cases were more likely to agree than disagree with the statement.

Figure 7: Participating in MIDP Arizona Respondents’ Agreement with the Statement “The discovery procedures followed in the case were fair.” (n = 959)

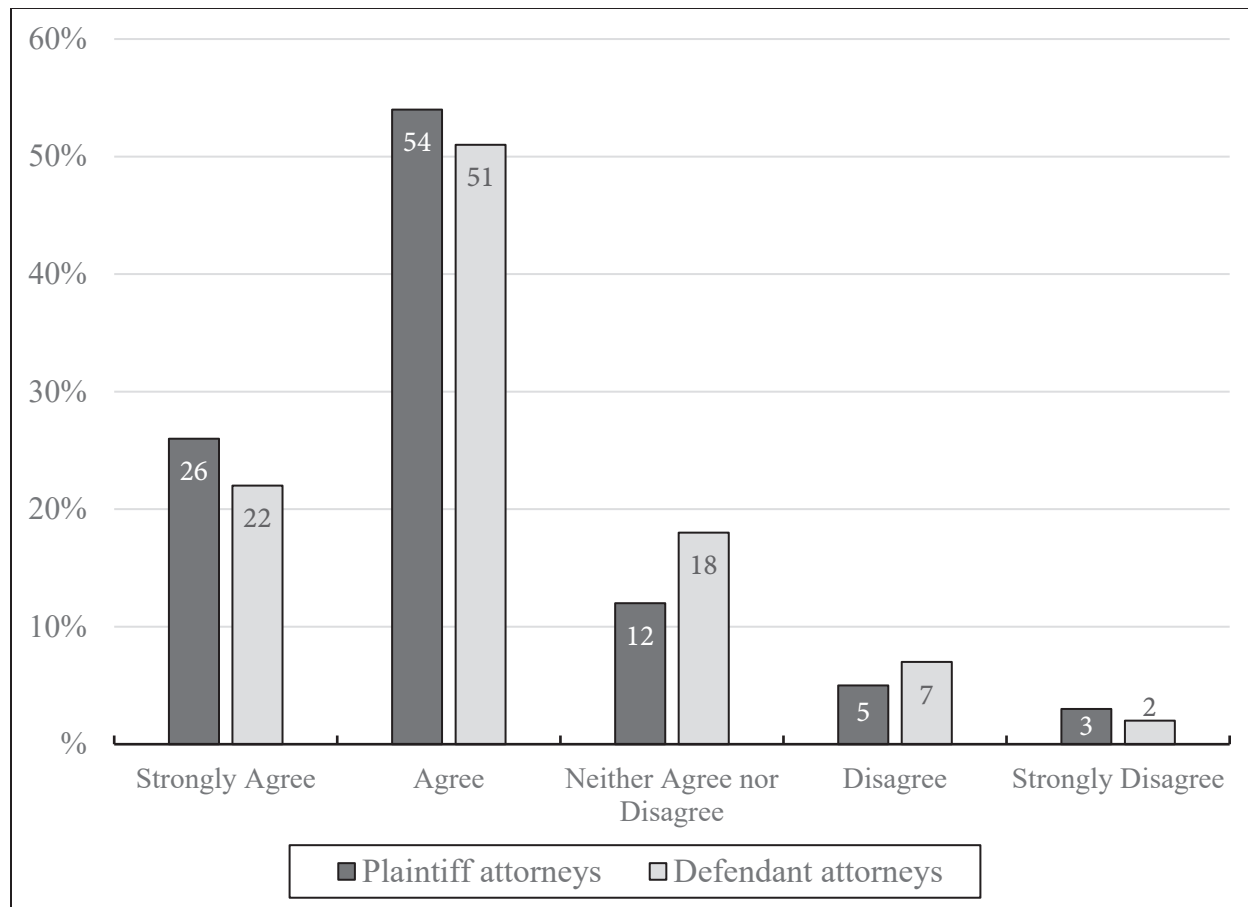


Figure 8: Not Participating in MIDP Arizona Respondents’ Agreement with the Statement “The discovery procedures followed in the case were fair.” (n = 432)

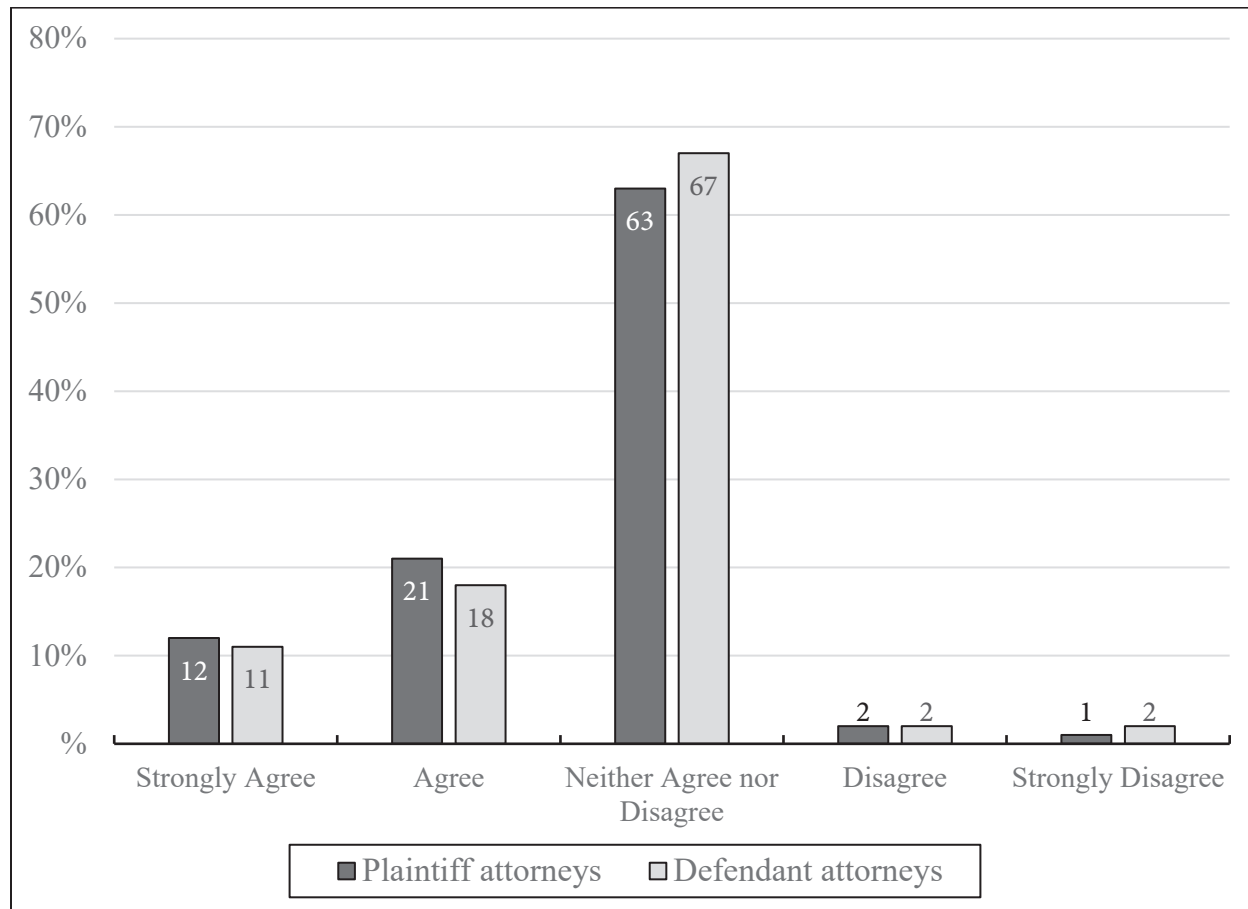


Figure 9: Participating in MIDP Illinois Northern Respondents' Agreement with the Statement "The discovery procedures followed in the case were fair." (n = 1,773)

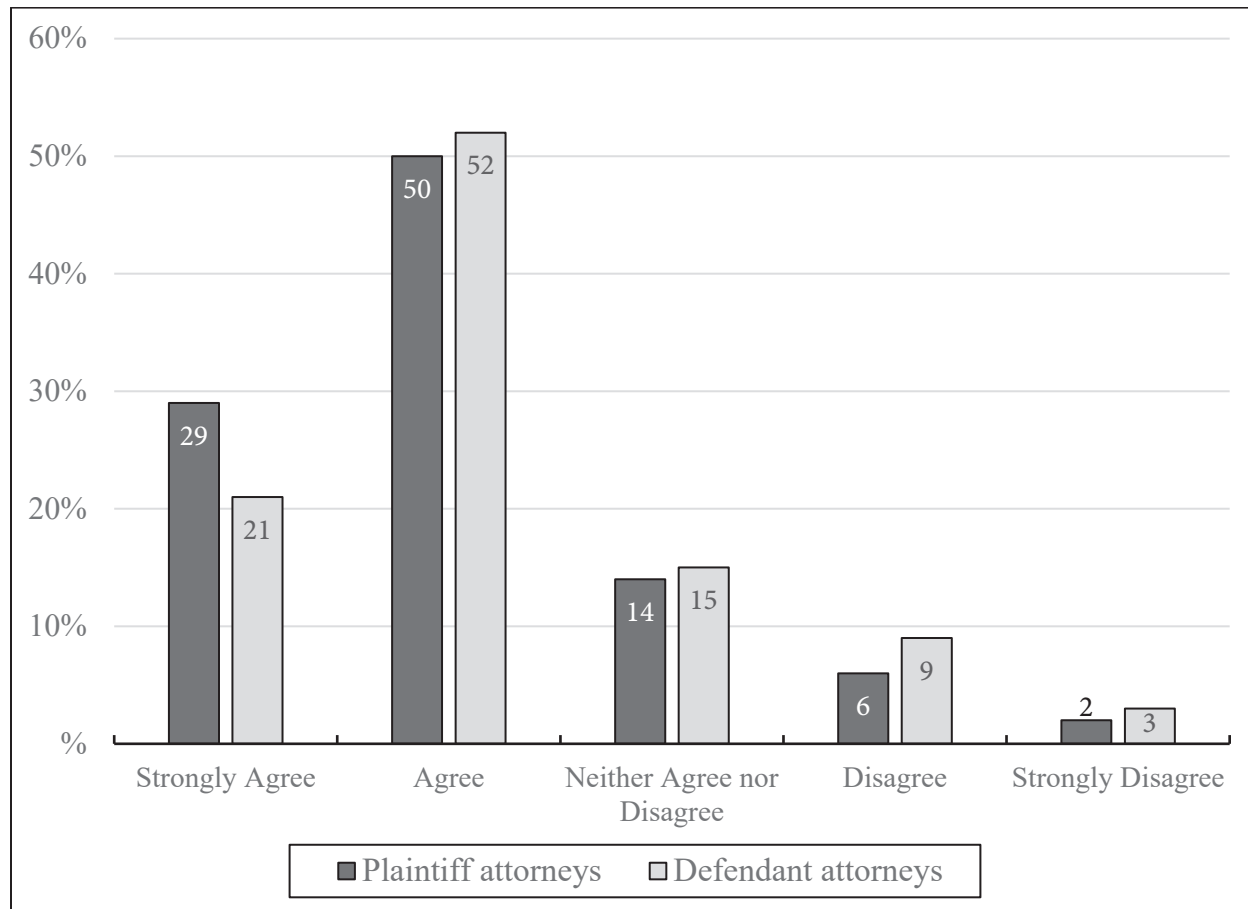
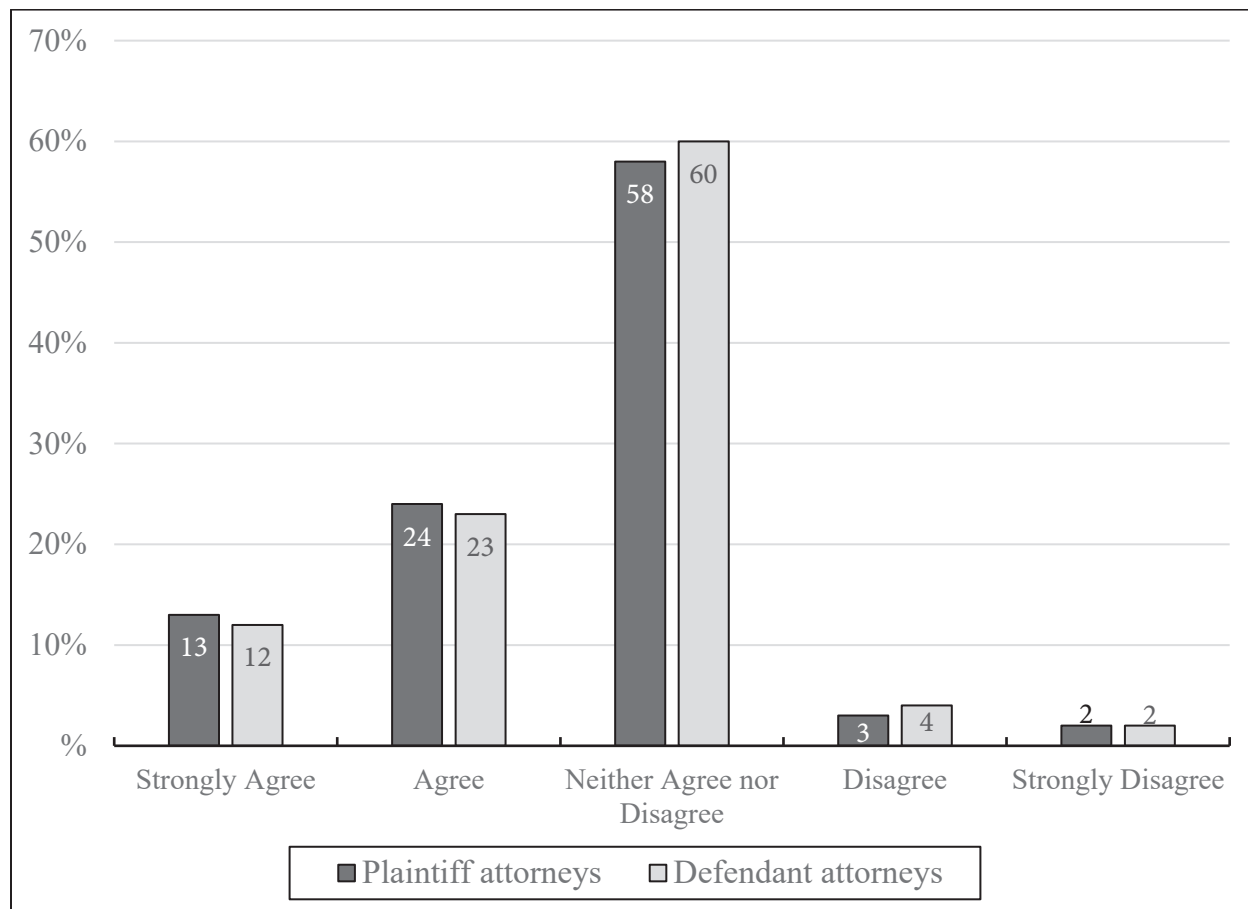


Figure 10: Not Participating in MIDP Illinois Northern Respondents' Agreement with the Statement "The discovery procedures followed in the case were fair." (n = 1,332)



Substantive fairness. In participating cases in Arizona, respondents tended to agree that the substantive outcome of the case was fair (**Figure 11**). About 73% of plaintiff attorneys either strongly agreed (22%) or agreed (51%) with the statement, “the substantive outcome of the case was fair” and 78% of defendant attorneys either strongly agreed (34%) or agreed (44%). For both plaintiff and defendant attorneys, 16% neither agreed nor disagreed, and relatively few respondents disagreed or strongly disagreed. In non-participating cases in Arizona (**Figure 12**), 53% of plaintiff attorneys either strongly agreed (23%) or agreed (30%) that the outcome was substantively fair, and even more defendant attorneys (70%) either strongly agreed (41%) or agreed (29%). The intensity of the defendant attorney response (41% strongly agreeing) is notable, though our data offer no explanation. One might speculate that defendant attorneys are especially positive about case outcomes in cases in which they avoid the cost and burden of discovery for their clients. Most of the other respondents in non-participating cases neither agreed nor disagreed with the statement: 34% of plaintiff attorneys and 28% of defendant attorneys.

Illinois Northern attorneys in cases participating in the MIDP tended to agree that the substantive outcome of the case was fair (**Figure 13**). Fully 77% of Illinois Northern plaintiff attorneys either strongly agreed (28%) or agreed (49%) with the statement, “the substantive

outcome of the case was fair,” and 74% of defendant attorneys either strongly agreed (28%) or agreed (46%). In non-participating cases (**Figure 14**), 58% of plaintiff attorneys either strongly agreed (26%) or agreed (32%), and 62% of defendant attorneys either strongly agreed (32%) or agreed (30%). But a third of both plaintiff attorneys (33%) and defendant attorneys (33%) neither agreed nor disagreed.

Figure 11: Participating in MIDP Arizona Respondents’ Agreement with the Statement “The substantive outcome of the case was fair.” (n = 947)

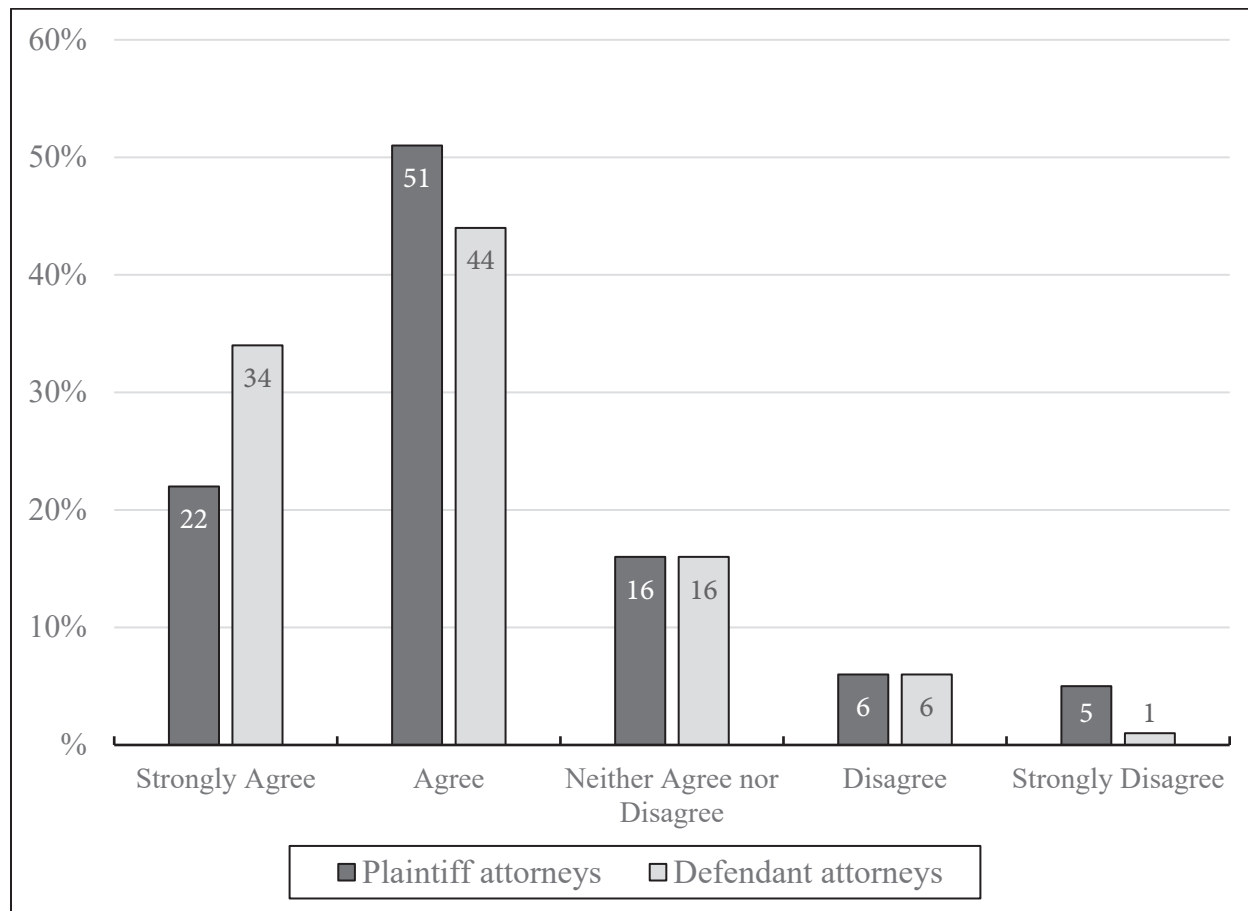


Figure 12: Not Participating in MIDP Arizona Respondents’ Agreement with the Statement “The substantive outcome of the case was fair.” (n = 432)

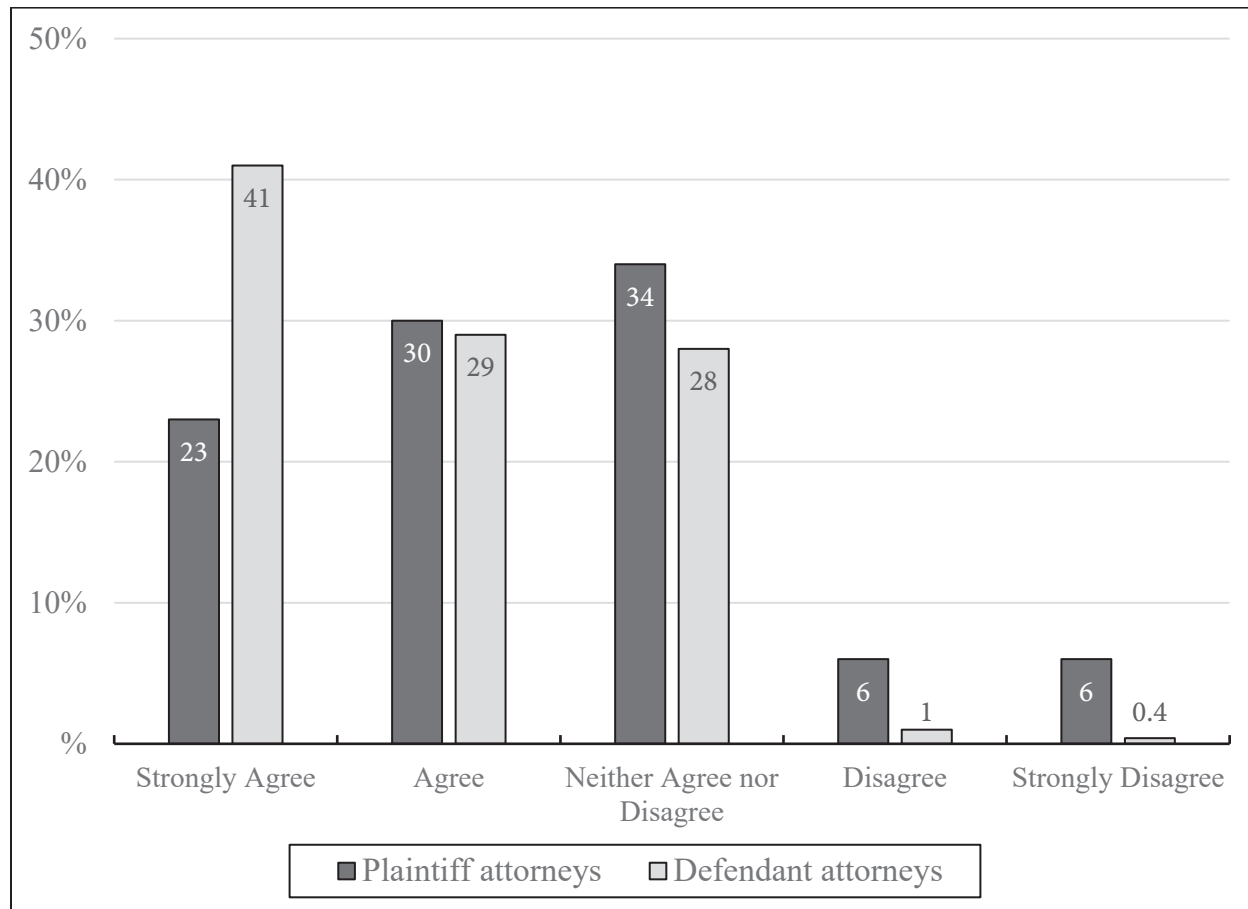


Figure 13: Participating in MIDP Illinois Northern Respondents' Agreement with the Statement "The substantive outcome of the case was fair." (n = 1,760)

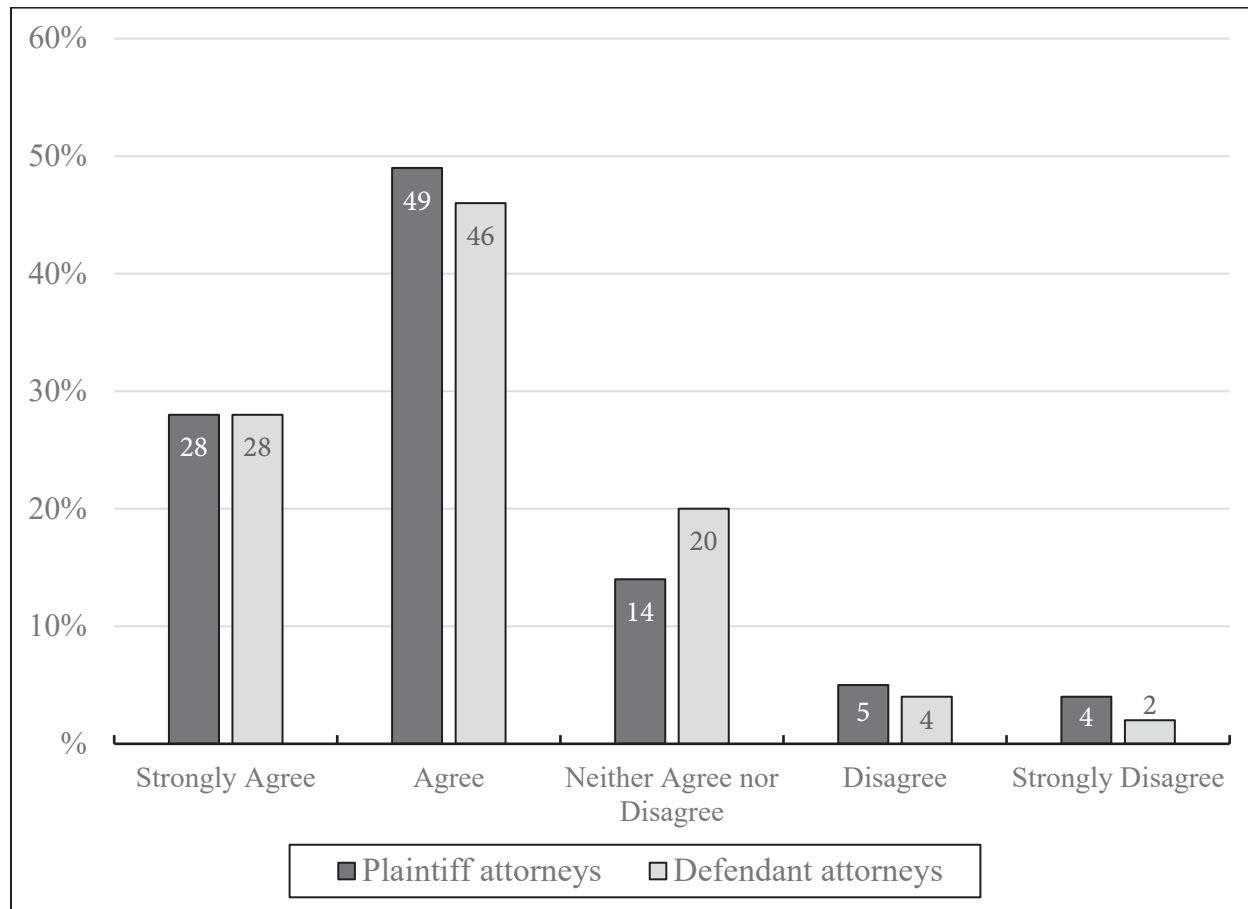
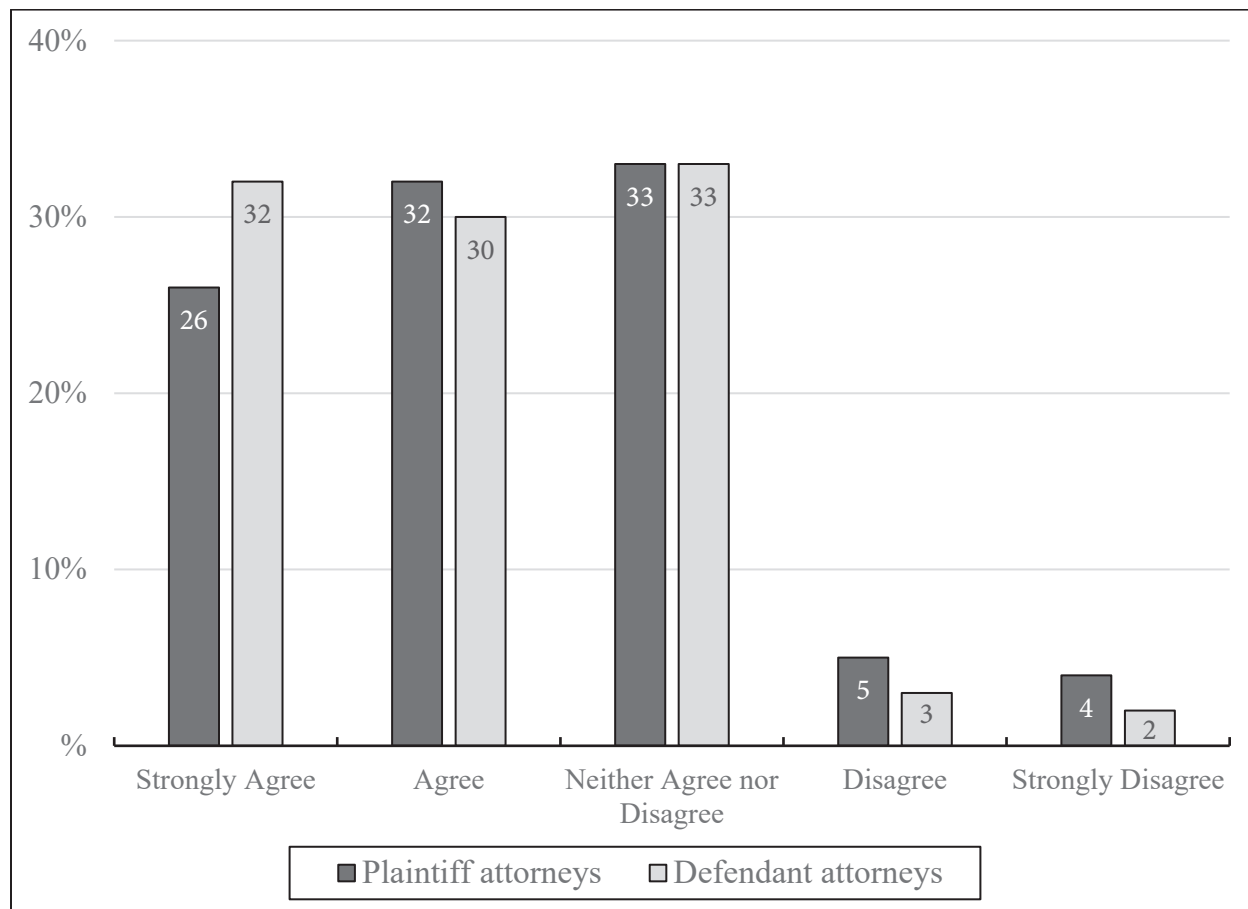


Figure 14: Not Participating in MIDP Illinois Northern Respondents' Agreement with the Statement "The substantive outcome of the case was fair." (n = 1,338)



Participation in the Pilot

The survey asked respondents how they first became aware of the MIDP. In Arizona, attorneys most often said they learned of it through notice of the standing order after filing the case (40%), followed by communication sent out by the court prior to the filing of the case (28%), communication with a colleague/in-office training (15%), a bar program or publication (7%), or some other way (11%). In Illinois Northern, attorneys most often said they learned of it through communication sent out by the court prior to the filing of the case (36%), followed by notice of the standing order after filing the case (35%), communication with a colleague/in-office training (12%), a bar program or publication (7%), or some other way (10%). In both districts, attorneys who selected "other" generally noted that they became aware through prior filings and cases or through local counsel making them aware.

The surveys asked respondents to answer if, in the closed case, "either side provide[d] the other side with mandatory initial discovery, as required by the standing order." All respondents were informed that their answers applied only to the closed case named in the subject line of the email inviting them to participate in the survey. Response options were, "Yes, all required exchanges

were made,” “Yes, my side did but all sides did not,” “Yes, other sides did but my side did not,” “No,” and “I do not recall.” In the figures, the one-side responses are combined; few respondents indicated that the other side made MIDP responses but that their side did not (27 total respondents).

In Arizona (**Figure 15**), 57% of plaintiff attorneys and 55% of defendant attorneys reported that, “Yes all required exchanges were made.” Another 9% of plaintiff attorneys and defendant attorneys each responded that one side but not both made MIDP responses. Roughly 27% of plaintiff attorneys and 29% of defendant attorneys stated that neither side did, and 7% of plaintiff attorneys and 6% of defendant attorneys said they did not recall. In Illinois Northern (**Figure 16**), 47% of plaintiff attorneys and 48% of defendant attorneys reported that, “Yes all required exchanges were made.” Another 8% of plaintiff attorneys and defendant attorneys each responded that one side, but not both, made MIDP responses. Roughly 36% of plaintiff attorneys and defendant attorneys each stated that neither side did, and 7% of plaintiff attorneys and 9% of defendant attorneys said they did not recall.

Figure 15: Participation in MIDP in Arizona (n = 1,480)

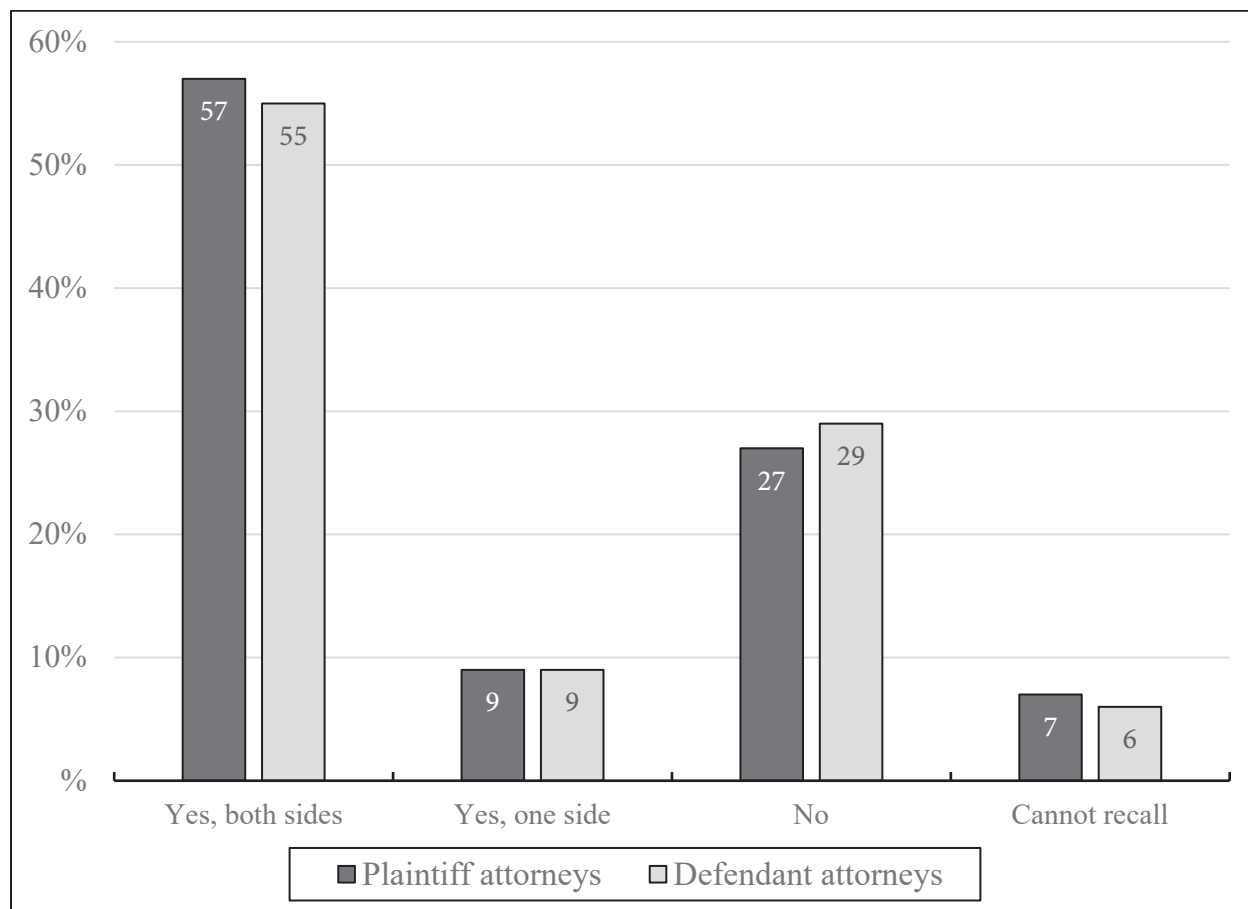
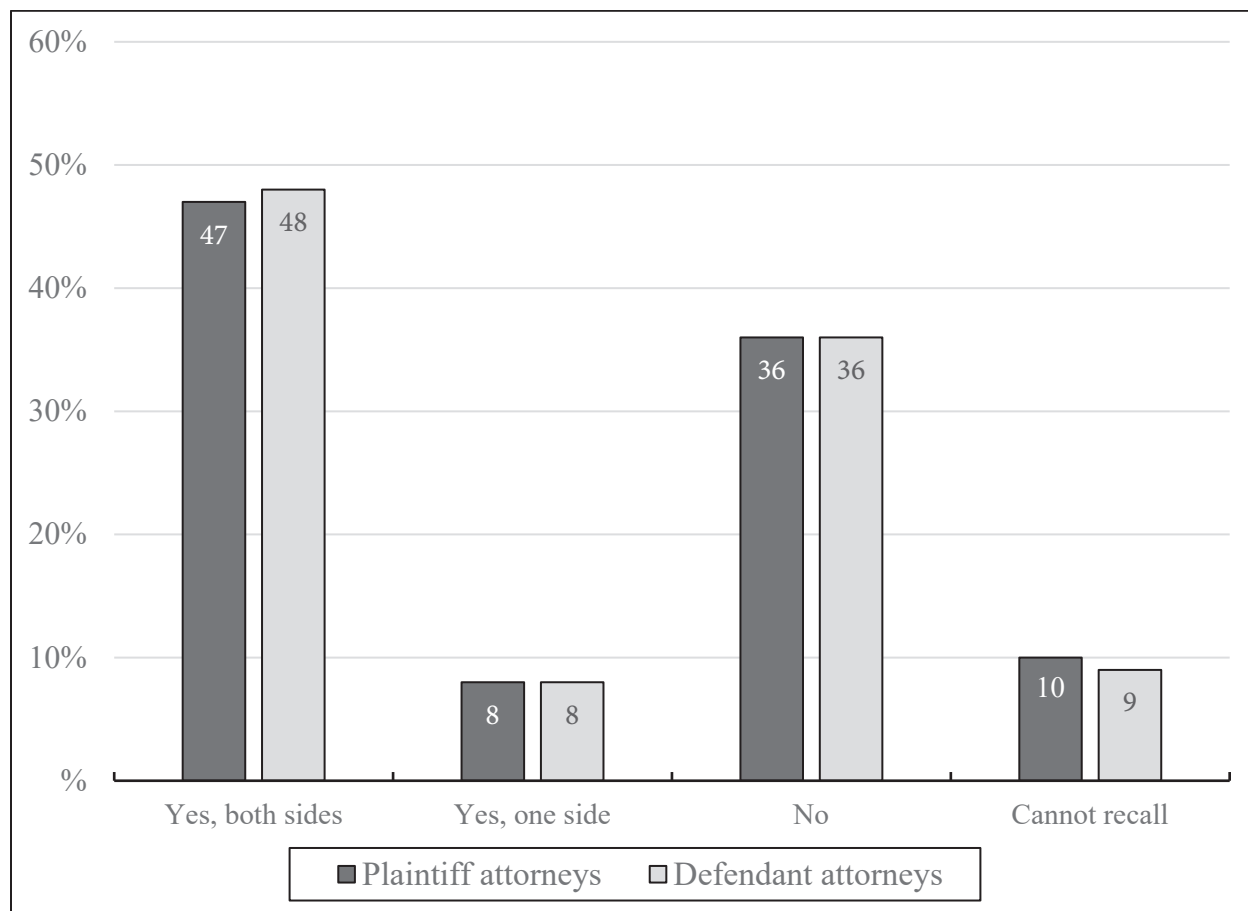


Figure 16: Participation in MIDP in Northern Illinois (n = 3,266)

Combining the both-sides and one-side responses, we can estimate the MIDP participation rate in pilot cases in the two districts. In Arizona, the participation rate in the closed case survey results was 63–65%, and in Illinois Northern, the participation rate was about 55%. This higher MIDP participation rate in Arizona is a consistent finding of the study.³³ The extent to which these participation rates reflect resistance to the MIDP disclosure obligations imposed by the pilot is difficult to estimate. It is impossible to know, for example, how many defendants sought an extension of time to file a responsive pleading to avoid triggering MIDP obligations. Impressionistically, motions to extend time to answer complaints, including joint motions and second motions, were somewhat common in Illinois Northern.³⁴

33. See *supra* note 26.

34. For a sample of pilot cases, the median time from case filing to the filing of the first responsive pleading was 62 days in Illinois Northern, compared to 48 days in Arizona. See *infra* at 90 (Illinois Northern) and 85 (Arizona). For example, consider this Minute Entry from a non-participating Illinois Northern pilot case in which no responsive pleading was filed: “MINUTE entry before the Honorable Robert M. Dow, Jr: Second joint motion to extend response deadlines and initial status hearing . . . is granted. Defendants’ responses to [Plaintiff’s] amended complaint is due 5/30/2018.” Minute Entry, Gen. Star Indem. Co. v. Panther Wholesale, Inc., No. 1:17cv8039 (N.D. Ill. Apr. 2, 2018). The defendants in this case never answered; the case was voluntarily dismissed (probably settled) on May 29, 2018.

If MIDP responses were not reported to have been made in the closed case, respondents were asked a follow-up question about why they were not made. The primary reason respondents in both districts gave for not making the MIDP responses was resolution of the case before the pilot obligations arose (generally speaking, 30 days after filing of a responsive pleading). In Arizona, 77% of plaintiff attorneys and 79% of defendant attorneys responded that the case was dismissed, transferred, or otherwise resolved before the pilot's discovery obligations arose. About 6% of Arizona plaintiff attorneys and 2% of defendant attorneys responded that the parties stipulated that no discovery would be conducted in the case. About 3% of Arizona plaintiff attorneys and 4% of defendant attorneys responded that the parties certified that they believed the case would be resolved in 30 days after the responsive pleading. Additionally, 14% of Arizona plaintiff attorneys and 15% of defendant attorneys selected "Other" and provided a reason, mostly that the case had settled, that it was not subject to the MIDP, or that a motion to dismiss was pending.

In Illinois Northern, 62% of plaintiff attorneys and 65% of defendant attorneys responded that the case was dismissed, transferred, or otherwise resolved before the pilot's discovery obligations arose. About 5% of Illinois Northern plaintiff attorneys and 4% of defendant attorneys responded that the parties stipulated that no discovery would be conducted in the case. About 8% of Northern District of Illinois plaintiff attorneys and 6% of defendant attorneys responded that the parties certified that they believed the case would be resolved in 30 days after the responsive pleading. Additionally, 26% of Illinois Northern plaintiff attorneys and defendant attorneys each selected "Other" and provided a reason, mostly that the case had settled, that it was not subject to the MIDP, that discovery was stayed, or that a motion to dismiss was pending.

Respondents' Evaluation of the Pilot's Effects on Closed Cases

Survey respondents in participating cases were asked a series of 12 questions assessing how the MIDP had affected the recently closed case. These questions were designed to address the goals of the pilot, such as reducing discovery disputes and motions practice, and, in a few instances, to address concerns that were raised about potential effects of the MIDP exchanges, such as disclosure of information through the MIDP that would not otherwise have been requested. Respondents stated agreement or disagreement with the statements about the "exchange of initial discovery" in the closed case. Responses to each statement are provided separately below, with responses discussed by district and attorney role.

Provided Relevant Information Earlier in the Case

In both districts, more respondents agreed with the statement that the MIDP responses "provided relevant information earlier in the case" than agreed with any of the other 12 statements. This was expected because the primary purpose of the MIDP is to provide relevant information earlier in the case.

In Arizona (**Figure 17**), 75% of plaintiff attorneys either strongly agreed (21%) or agreed (54%) with this statement, compared to the 10% who either disagreed (7%) or strongly disagreed (3%). Among Arizona defendant attorneys, 67% strongly agreed (13%) or agreed (54%), compared to 17% who either disagreed (12%) or strongly disagreed (5%). Relatively few Arizona plaintiff attorneys (12%) or defendant attorneys (15%) neither agreed nor disagreed.

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In Illinois Northern (**Figure 18**), 66% of plaintiff attorneys either agreed (47%) or strongly agreed (19%) with this statement, compared to the 17% who either disagreed (11%) or strongly disagreed (6%). Among Illinois Northern defendant attorneys, 55% agreed (45%) or strongly agreed (10%), compared to 23% who disagreed (17%) or strongly disagreed (6%). Similar numbers of Illinois Northern plaintiff attorneys (16%) and defendant attorneys (20%) neither agreed nor disagreed.

Figure 17: MIDP “Provided Relevant Information Earlier in the Case,” Arizona (n = 921)

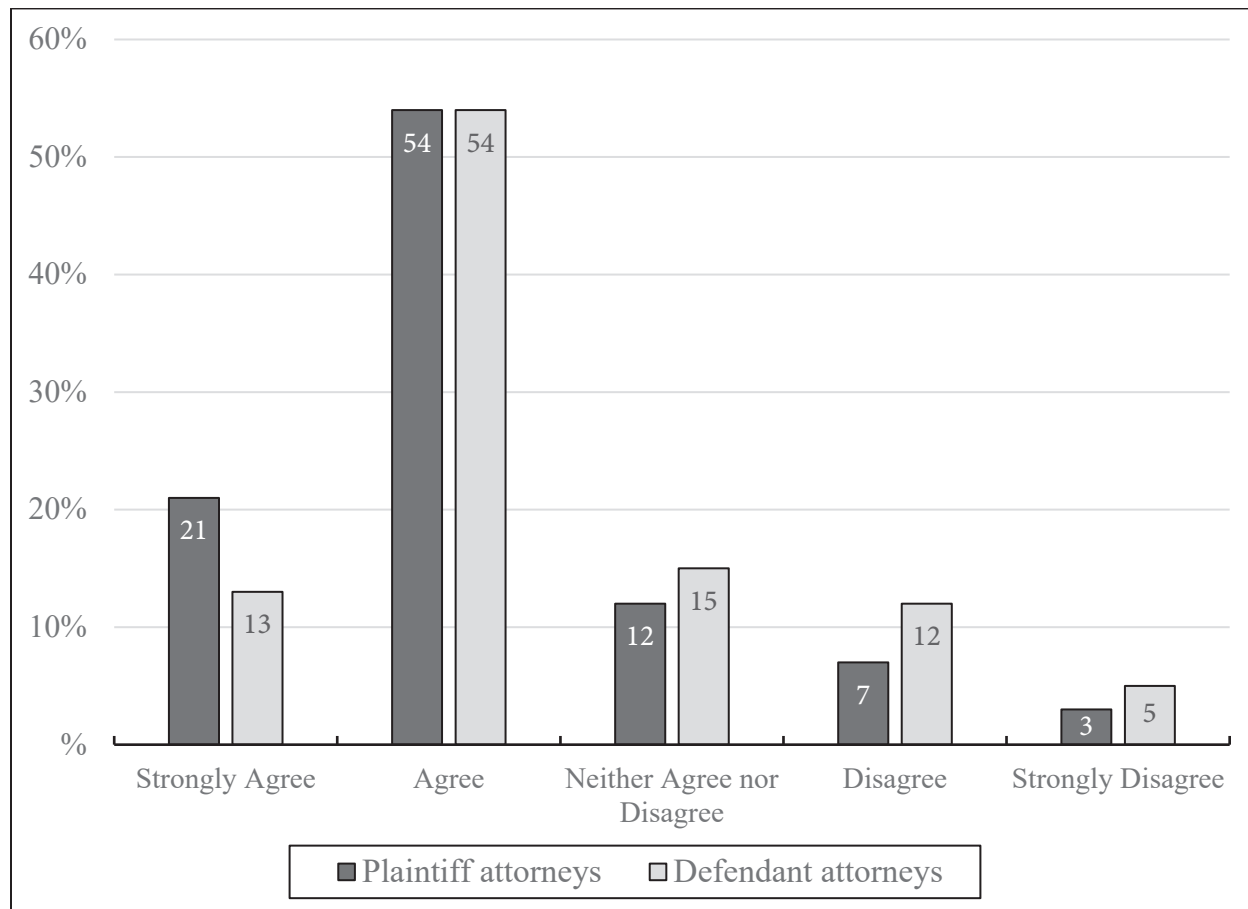
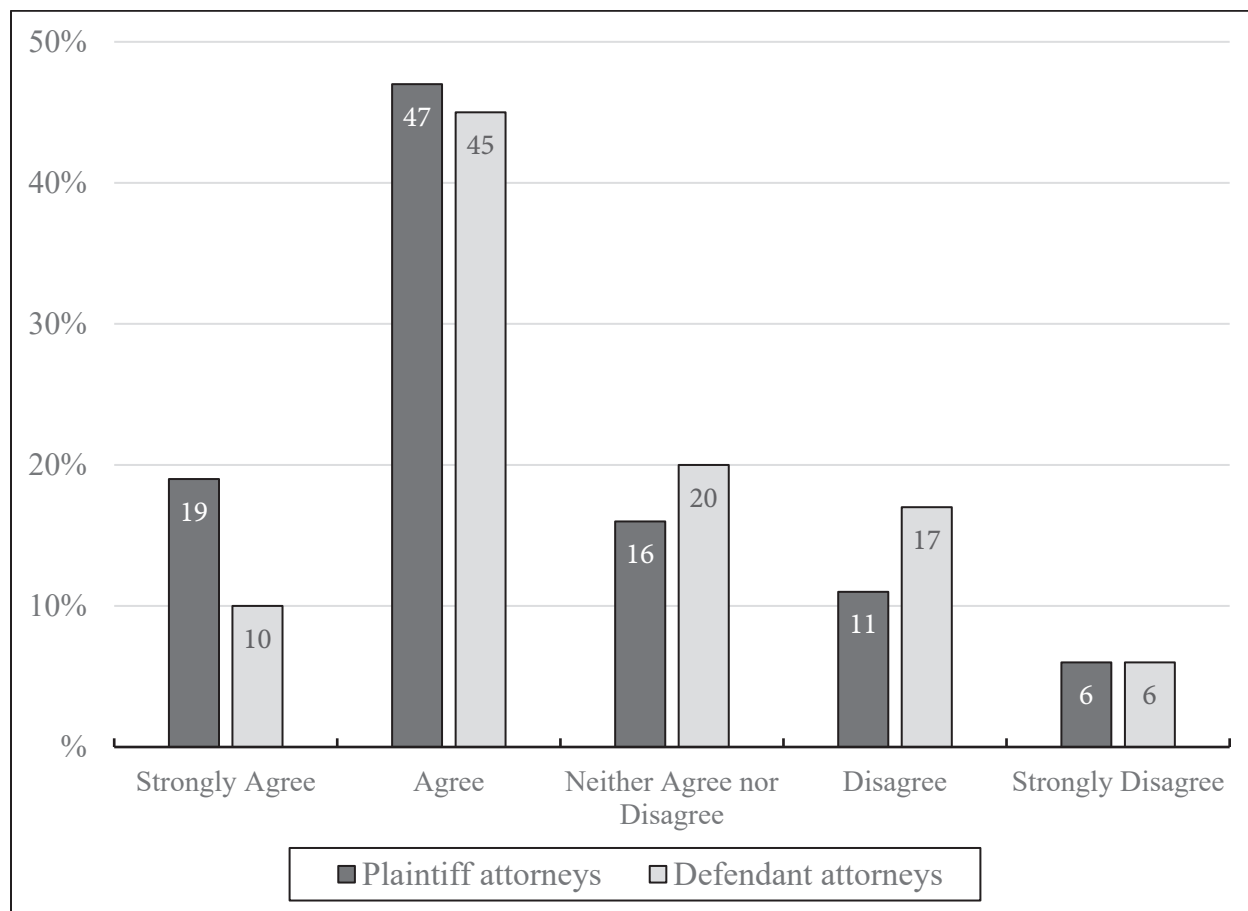


Figure 18: MIDP “Provided Relevant Information Earlier in the Case,” Illinois Northern (n = 1,732)

Led to Disclosure of Information That Would Not Likely Have Been Requested Otherwise

Arizona respondents tended to disagree with or express neutrality toward this statement while Illinois Northern respondents most often disagreed or strongly disagreed with it. Relatively few respondents in either district saw the exchange of information through the MIDP as leading to disclosure of information that would not otherwise have been requested by opposing counsel.

In Arizona (**Figure 19**), 43% of Arizona plaintiff attorneys either disagreed (34%) or strongly disagreed (9%) with the statement; 30% neither agreed nor disagreed. Only 24% of plaintiff attorneys either strongly agreed (7%) or agreed (17%). Among Arizona defendant attorneys, 49% either disagreed (35%) or strongly disagreed (14%); 31% neither agreed nor disagreed. Only 18% of defendant attorneys either strongly agreed (3%) or agreed (14%) with the statement.

In Illinois Northern (**Figure 20**), 58% of plaintiff attorneys either disagreed (39%) or strongly disagreed (19%), 21% neither agreed nor disagreed, and 19% either strongly agreed (6%) or agreed (13%) with this statement. Likewise, among defendant attorneys, 67% either disagreed (42%) or strongly disagreed (25%), 18% neither agreed nor disagreed, and only 12% strongly agreed (3%) or agreed (9%).

Figure 19: MIDP “Led to Disclosure of Information That Would Not Likely Have Been Requested Otherwise,” Arizona (n = 922)

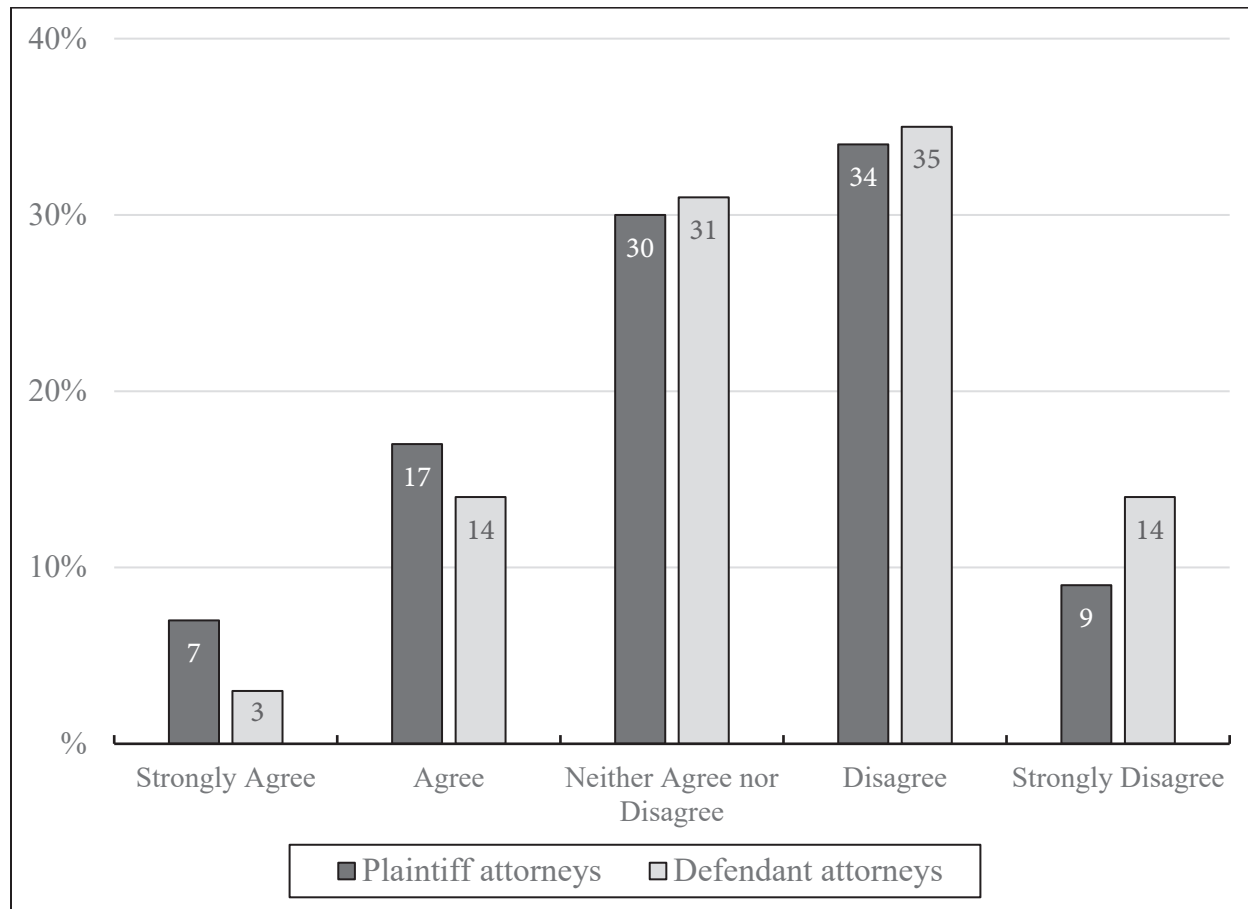
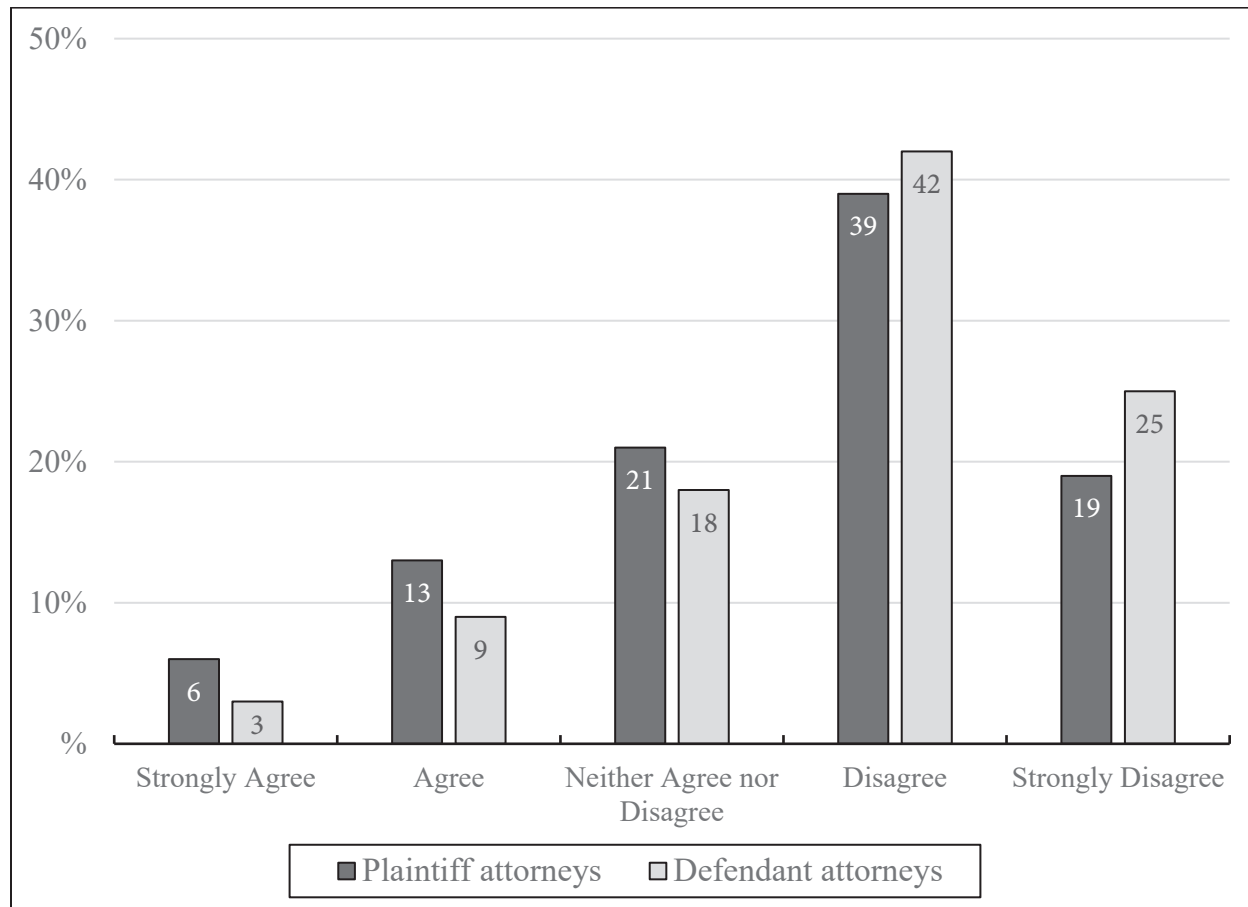


Figure 20: MIDP “Led to Disclosure of Information That Would Not Likely Have Been Requested Otherwise,” Illinois Northern (n = 1,732)



Focused Subsequent Discovery on the Important Issues in the Case

The MIDP was intended to accelerate the exchange of relevant information but not change the discovery to which the parties would have access. However, respondents were less clear on whether the accelerated exchange of information focused subsequent discovery on the important issues in the case.

In Arizona (**Figure 21**), 42% of plaintiff attorneys either strongly agreed (10%) or agreed (32%), 36% neither agreed nor disagreed, and 18% either disagreed (13%) or strongly disagreed (5%) with this statement. Among defendant attorneys, 33% either strongly agreed (6%) or agreed (27%), 36% neither agreed nor disagreed, and 27% either disagreed (18%) or strongly disagreed (9%).

In Illinois Northern (**Figure 22**), 37% of plaintiff attorneys either strongly agreed (9%) or agreed (28%) that the MIDP focused subsequent discovery on the important issues in the case, compared to the 31% who either disagreed (21%) or strongly disagreed (10%), and 30% who neither agreed nor disagreed. Only 22% of defendant attorneys strongly agreed (3%) or agreed (19%), compared to 53% who disagreed (28%) or strongly disagreed (15%) and 30% who neither agreed nor disagreed.

Figure 21: MIDP “Focused Subsequent Discovery on the Important Issues in the Case,” Arizona (n = 920)

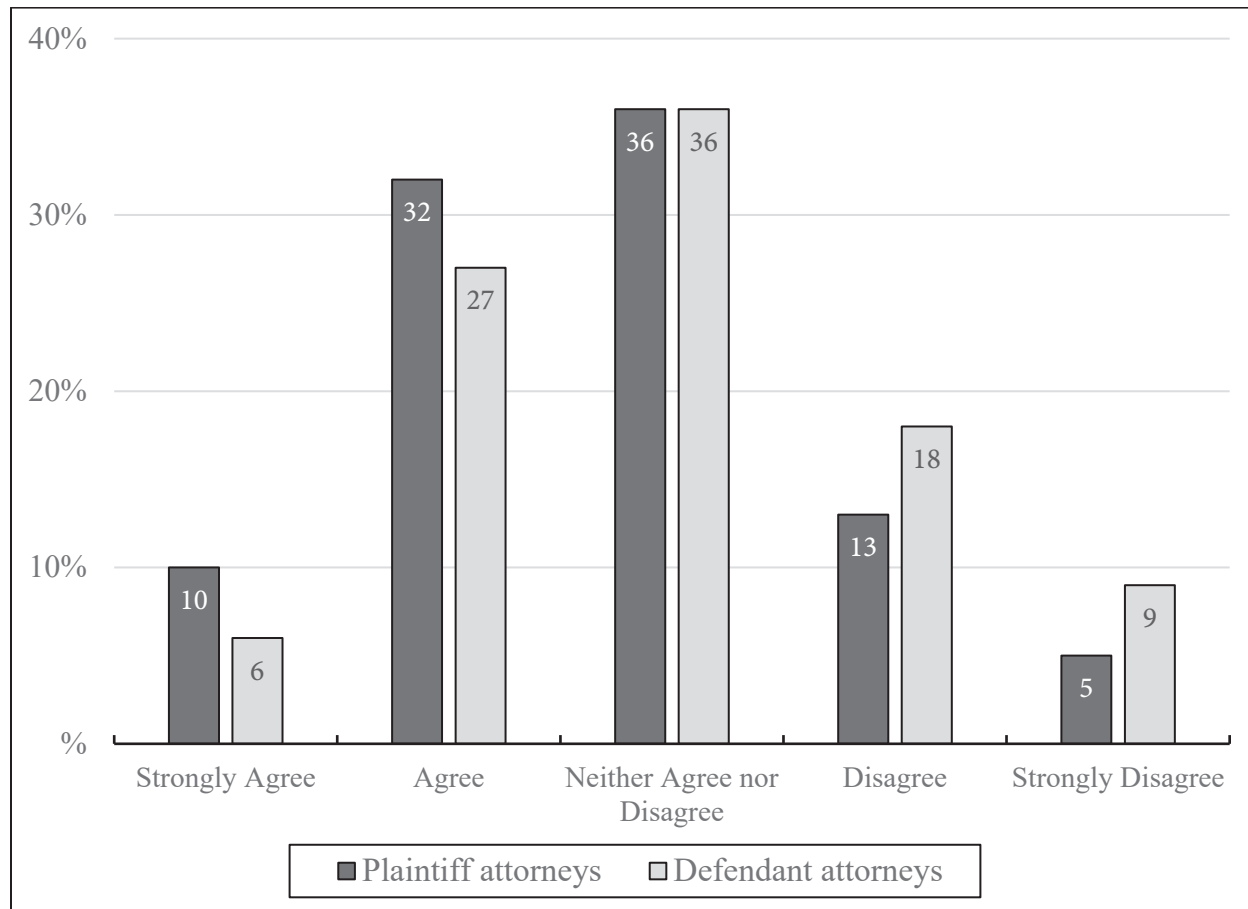
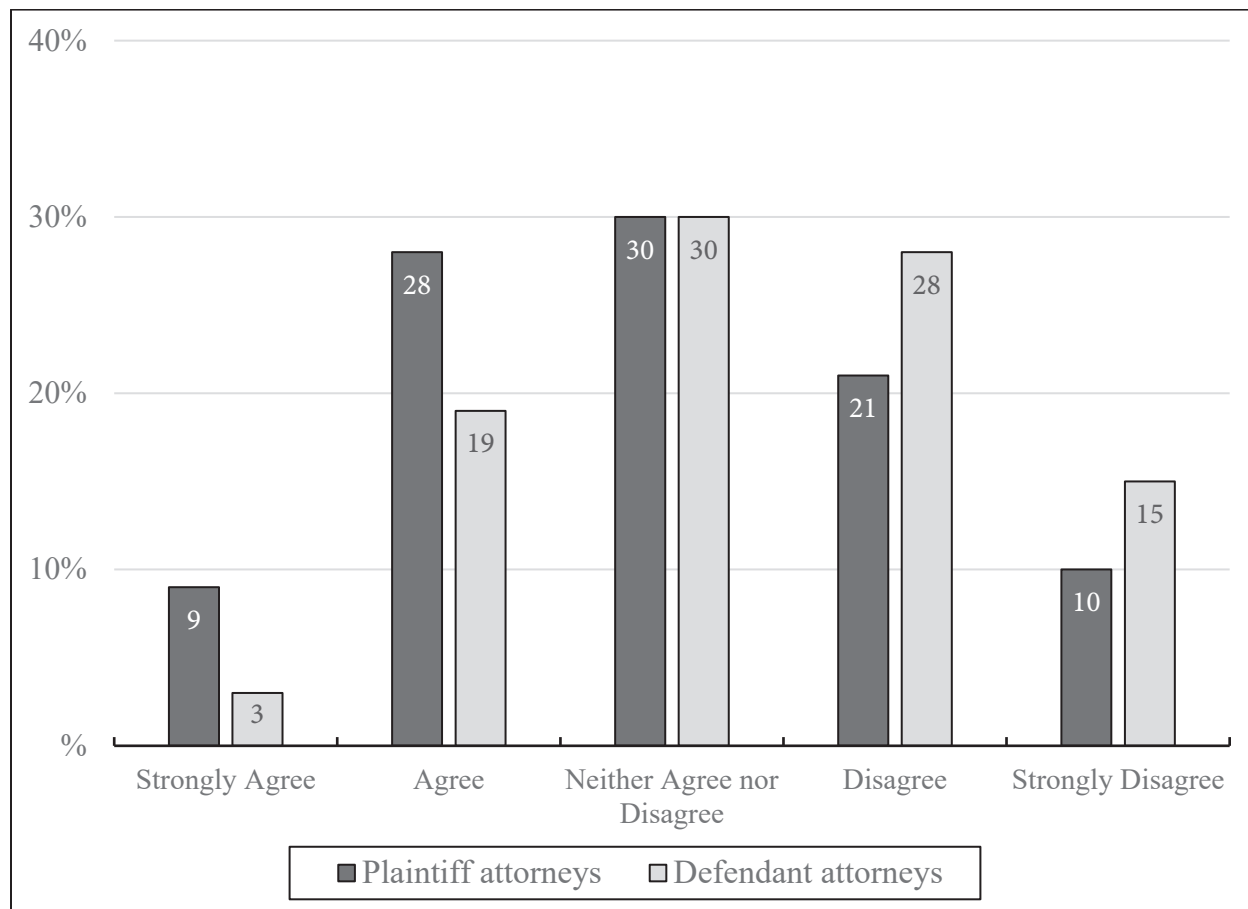


Figure 22: MIDP “Focused Subsequent Discovery on the Important Issues in the Case,” Illinois Northern (n = 1,762)



Enhanced Effectiveness of Settlement Negotiations

Respondents were evenly divided in their responses to this statement. Similar numbers of both Arizona and Illinois Northern respondents agreed, expressed neutrality toward, or disagreed that the MIDP enhanced effectiveness of settlement negotiations.

In Arizona (**Figure 23**), 41% of plaintiff attorneys strongly agreed (10%) or agreed (31%) that the MIDP enhanced the effectiveness of settlement negotiations, 30% neither agreed nor disagreed, and 25% either disagreed (18%) or strongly disagreed (7%). Among Arizona defendant attorneys, 31% either strongly agreed (7%) or agreed (24%), 32% neither agreed nor disagreed, and 35% either disagreed (23%) or strongly disagreed (12%).

In Illinois Northern (**Figure 24**), 35% of plaintiff attorneys either strongly agreed (10%) or agreed (25%) that the MIDP enhanced the effectiveness of settlement negotiations, compared to the 37% who either disagreed (25%) or strongly disagreed (12%), and 27% who neither agreed nor disagreed. Among Illinois Northern defendant attorneys, 26% strongly agreed (4%) or agreed (22%), compared to 45% who disagreed (28%) or strongly disagreed (17%), and 27% who neither agreed nor disagreed.

Figure 23: MIDP “Enhanced Effectiveness of Settlement Negotiations,” Arizona (n = 917)

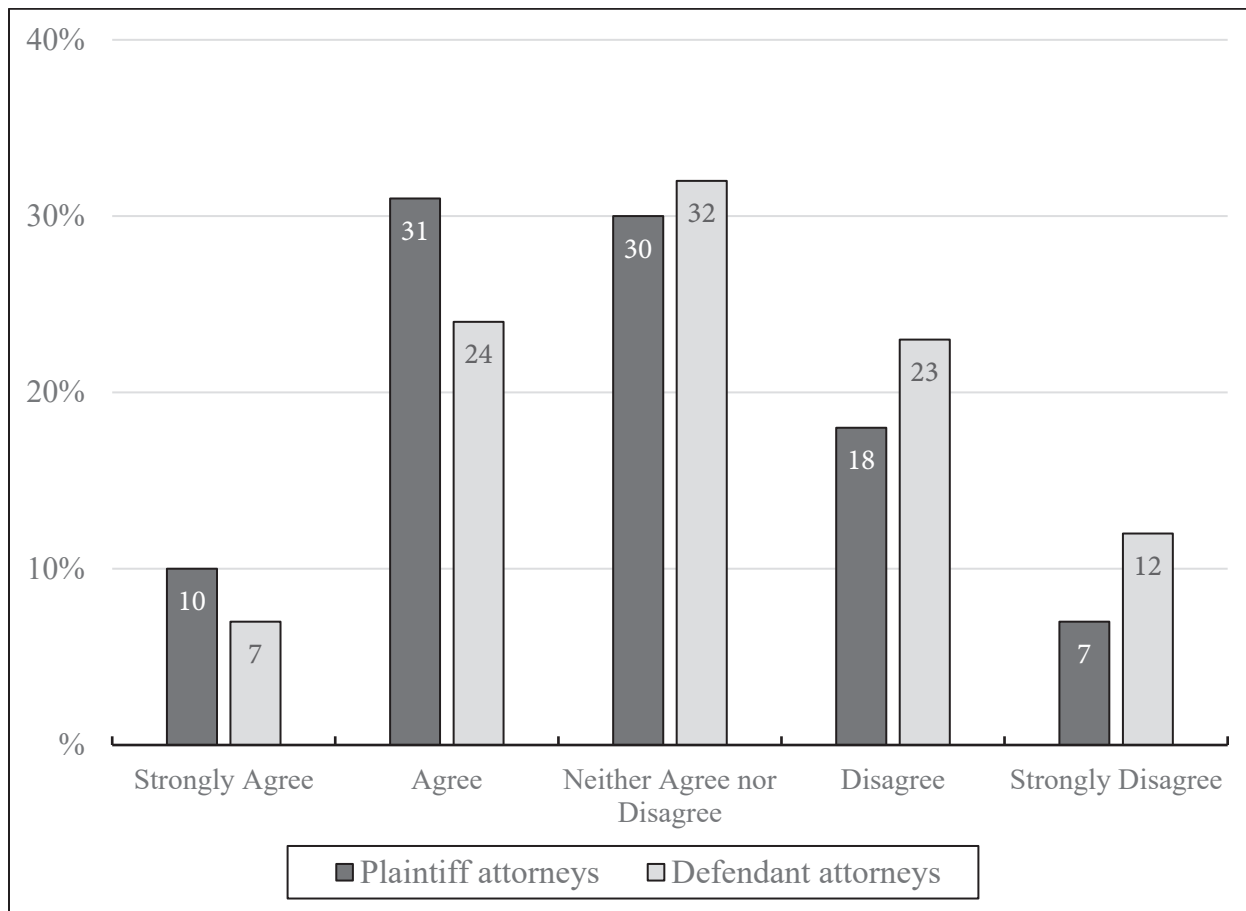
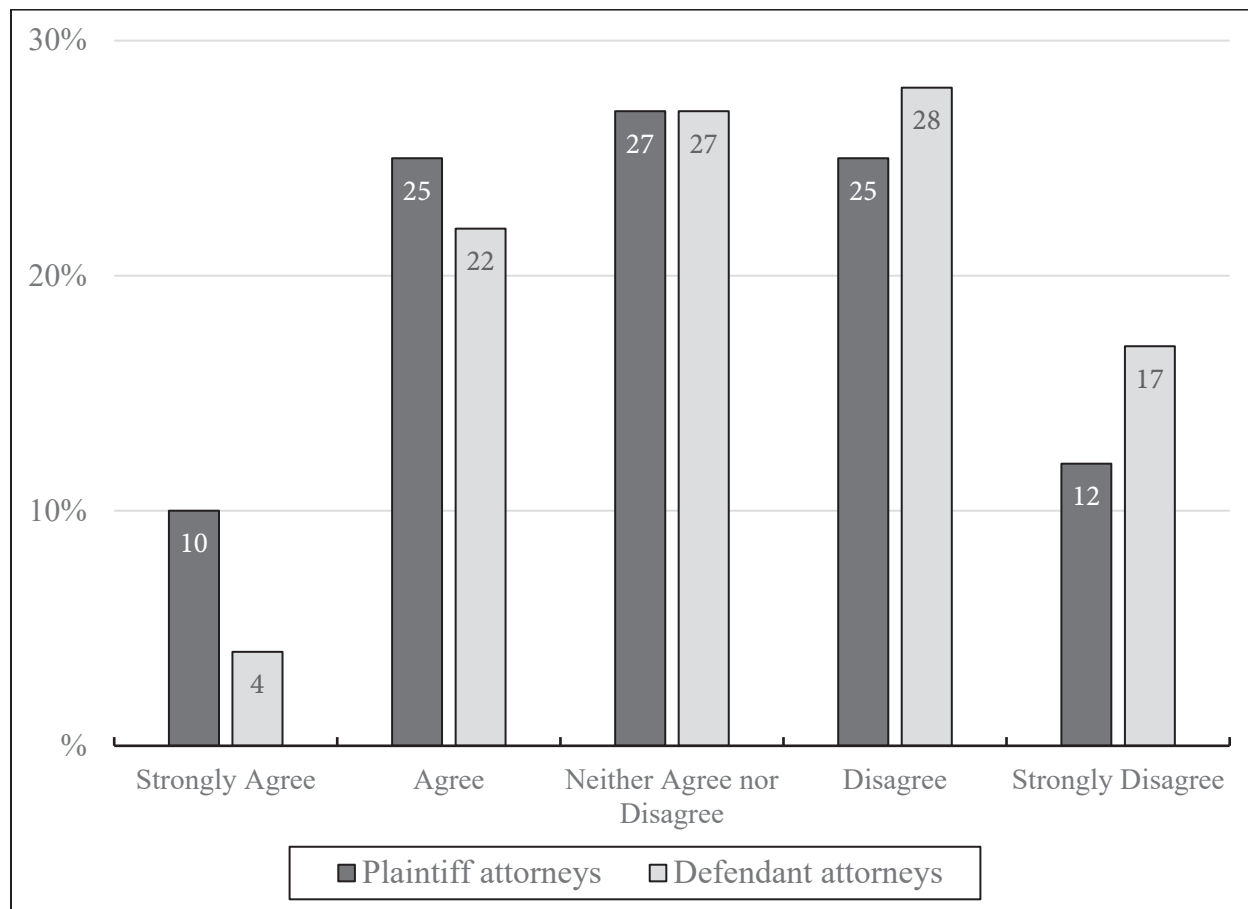


Figure 24: MIDP “Enhanced Effectiveness of Settlement Negotiations,” Illinois Northern (n = 1,728)



Expedited Settlement Discussions Among the Parties

As with the last statement, respondents were evenly divided in their responses to this statement. Similar numbers of both Arizona and Illinois Northern respondents agreed, expressed neutrality toward, or disagreed that the MIDP expedited settlement discussions among the parties.

In Arizona (**Figure 25**), 36% of plaintiff attorneys either strongly agreed (10%) or agreed (26%), 31% neither agreed nor disagreed, and 30% either disagreed (22%) or strongly disagreed (8%) with this statement. Among Arizona defendant attorneys, 28% either strongly agreed (7%) or agreed (21%) or, 30% neither agreed nor disagreed, and 39% either disagreed (27%) or strongly disagreed (12%).

In Illinois Northern (**Figure 26**), 33% of plaintiff attorneys either strongly agreed (11%) or agreed (22%) with this statement, compared to the 41% who either disagreed (27%) or strongly disagreed (14%), and 24% who neither agreed nor disagreed. Among defendant attorneys, 26% strongly agreed (5%) or agreed (21%), compared to 48% who disagreed (31%) or strongly disagreed (17%), and 24% who neither agreed nor disagreed.

Figure 25: MIDP “Expedited Settlement Discussions Among the Parties,” Arizona (n = 921)

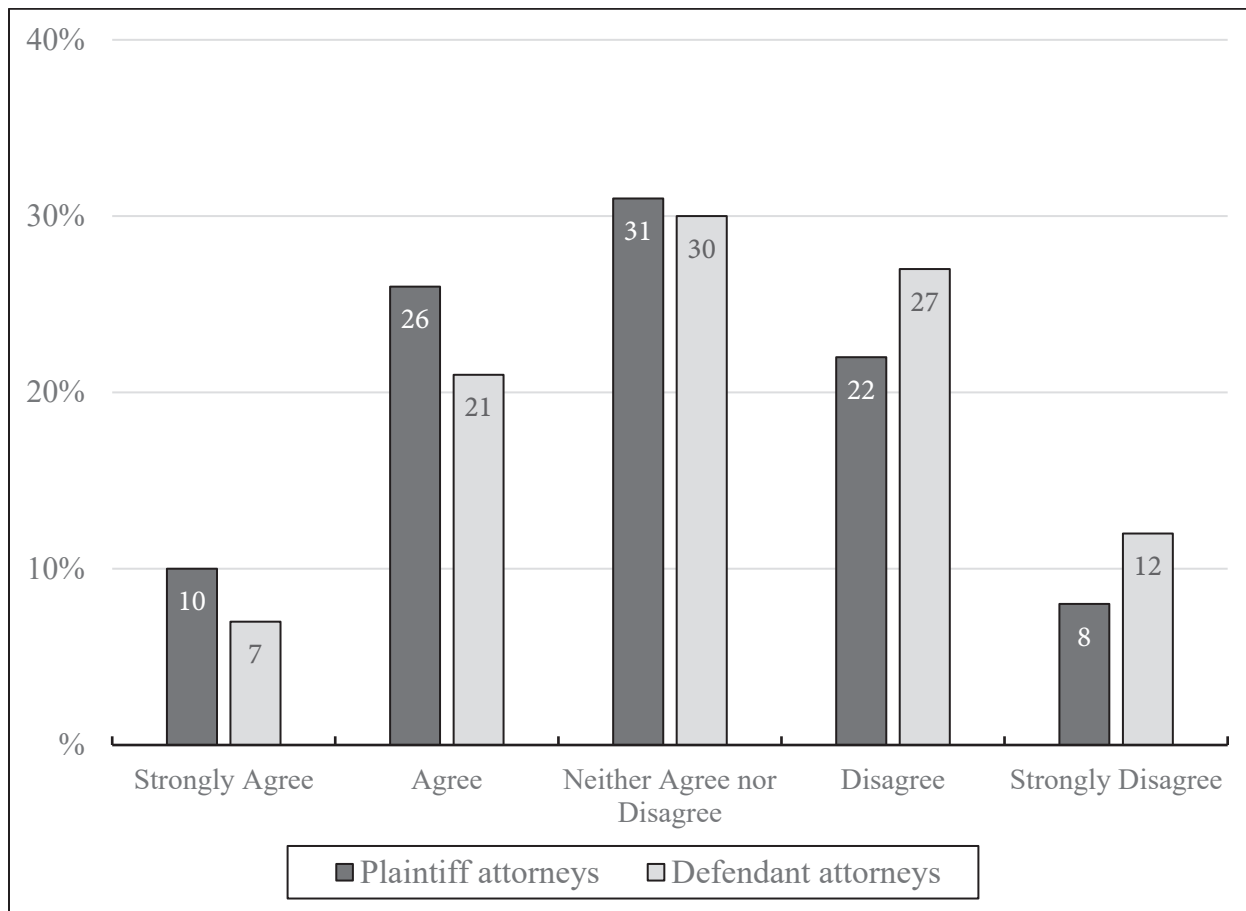
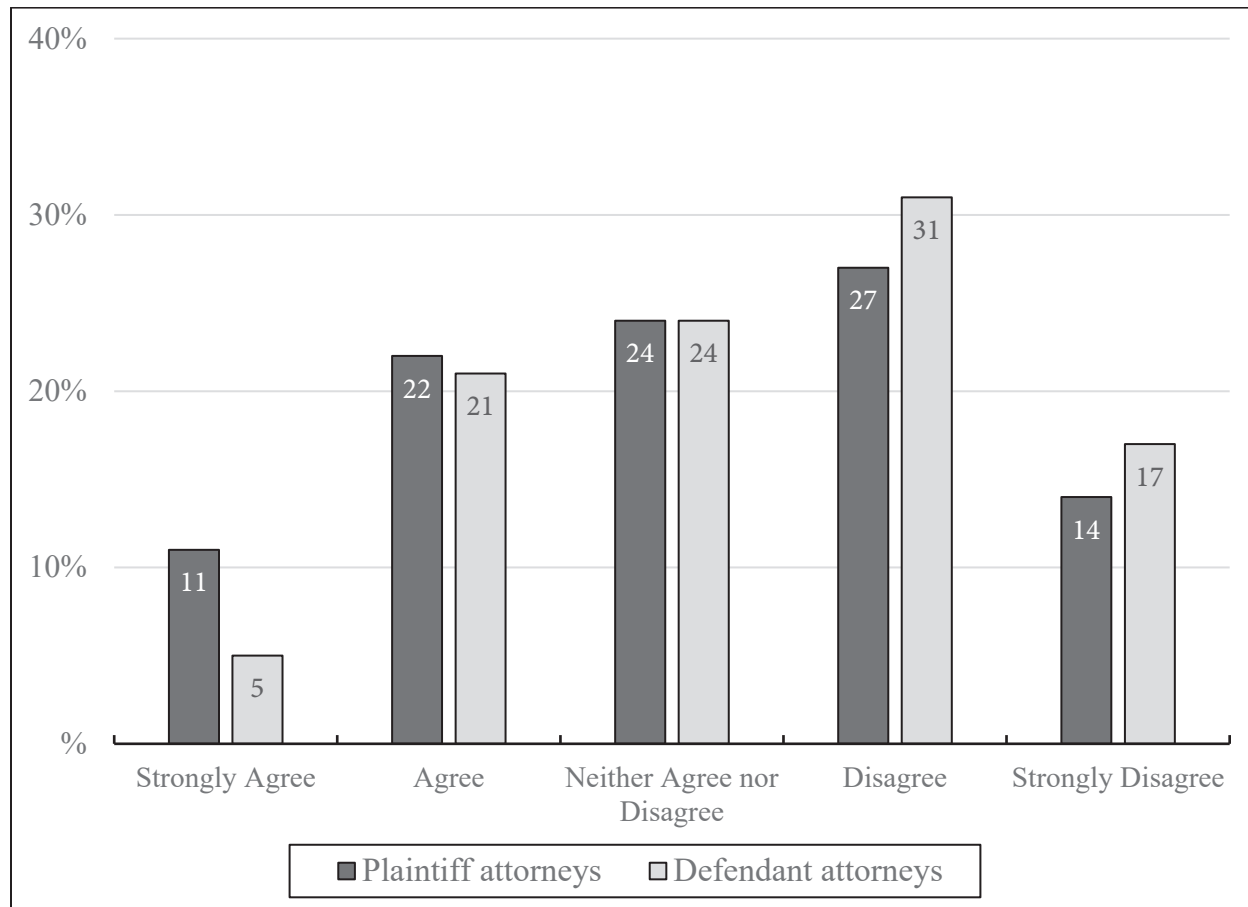


Figure 26: MIDP “Expedited Settlement Discussions Among the Parties,” Illinois Northern (n = 1,728)



Reduced the Number of Discovery Requests That Would Have Otherwise Been Made

Regarding whether the MIDP reduced the number of discovery requests that would have otherwise been made, both plaintiff and defendant attorneys in Arizona and plaintiff attorneys in Illinois Northern tended to agree with this statement, and defendant attorneys in Illinois Northern tended to disagree.

In Arizona (**Figure 27**), 51% of plaintiff attorneys either strongly agreed (13%) or agreed (38%), 23% neither agreed nor disagreed, and 21% either disagreed (16%) or strongly disagreed (5%). Similarly, for Arizona defendant attorneys, 47% either strongly agreed (10%) or agreed (37%), 19% neither agreed nor disagreed, and 30% either disagreed (20%) or strongly disagreed (10%).

In Illinois Northern (**Figure 28**), 39% of plaintiff attorneys either strongly agreed (10%) or agreed (29%) with this statement, compared to the 38% who either disagreed (25%) or strongly disagreed (13%), and 20% who neither agreed nor disagreed. In contrast, only 29% of defendant attorneys strongly agreed (6%) or agreed (23%), compared to 47% who disagreed (31%) or strongly disagreed (16%), and 20% who neither agreed nor disagreed.

Figure 27: MIDP “Reduced the Number of Discovery Requests That Would Have Otherwise Been Made,” Arizona (n = 921)

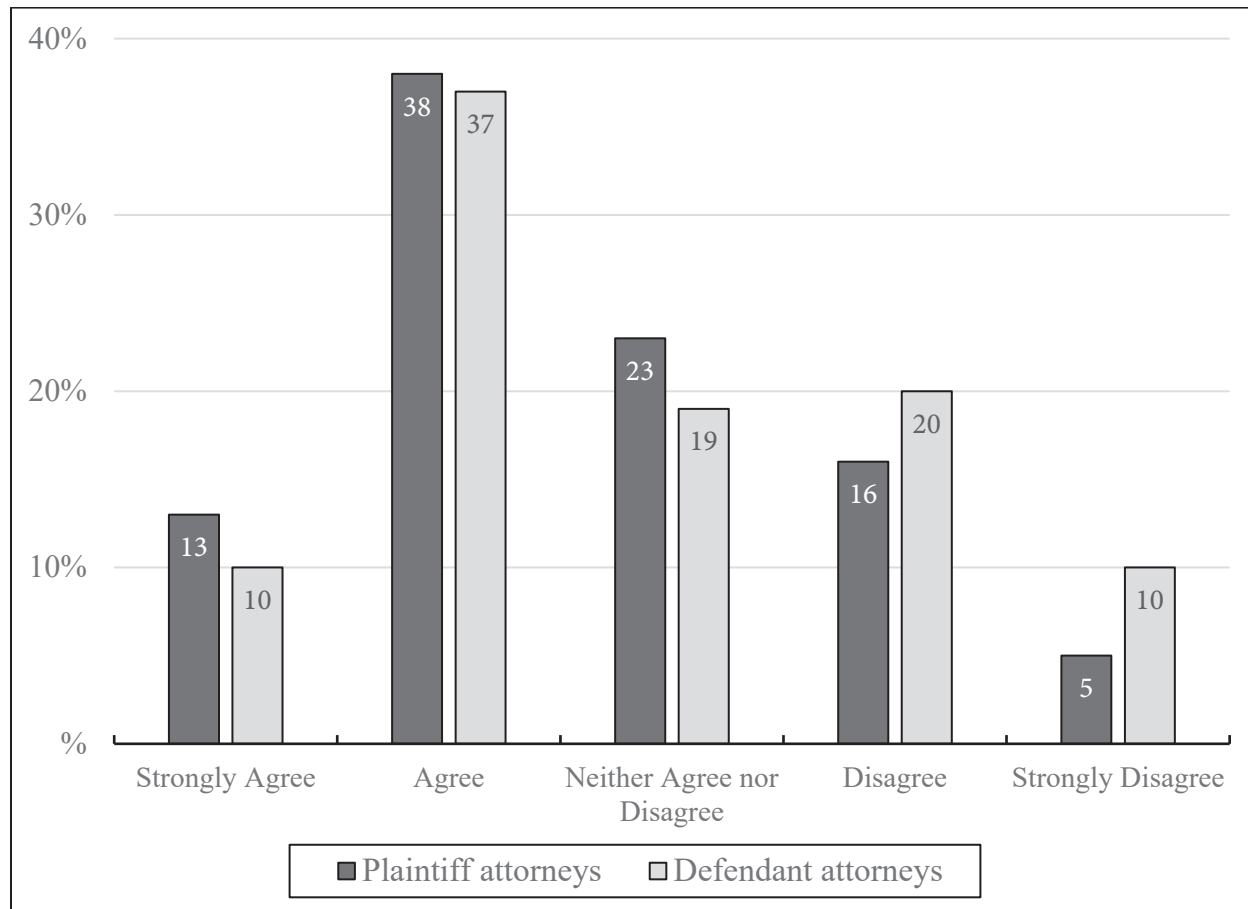
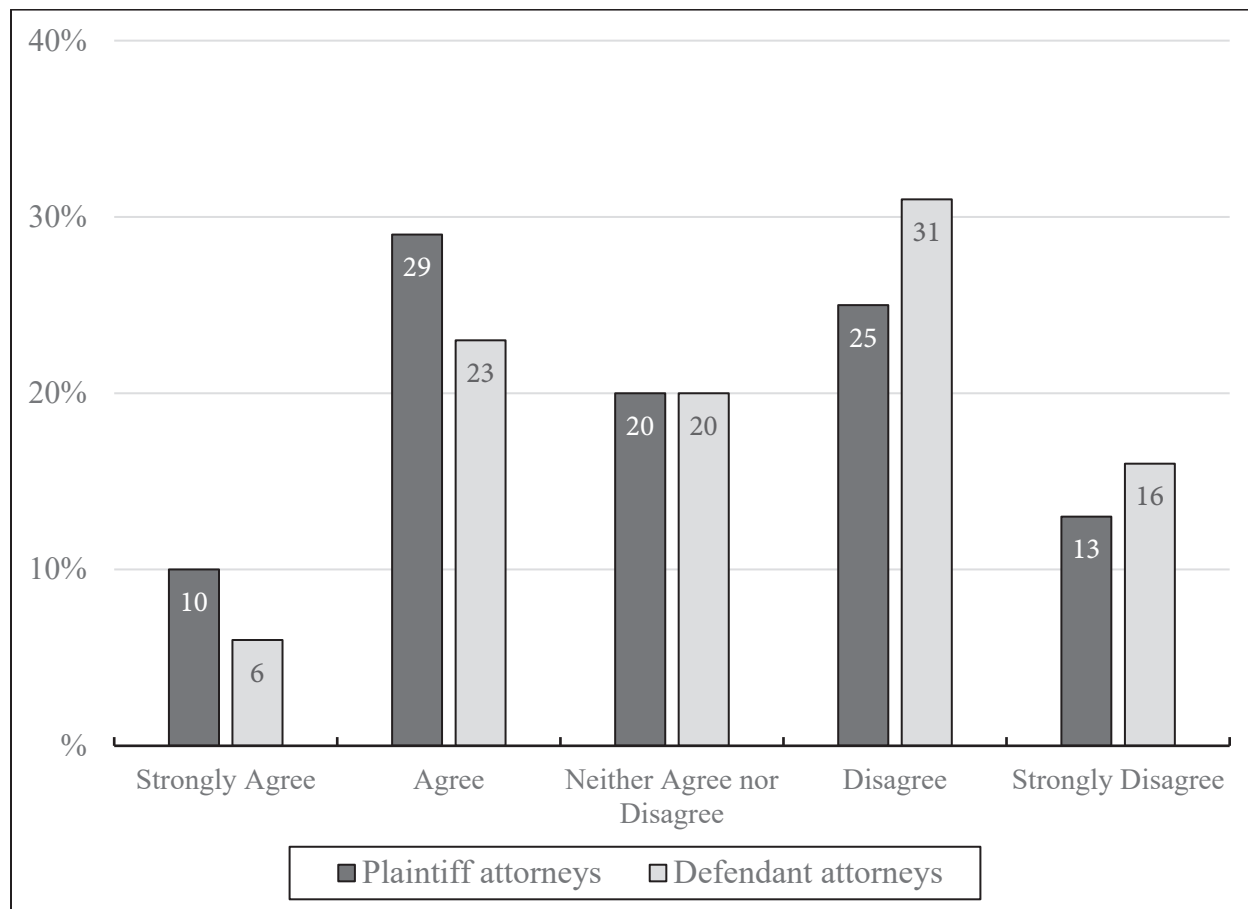


Figure 28: MIDP “Reduced the Number of Discovery Requests That Would Have Otherwise Been Made,” Illinois Northern (n = 1,725)



Reduced the Volume of Discovery Required to Resolve the Case

This question is slightly different from the preceding one, focused not on the number of discovery requests but on the actual volume of discovery. A single request for electronically stored information may represent a massive volume of information (in petabytes). Arizona respondents tended to be evenly divided on whether MIDP met this goal, while Illinois Northern respondents tended to disagree that it did.

In Arizona (**Figure 29**), 37% of plaintiff attorneys either strongly agreed (9%) or agreed (28%), 30% neither agreed nor disagreed, and 27% either disagreed (20%) or strongly disagreed (7%). For Arizona defendant attorneys, 33% either strongly agreed (8%) or agreed (25%), 25% neither agreed nor disagreed, and 38% either disagreed (25%) or strongly disagreed (13%).

In Illinois Northern (**Figure 30**), only 28% of plaintiff attorneys either strongly agreed (8%) or agreed (20%) that the MIDP reduced the volume of discovery required to resolve the closed case and 24% neither agreed nor disagreed; 45% either disagreed (30%) or strongly disagreed (15%). Similarly, only 19% of defendant attorneys strongly agreed (4%) or agreed (15%) and 23% neither agreed nor disagreed, but 54% disagreed (33%) or strongly disagreed (21%).

Figure 29: MIDP “Reduced the Volume of Discovery Required to Resolve the Case,” Arizona (n = 921)

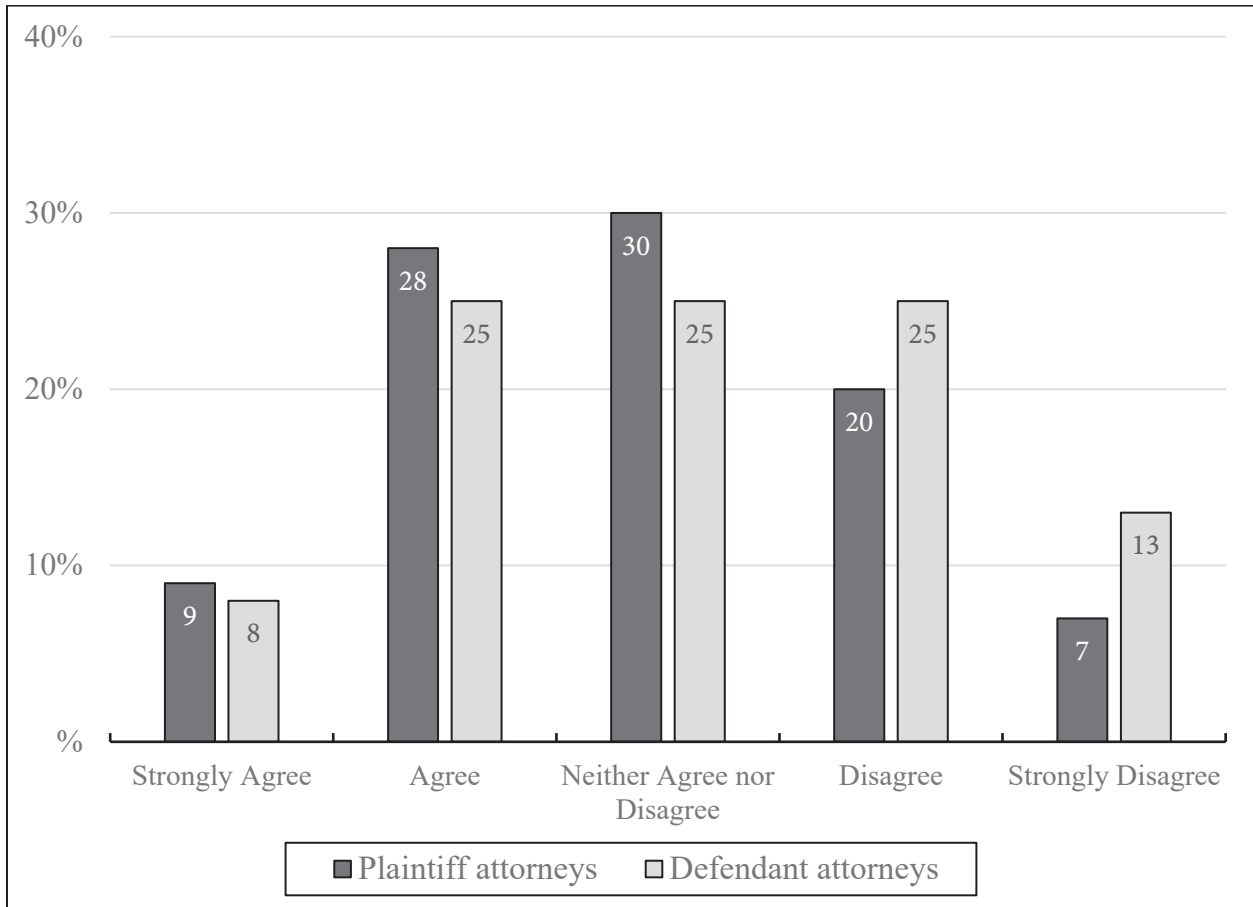
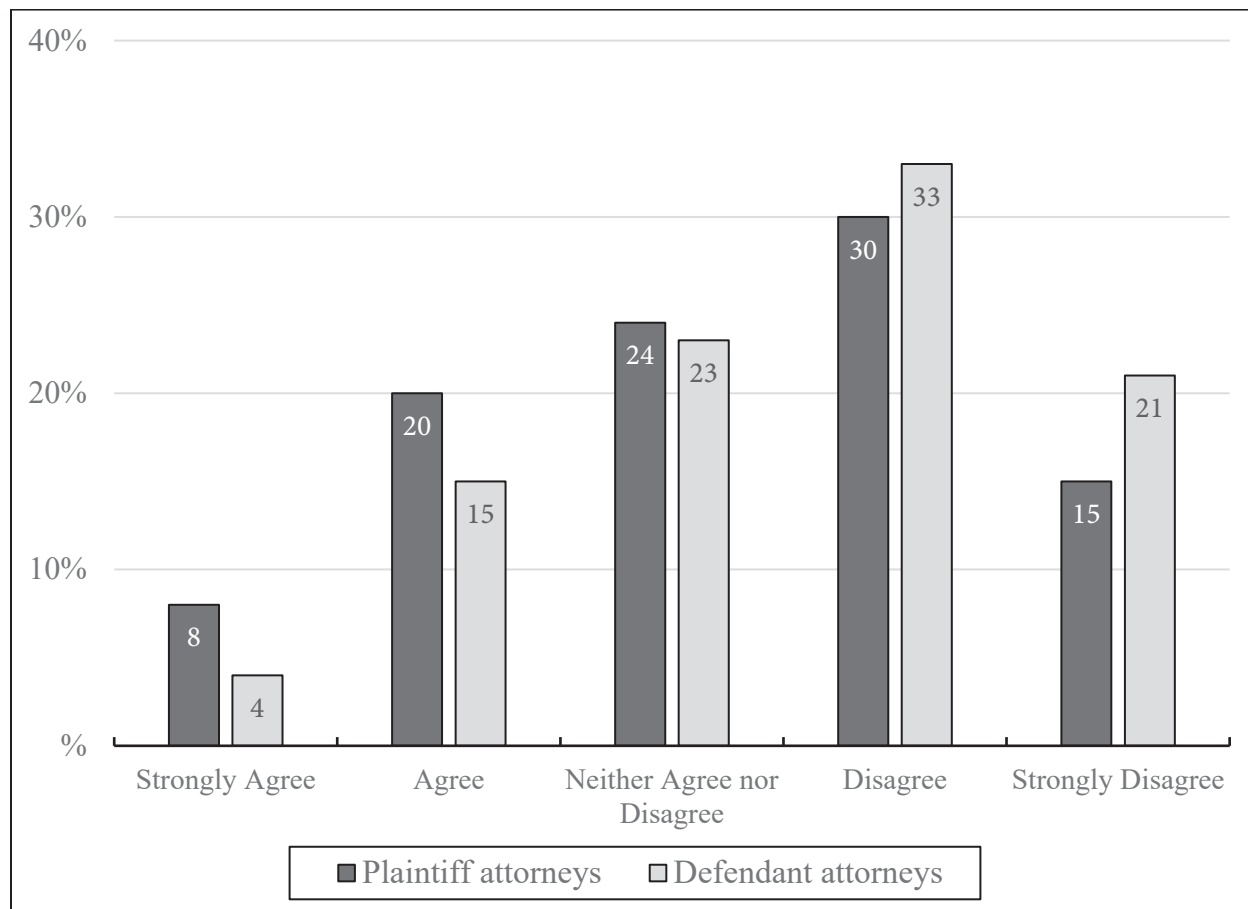


Figure 30: MIDP “Reduced the Volume of Discovery Required to Resolve the Case,” Illinois Northern (n = 1,723)



Reduced the Number of Discovery Disputes That Would Have Otherwise Been Made in the Case

Regarding whether the MIDP reduced the number of discovery disputes that would have otherwise occurred, Arizona plaintiff attorneys tended to agree or respond neutrally; Arizona defendant attorneys and Illinois Northern plaintiff and defendant attorneys tended to disagree or respond neutrally.

In Arizona (**Figure 31**), 34% of plaintiff attorneys either strongly agreed (6%) or agreed (28%), 35% neither agreed nor disagreed, and 23% either disagreed (16%) or strongly disagreed (7%). For Arizona defendant attorneys, 25% either strongly agreed (6%) or agreed (19%), 32% neither agreed nor disagreed, and 34% either disagreed (23%) or strongly disagreed (11%).

In Illinois Northern (**Figure 32**), 27% of plaintiff attorneys either strongly agreed (8%) or agreed (19%) that the MIDP reduced the number of discovery disputes, 31% neither agreed nor disagreed, and 38% either disagreed (26%) or strongly disagreed (12%). Only 18% of defendant attorneys strongly agreed (3%) or agreed (15%), compared to 32% who neither agreed nor disagreed, and 43% who disagreed (29%) or strongly disagreed (14%).

Figure 31: MIDP “Reduced the Number of Discovery Disputes That Would Have Otherwise Been Made in the Case,” Arizona (n = 919)

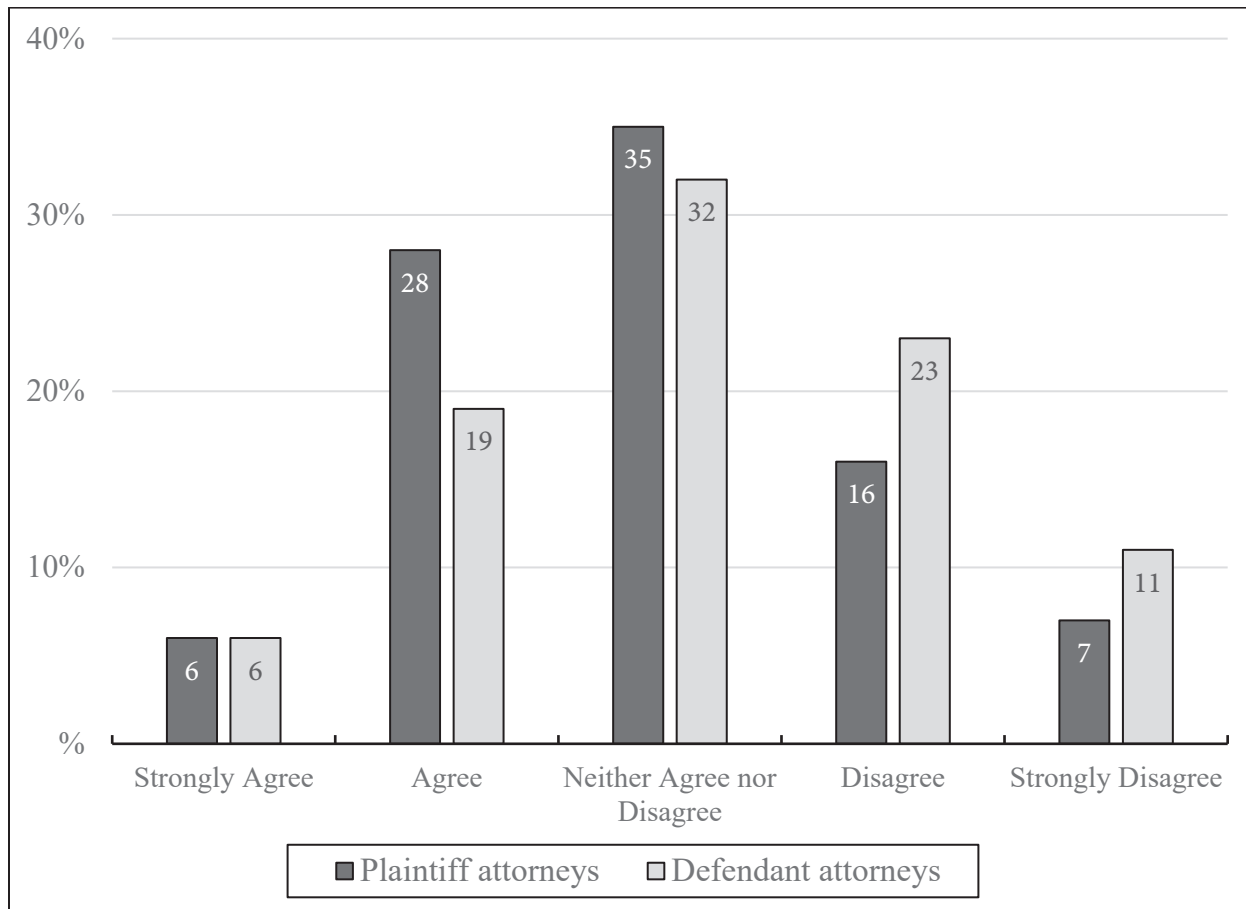
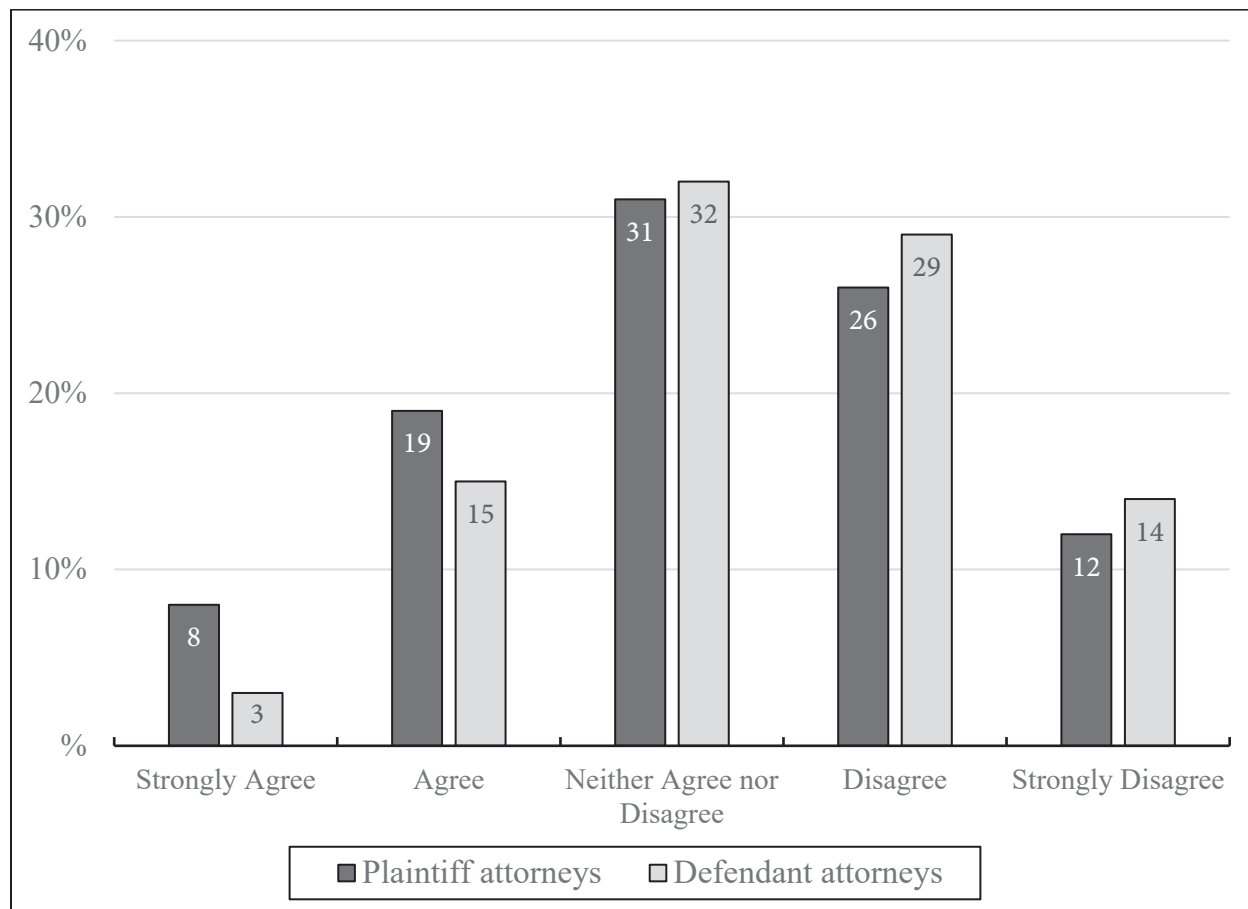


Figure 32: MIDP “Reduced the Number of Discovery Disputes That Would Have Otherwise Been Made in the Case,” Illinois Northern (n = 1,721)



Reduced the Number of Motions Filed in the Case

Respondents tended to respond neutrally or disagree with the statement that MIDP reduced the number of motions filed in the case.

In Arizona (**Figure 33**), 23% of plaintiff attorneys either strongly agreed (5%) or agreed (18%), 39% neither agreed nor disagreed, and 30% either disagreed (22%) or strongly disagreed (8%). Among Arizona defendant attorneys, 18% either strongly agreed (5%) or agreed (13%), 35% neither agreed nor disagreed, and 40% either disagreed (28%) or strongly disagreed (12%).

In Illinois Northern (**Figure 34**), 24% of plaintiff attorneys either strongly agreed (7%) or agreed (17%) with this statement, 34% neither agreed nor disagreed, and 38% disagreed (26%) or strongly disagreed (12%). Only 15% of defendant attorneys strongly agreed (3%) or agreed (12%), compared to 44% who disagreed (30%) or strongly disagreed (14%) and 34% who neither agreed nor disagreed.

Figure 33: MIDP “Reduced the Number of Motions Filed in the Case,” Arizona (n = 919)

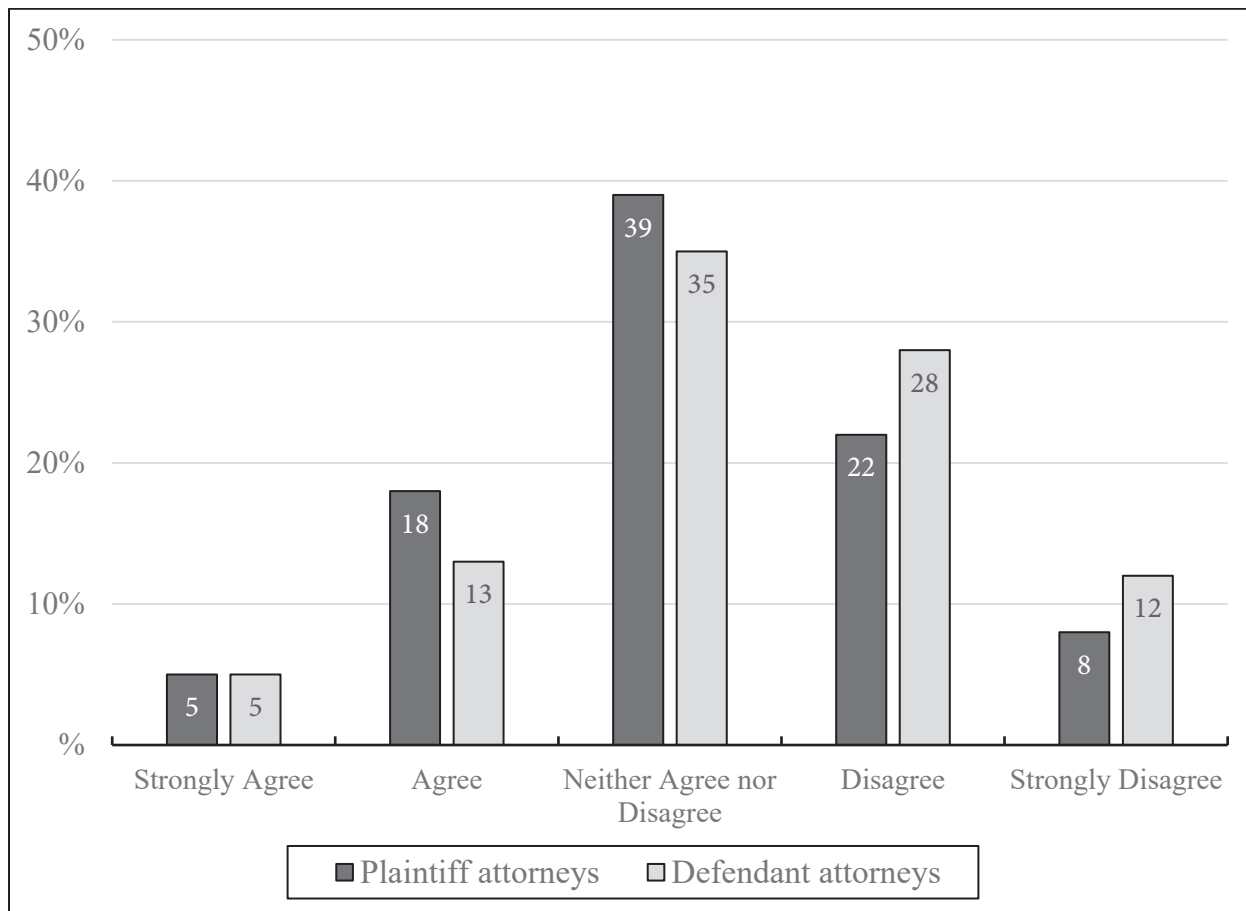
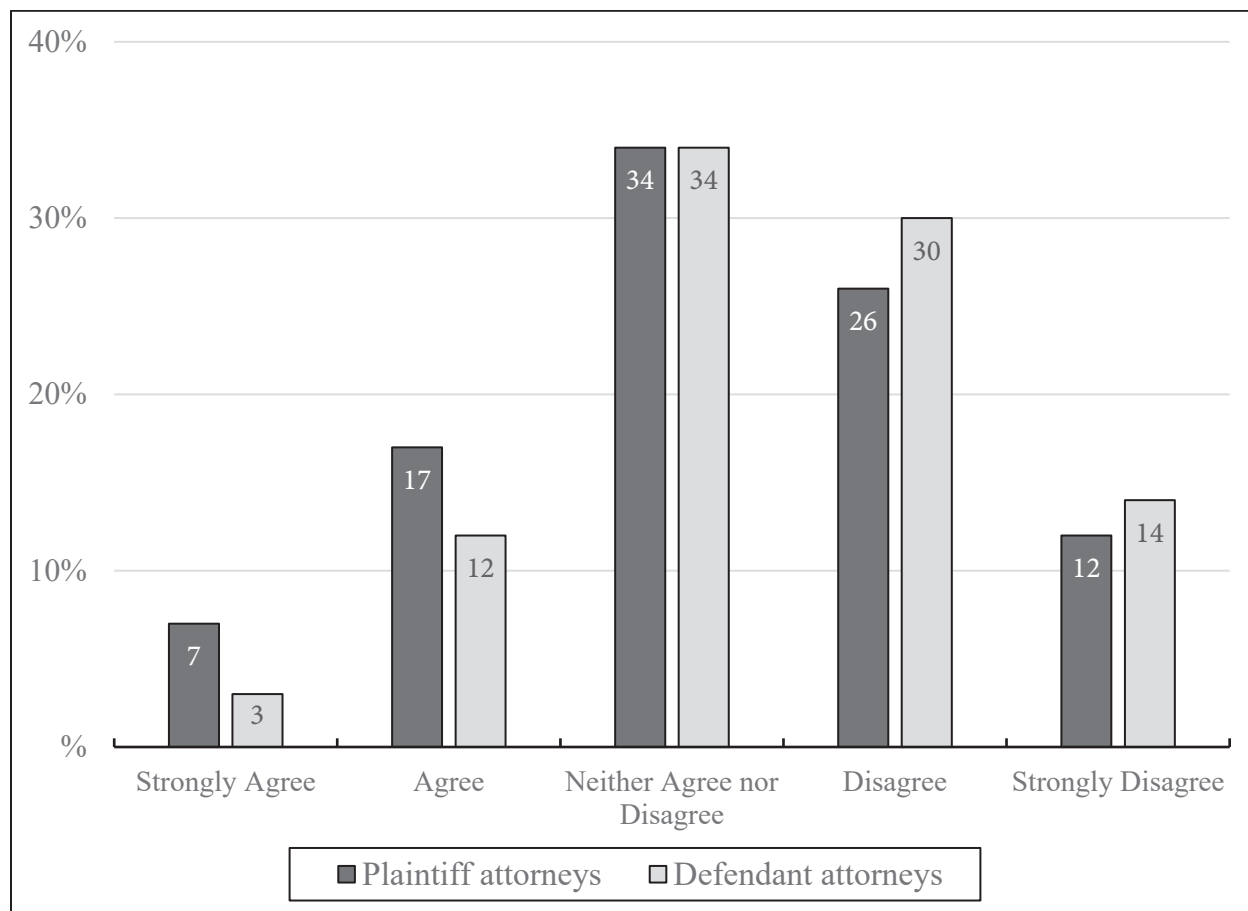


Figure 34: MIDP “Reduced the Number of Motions Filed in the Case,” Illinois Northern (n = 1,722)

Reduced the Discovery Costs in the Case for My Client

Regarding whether the MIDP reduced discovery costs for their client, Arizona plaintiff attorneys tended to agree or respond neutrally, while Arizona defendant attorneys tended to agree, respond neutrally, or disagree at similar rates. Illinois Northern plaintiff attorneys tended to disagree or respond neutrally, and Illinois Northern defendant attorneys tended to disagree or strongly disagree.

In Arizona (**Figure 35**), 35% of plaintiff attorneys either strongly agreed (7%) or agreed (28%), 29% neither agreed nor disagreed, and 31% either disagreed (22%) or strongly disagreed (9%). Among Arizona defendant attorneys, 29% either strongly agreed (7%) or agreed (22%), 24% neither agreed nor disagreed, and 42% either disagreed (23%) or strongly disagreed (19%).

In Illinois Northern (**Figure 36**), 29% of plaintiff attorneys either strongly agreed (9%) or agreed (20%) that the MIDP reduced discovery costs for their client, compared to the 45% who either disagreed (29%) or strongly disagreed (16%), and 24% who neither agreed nor disagreed. Only 20% of defendant attorneys strongly agreed (3%) or agreed (17%), compared to 55% who disagreed (31%) or strongly disagreed (24%) and 21% who neither agreed nor disagreed.

Figure 35: MIDP “Reduced the Discovery Costs in the Case for My Client,” Arizona (n = 921)

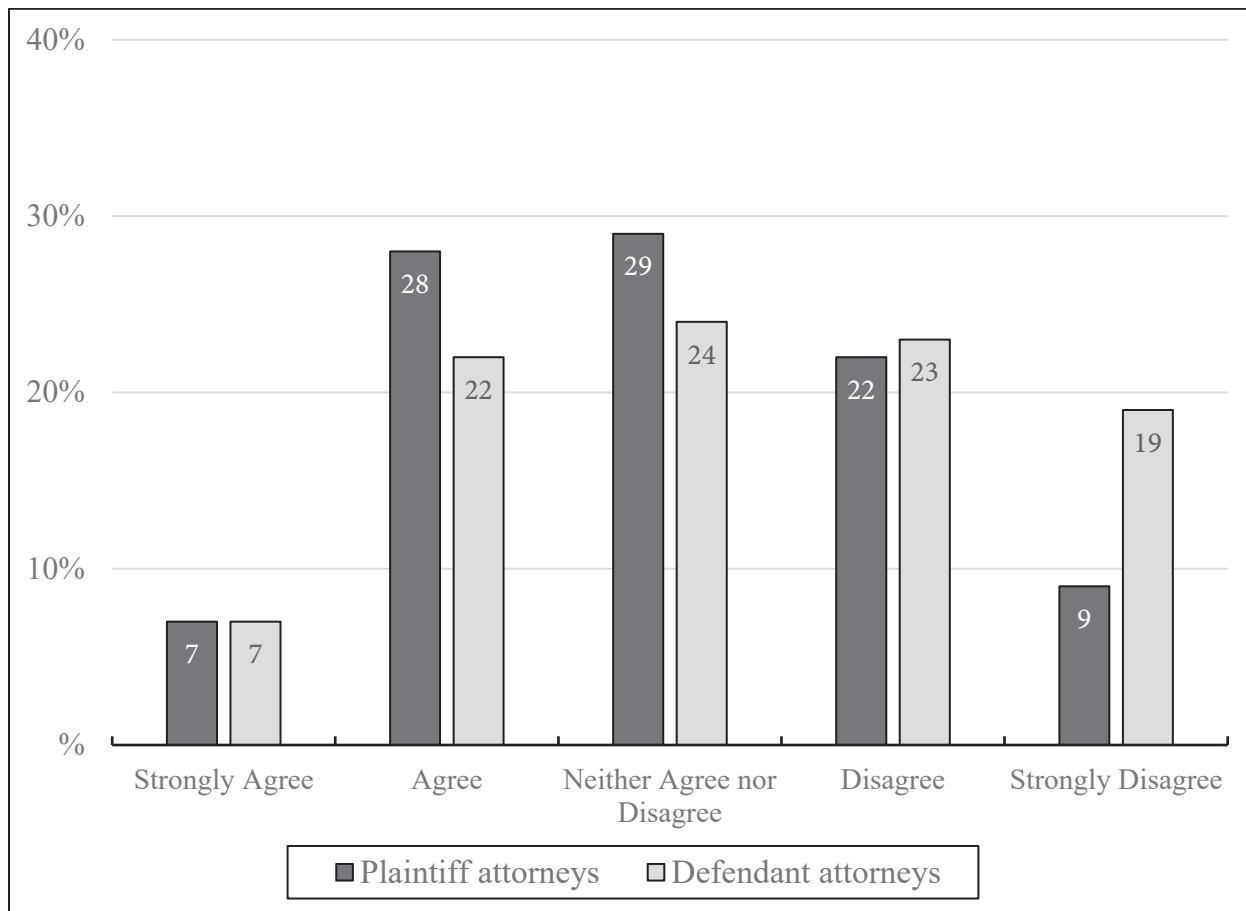
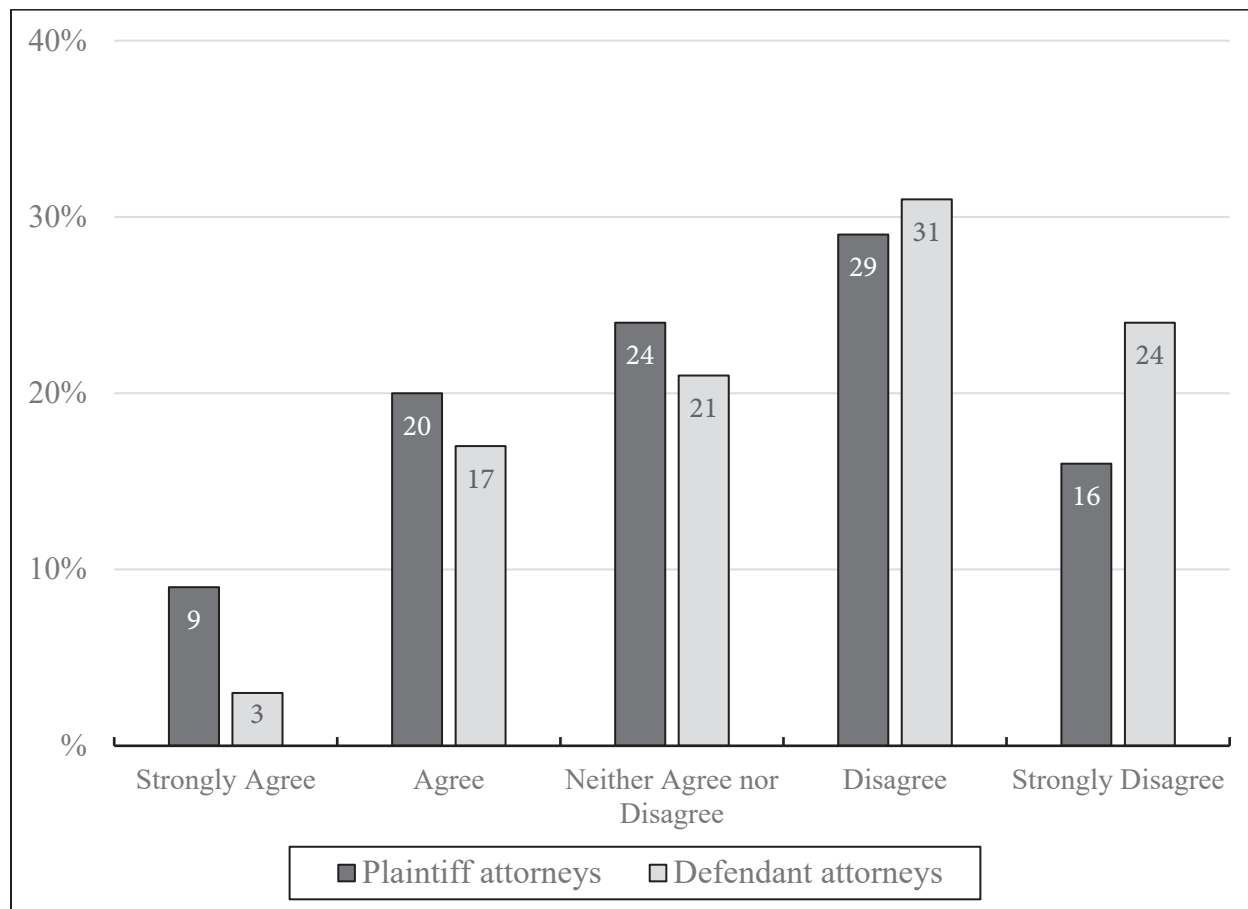


Figure 36: MIDP “Reduced the Discovery Costs in the Case for My Client,” Illinois Northern (n = 1,726)



Reduced the Overall Costs in the Case for My Client

When considering whether the MIDP reduced the overall costs for their clients, Arizona plaintiff attorneys tended to agree or respond neutrally, while Arizona defendant attorneys tended to respond neutrally or disagree. As with the preceding statement, Illinois Northern plaintiff attorneys tended to disagree or respond neutrally, and Illinois Northern defendant attorneys tended to disagree or strongly disagree.

In Arizona (**Figure 37**), 32% of plaintiff attorneys either strongly agreed (7%) or agreed (25%), 33% neither agreed nor disagreed, and 31% either disagreed (21%) or strongly disagreed (10%). For Arizona defendant attorneys, 28% either strongly agreed (7%) or agreed (21%), 24% neither agreed nor disagreed, and 44% either disagreed (24%) or strongly disagreed (20%).

In Illinois Northern (**Figure 38**), 28% of plaintiff attorneys either strongly agreed (9%) or agreed (19%) that the MIDP reduced overall costs for their client, compared to the 46% who either disagreed (29%) or strongly disagreed (17%), and 24% who neither agreed nor disagreed. Only 20% of defendant attorneys strongly agreed (3%) or agreed (17%), compared to 55% who disagreed (31%) or strongly disagreed (24%) and 22% who neither agreed nor disagreed.

Figure 37: MIDP “Reduced the Overall Costs in the Case for My Client,” Arizona (n = 918)

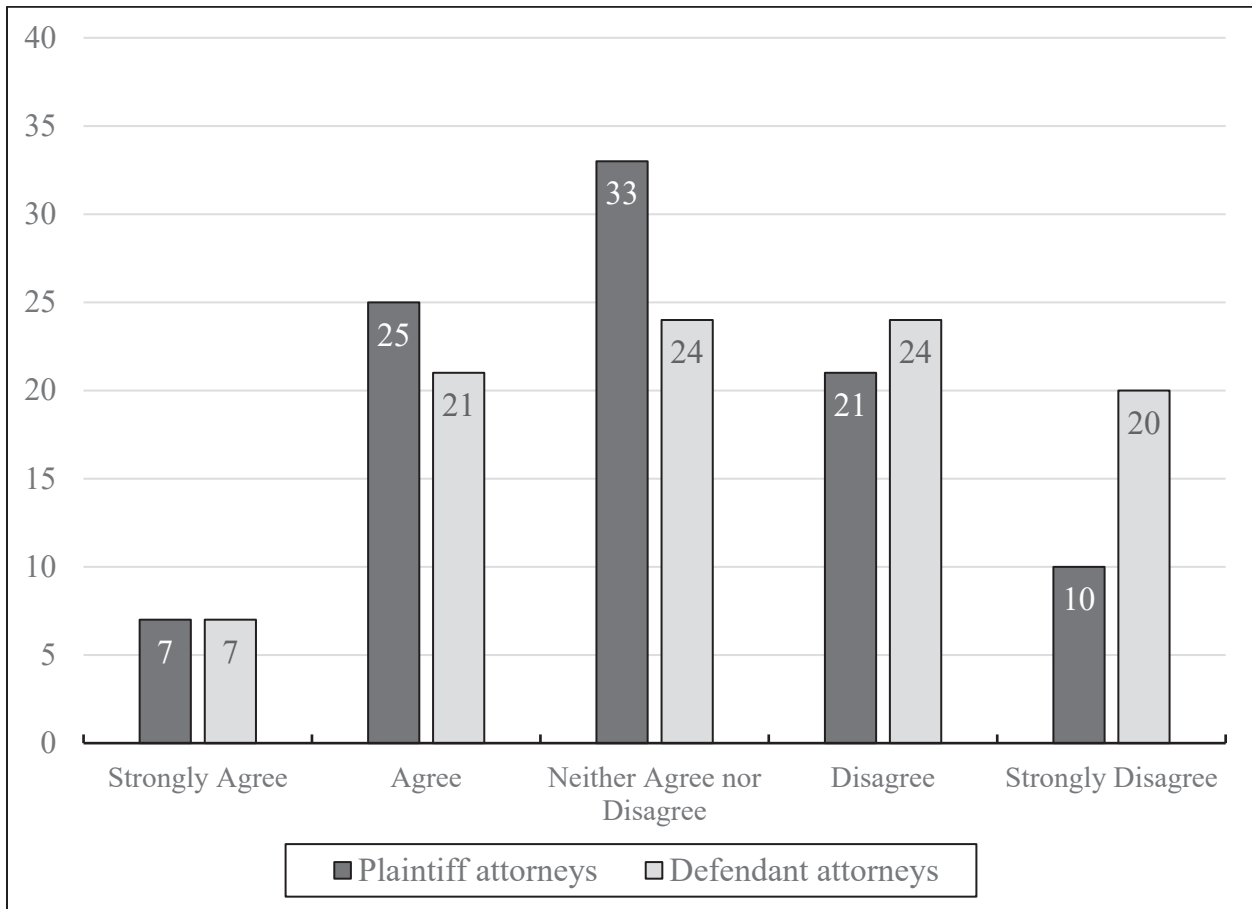
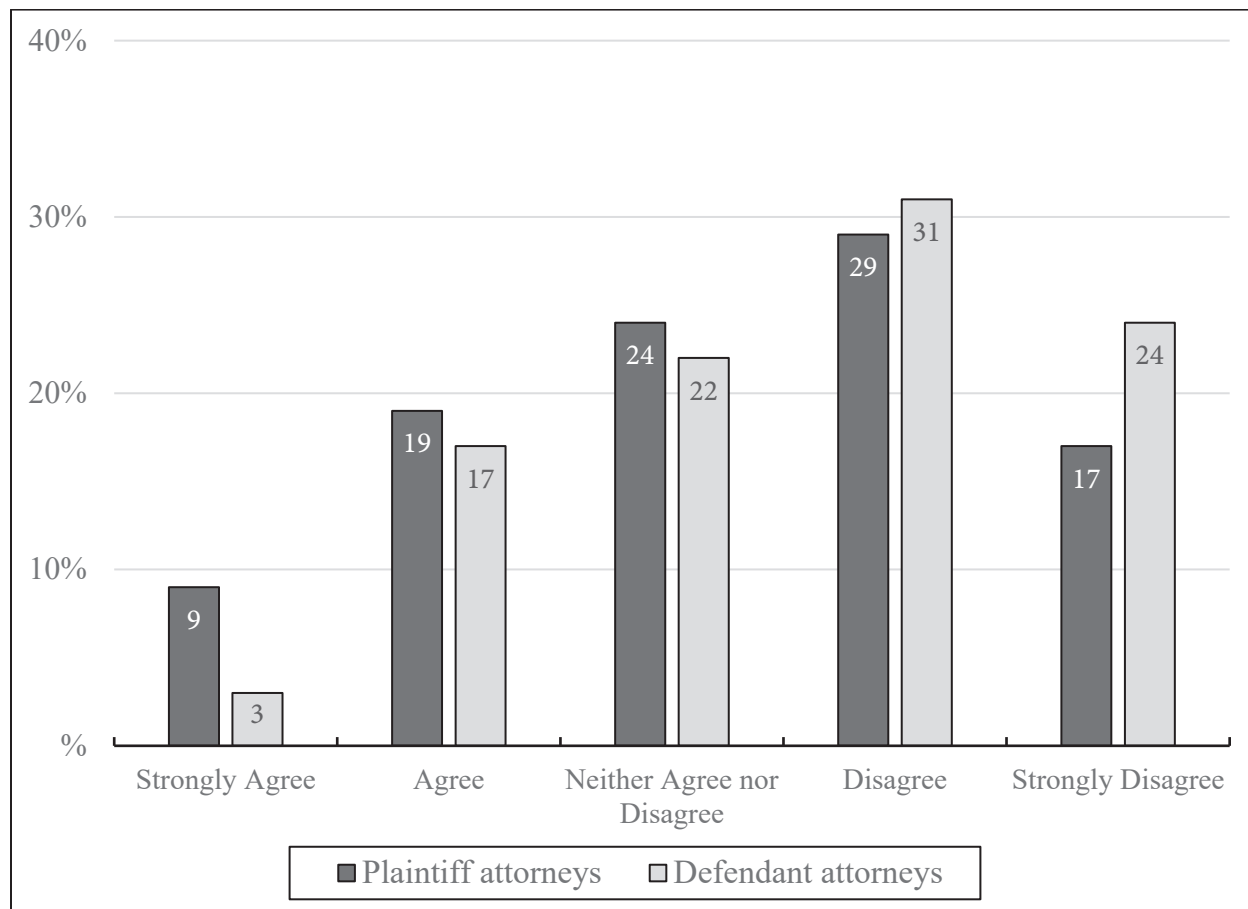


Figure 38: MIDP “Reduced the Overall Costs in the Case for My Client,” Illinois Northern (n = 1,723)



Reduced the Time from Filing to Resolution in the Case

Regarding whether the MIDP reduced the time from filing to resolution in the case, Arizona plaintiff attorneys tended to agree or respond neutrally, while Arizona defendant attorneys and Illinois attorneys tended to disagree or respond neutrally.

In Arizona (**Figure 39**), 36% of plaintiff attorneys either strongly agreed (8%) or agreed (28%), 31% neither agreed nor disagreed, and 28% either disagreed (21%) or strongly disagreed (7%). For Arizona defendant attorneys, 27% either strongly agreed (7%) or agreed (20%), 28% neither agreed nor disagreed, and 40% either disagreed (27%) or strongly disagreed (13%).

In Illinois Northern (**Figure 40**), 31% of plaintiff attorneys either strongly agreed (10%) or agreed (21%) that the MIDP reduced disposition time, compared to the 41% who either disagreed (26%) or strongly disagreed (15%), and 26% who neither agreed nor disagreed. Only 23% of defendant attorneys strongly agreed (4%) or agreed (19%), compared to 48% who disagreed (29%) or strongly disagreed (19%) and 26% who neither agreed nor disagreed.

Figure 39: MIDP “Reduced the Time from Filing to Resolution in the Case,” Arizona (n = 917)

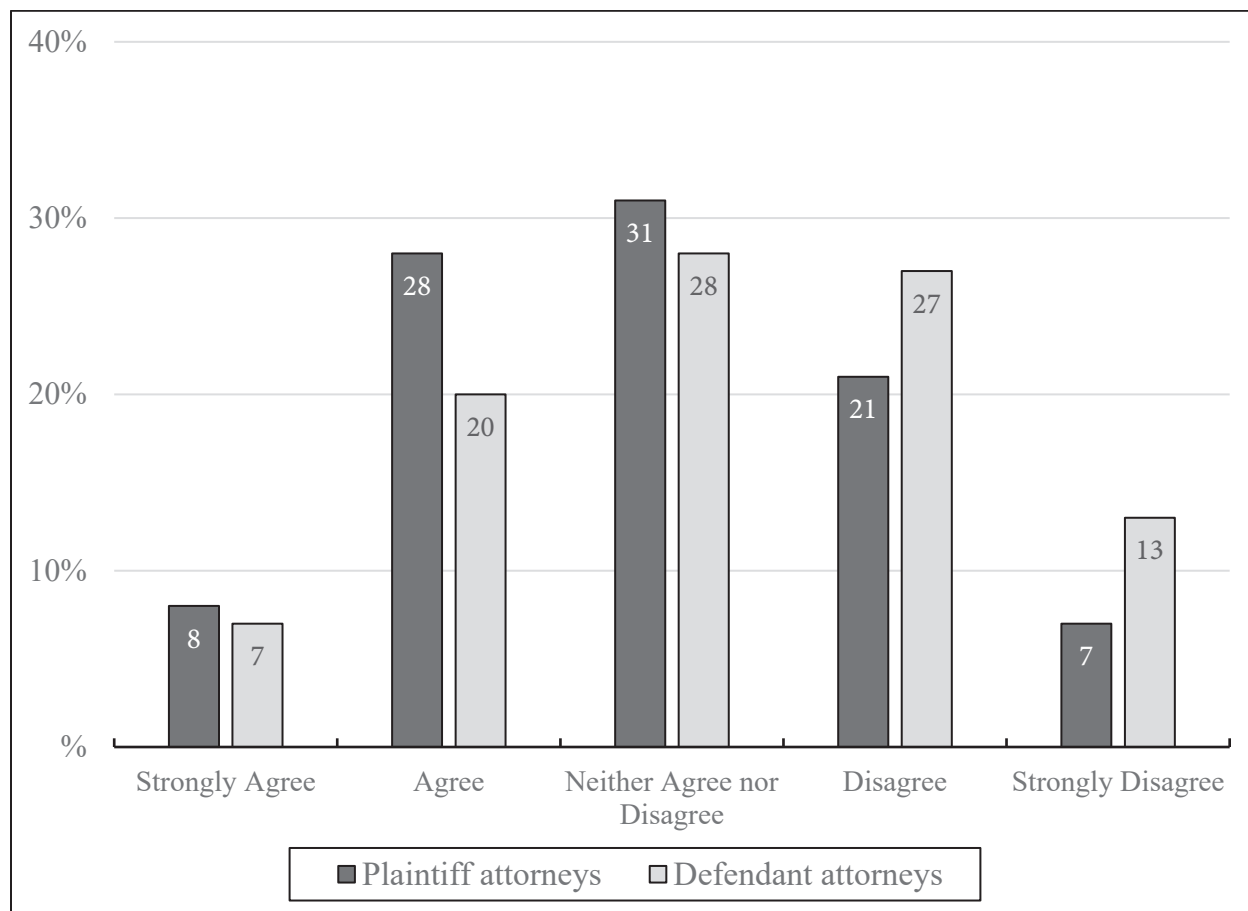
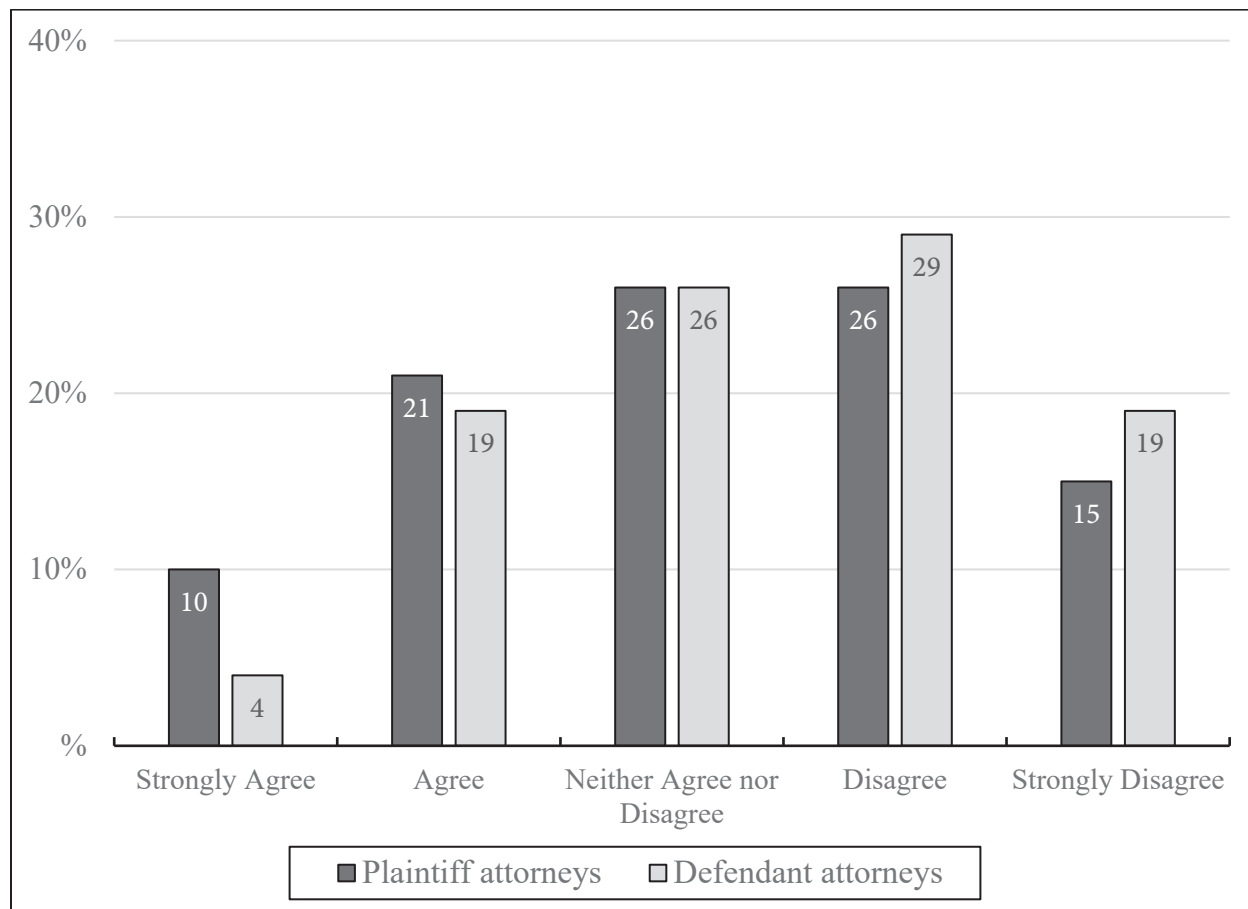


Figure 40: MIDP “Reduced the Time from Filing to Resolution in the Case,” Illinois Northern (n = 1,709)



Discovery Dispute Brought to Attention of the Court

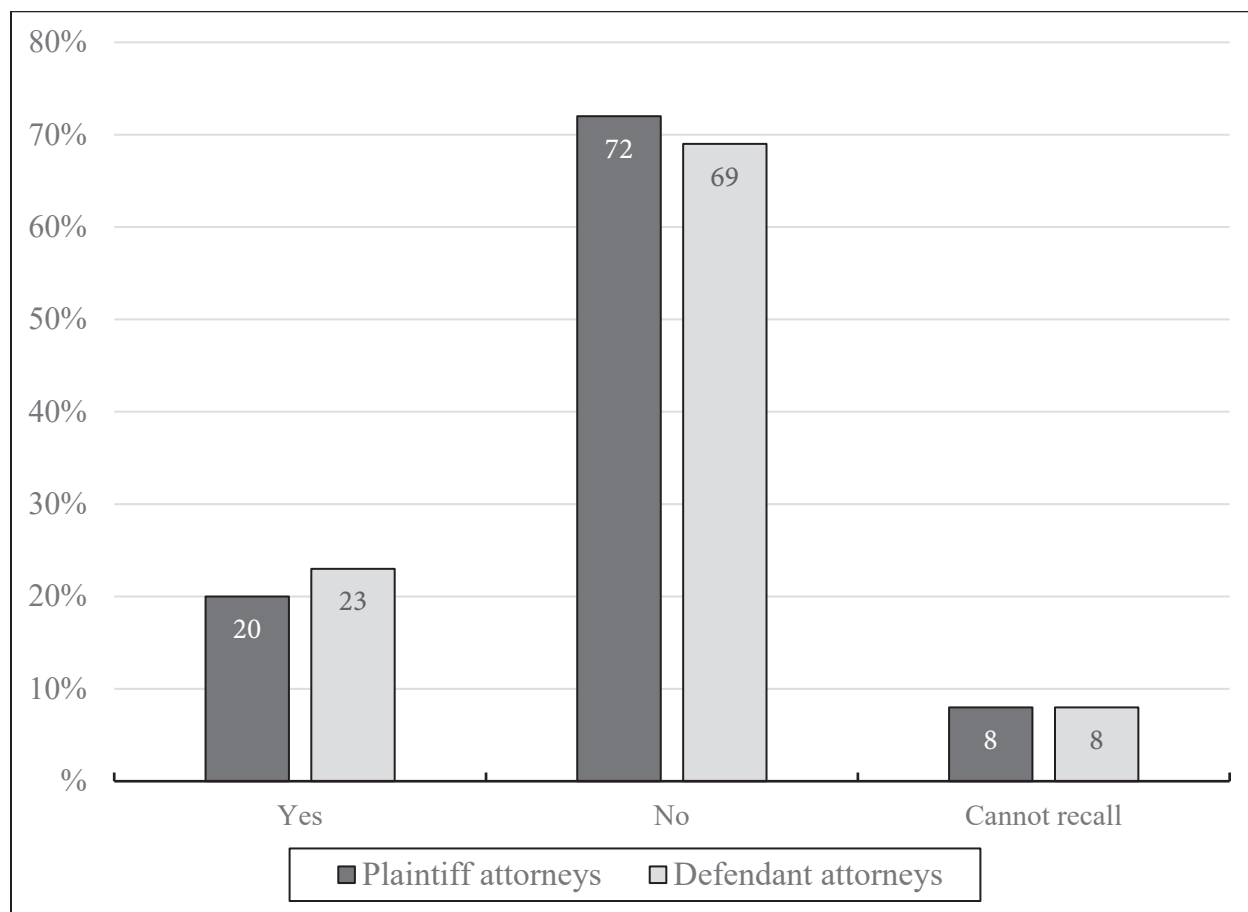
Two questions were added to the closed-case surveys for the final six survey rounds. These questions obtained additional information about discovery disputes and sanctions activity in the participating districts. First, respondents were asked whether there were discovery disputes in the named case brought to the attention of the court. In Arizona (**Figure 41**), 20% of plaintiff attorneys and 23% of defendant attorneys answered “Yes,” 72% of plaintiff attorneys and 69% of defendant attorneys answered “No,” and 8% each of plaintiff attorneys and defendant attorneys were unable to recall. In Illinois Northern (**Figure 42**), 30% of plaintiff attorneys and 26% of defendant attorneys answered “Yes,” 62% of plaintiff attorneys and 67% of defendant attorneys answered “No,” and 9% of plaintiff attorneys and 8% of defendant attorneys were unable to recall.³⁵

Second, respondents were asked whether the issue of discovery sanctions was raised in the named case. In Arizona (**Figure 43**), only 8% each of plaintiff and defendant attorneys answered “Yes,” compared with 86% of plaintiff attorneys and 87% of defendant attorneys answering “No,”

35. In a sample of pilot cases, no discovery motions were filed in 51% of participating cases in Illinois Northern or in 69% of participating cases in Arizona. See *infra* at 94 (Illinois Northern) and 87 (Arizona).

and 6% of plaintiff attorneys and 5% of defendant attorneys unable to recall. In Illinois Northern (Figure 44), only 9% of plaintiff attorneys and 7% of defendant attorneys answered “Yes,” compared with 87% of plaintiff attorneys and 90% of defendant attorneys answering “No,” and 4% of plaintiff attorneys and 3% of defendant attorneys unable to recall.³⁶

Figure 41: Was a Discovery Dispute in the Closed Case Brought to the Attention of the Court, Arizona (n = 786)



36. In a sample of pilot cases, motions for discovery sanctions were filed in 3% of participating cases in Illinois Northern and in 2% of participating cases in Arizona. See *infra* at 94 (Illinois Northern) and 87 (Arizona).

Figure 42: Was a Discovery Dispute in the Named Case Brought to the Attention of the Court, Illinois Northern (n = 1,516)

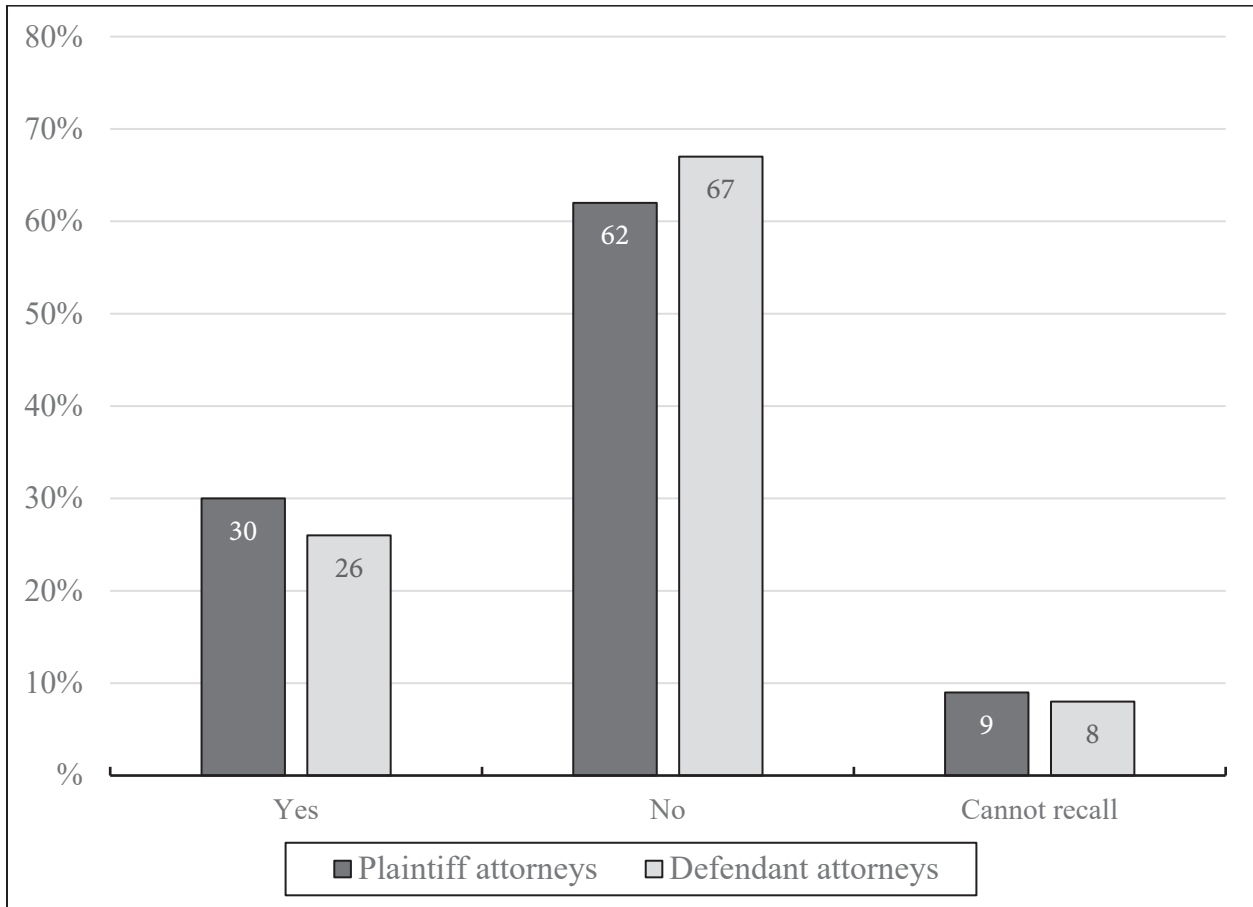


Figure 43: Were Discovery Sanctions Raised in the Closed Case, Arizona (n = 792)

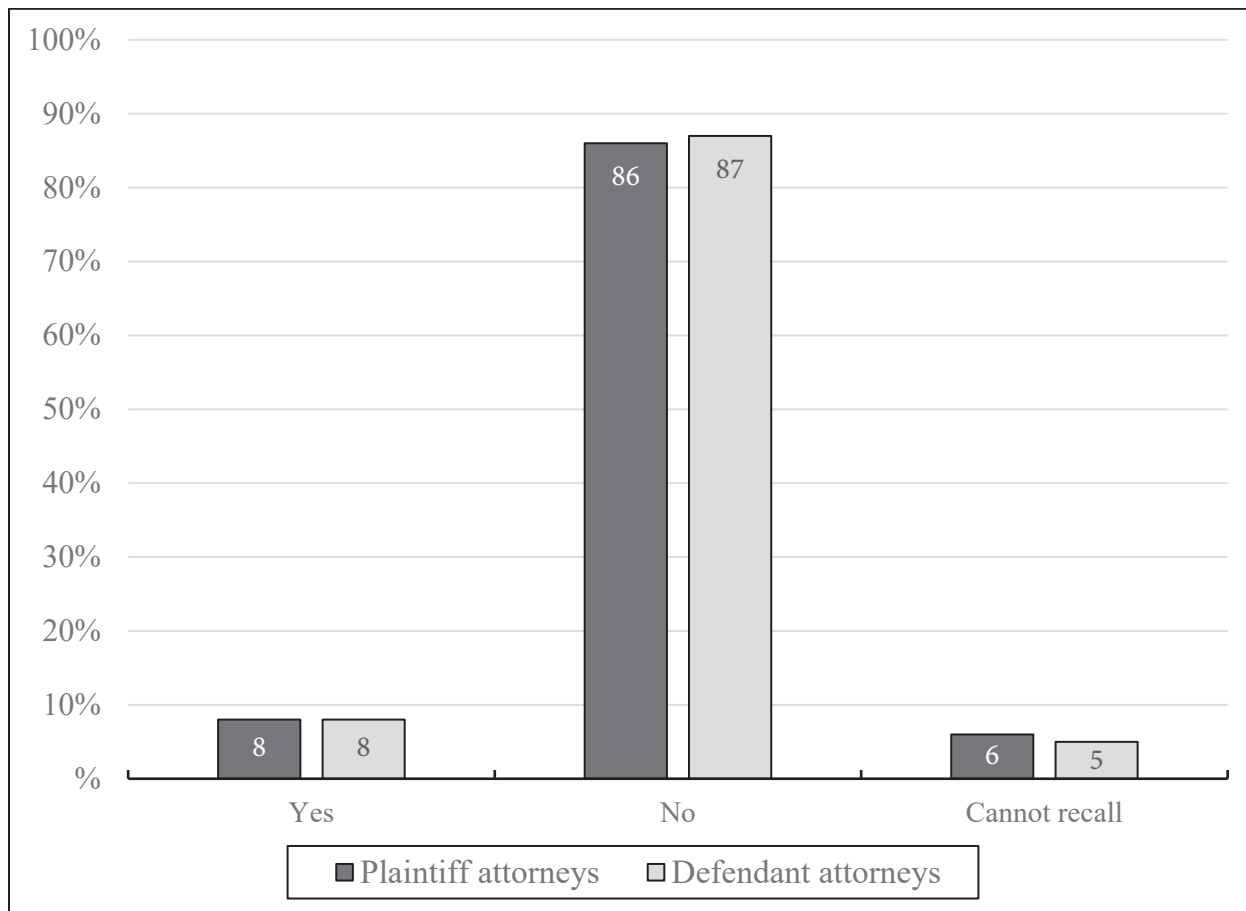
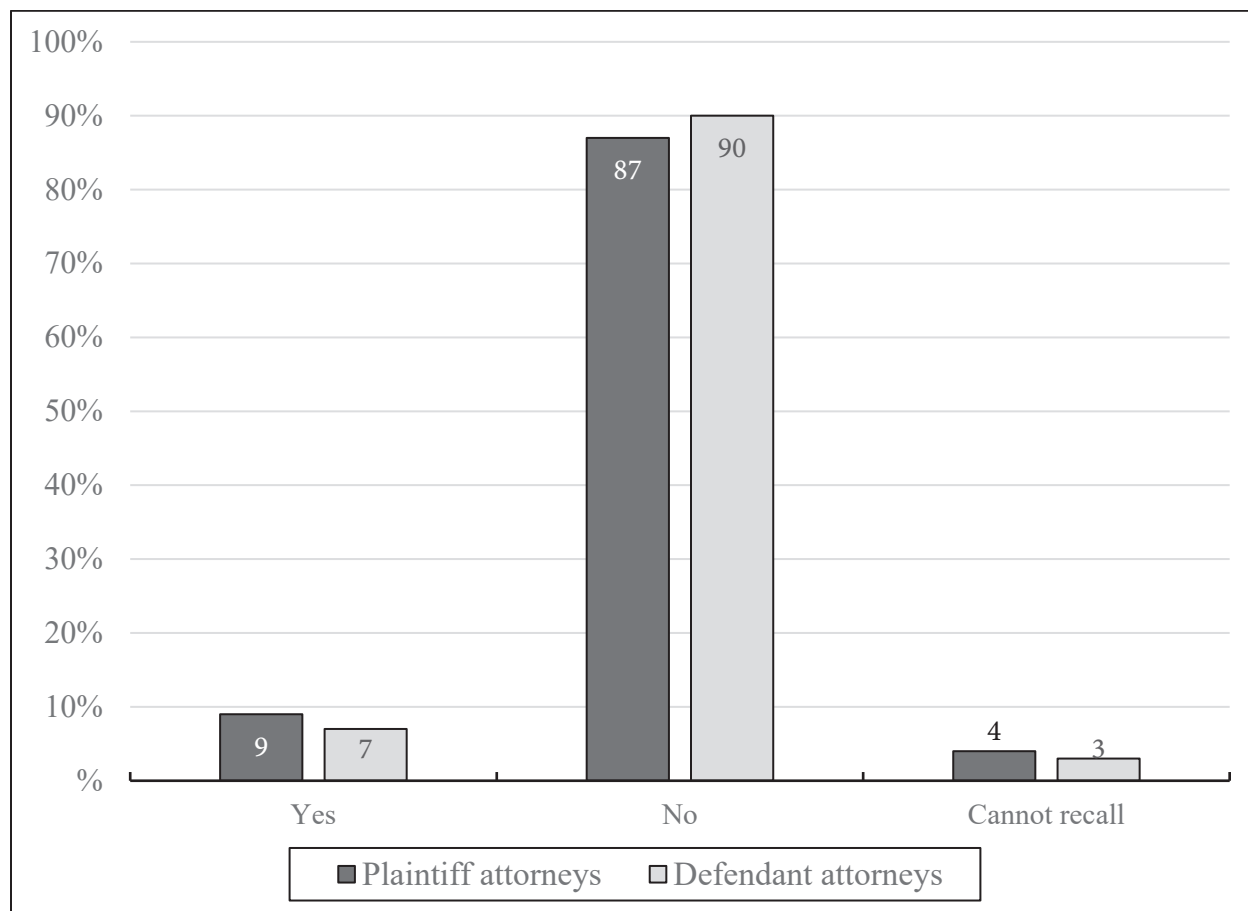


Figure 44: Were Discovery Sanctions Raised in the Closed Case, Illinois Northern (n = 1,511)

MIDP Reduced Discovery Costs: Additional Analysis

In November 2021, Judge David G. Campbell of the District of Arizona (and former chair of both the Advisory and Standing committees) asked whether the closed-case survey results could shed further light on the cases in which respondents strongly agreed or agreed that the MIDP reduced costs for their clients. Even though respondents tended to be neutral or to disagree or strongly disagree that the MIDP reduced costs, 35% of Arizona plaintiff attorneys and 29% of Arizona defendant attorneys strongly agreed or agreed, and 29% of Illinois Northern plaintiff attorneys and 20% of Illinois Northern defendant attorneys strongly agreed or agreed that the MIDP reduced discovery costs for their client in the closed case.

Follow-up analyses examined whether there were case characteristics or other factors that help to explain why some attorneys thought MIDP reduced costs for their clients. Were respondents more likely to perceive cost savings due to the MIDP in certain types of cases? Were they less likely to perceive savings in other types of cases?

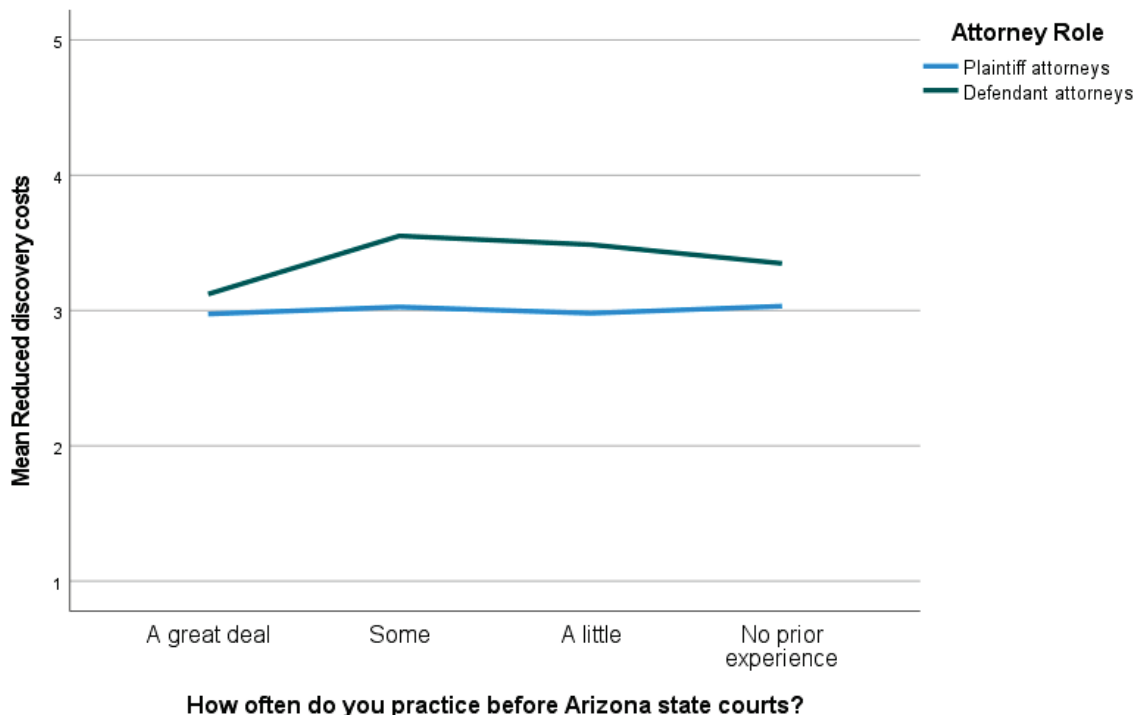
Respondents' answers to the two cost statements (discovery and overall) were very highly correlated, so to keep things simple this section focuses only on responses to the "discovery costs" prompt. On the five-point scale from strongly agree (1) to strongly disagree (5), most groupings

of respondents (e.g., plaintiff attorneys) average somewhere near 3, the neutral “neither agree nor disagree” option. This is common with questions of this type—respondents tend to cluster in the middle of the range. The lower a group of respondents’ average rating, the more likely they were to strongly agree or agree with the prompt; the higher a group’s average, the more likely they were to disagree or strongly disagree.

In general, plaintiff attorneys gave lower (more positive) average ratings than defendant attorneys. In Arizona, plaintiff attorneys overall ($n = 421$) averaged 2.99 out of 5, and defendant attorneys ($n = 458$) averaged 3.27 ($p < .001$). In Illinois Northern, plaintiff attorneys ($n = 822$) overall averaged 3.24 out of 5, and defendant attorneys ($n = 852$) averaged 3.52 ($p < .001$). As seen in preceding sections of the report, Arizona respondents tended to rate the MIDP more positively than Illinois Northern respondents across a range of statements.

The more positive evaluations of the MIDP in Arizona may be due to practitioners’ greater familiarity with more robust disclosures, given that much of the MIDP overlaps with already existing Arizona state court rules. **Figure 45** shows Arizona respondents’ average ratings on the discovery-cost prompt broken down by the respondents’ self-reported experience in Arizona state courts. Arizona plaintiff attorneys’ ratings were similar, averaging about 3, the midpoint, regardless of how often they practiced before Arizona state courts. The pattern for defendant attorneys shows more variation, with attorneys self-reporting the most experience in Arizona state courts rating the MIDP’s effects on costs the most positively of any state-court experience level. Few respondents, however, selected the “A little” and “No prior experience” response options, making it difficult to say how such attorneys responded to the MIDP overall. In interpreting these results, then, there is some reason to think that for defendant attorneys, experience with the Arizona state-court rules affected how they saw the MIDP, but the observed effect is slight. Defendant attorneys were not particularly well-disposed to the MIDP, regardless of state-court experience.

Figure 45: Experience Litigating in Arizona State Courts and Discovery-Cost Question (n = 875)



The closed case survey also asked about prior experience litigating in the participating districts. In Arizona (Figure 46), both plaintiff attorneys and defendant attorneys self-reporting “A great deal” of experience in the district rated the MIDP most negatively with respect to costs. The same pattern holds in Illinois Northern (Figure 47). Again, there are few respondents in the “No prior experience” category in either district, so one would not want to put much weight on the right end of the lines in either figure. But regular practitioners in both participating districts, on both sides of the v, were somewhat negative with respect to the MIDP’s effects on discovery costs. This most likely reflects resistance to changing local rules and procedures among those who are used to the way things have been done in the past.

Figure 46: Prior Experience in the District of Arizona and Discovery-Cost Question (n = 877)

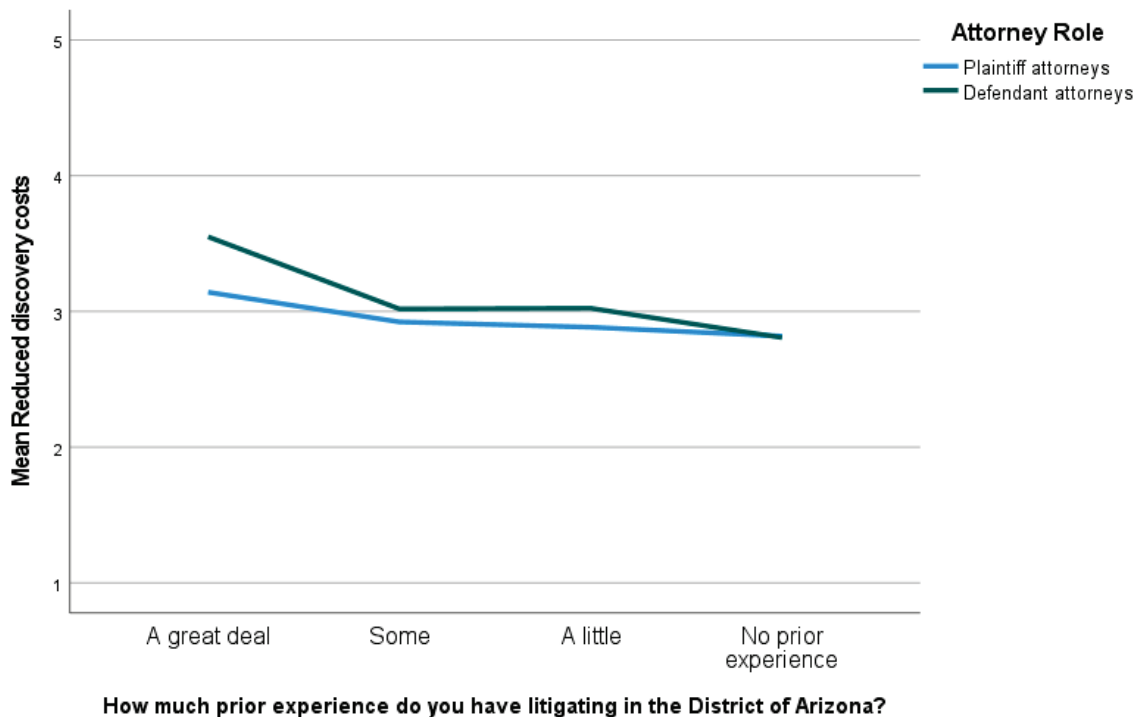
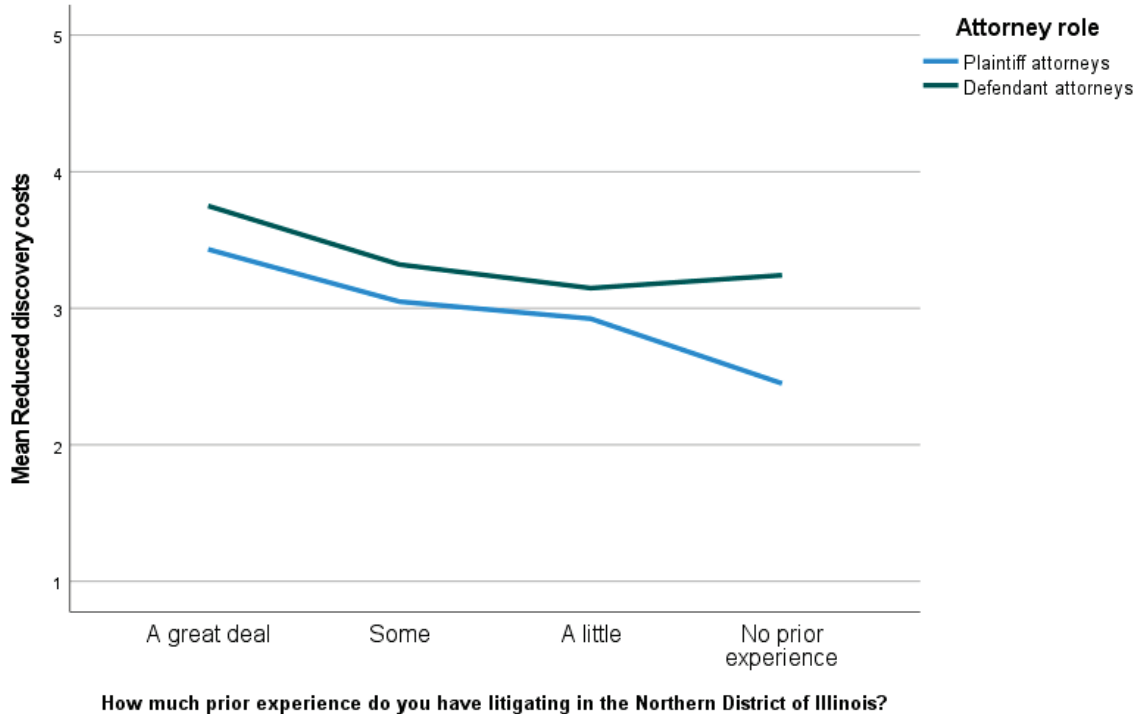


Figure 47: Prior Experience in the Illinois Northern and Discovery-Cost Question (n = 1,673)



Speaking of resistance to change, attorney experience in general (measured here by self-reported years of practicing law) may also affect how respondents viewed the MIDP’s effects. To simplify the presentation, attorney respondents were divided at the median years of self-reported practice in each district; the figures present the average ratings for less experienced respondents (attorneys with less than the median years of practice) and more experienced respondents (median or greater years of practice). In Arizona (**Figure 48**), more experienced respondents did not rate the MIDP’s effects on discovery costs differently than less experienced respondents; the two variables (years of practice and rating) are not correlated at the bivariate level for either plaintiff or defendant attorneys. In Illinois Northern (**Figure 49**), however, defendant attorneys with more experience rated the MIDP’s effects on discovery costs less negatively than less experienced defendant attorneys. There was no difference between less experienced and more experienced plaintiff attorneys, on average.

Figure 48: Attorney Experience and Discovery-Cost Question, Arizona, (n = 870)

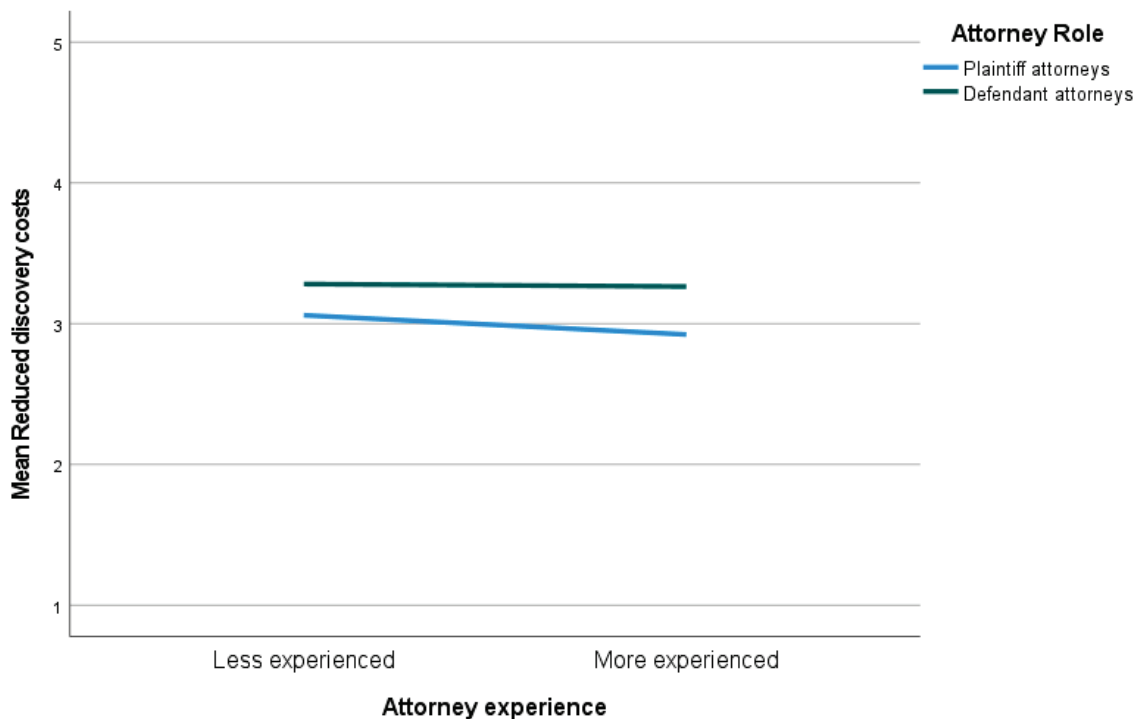
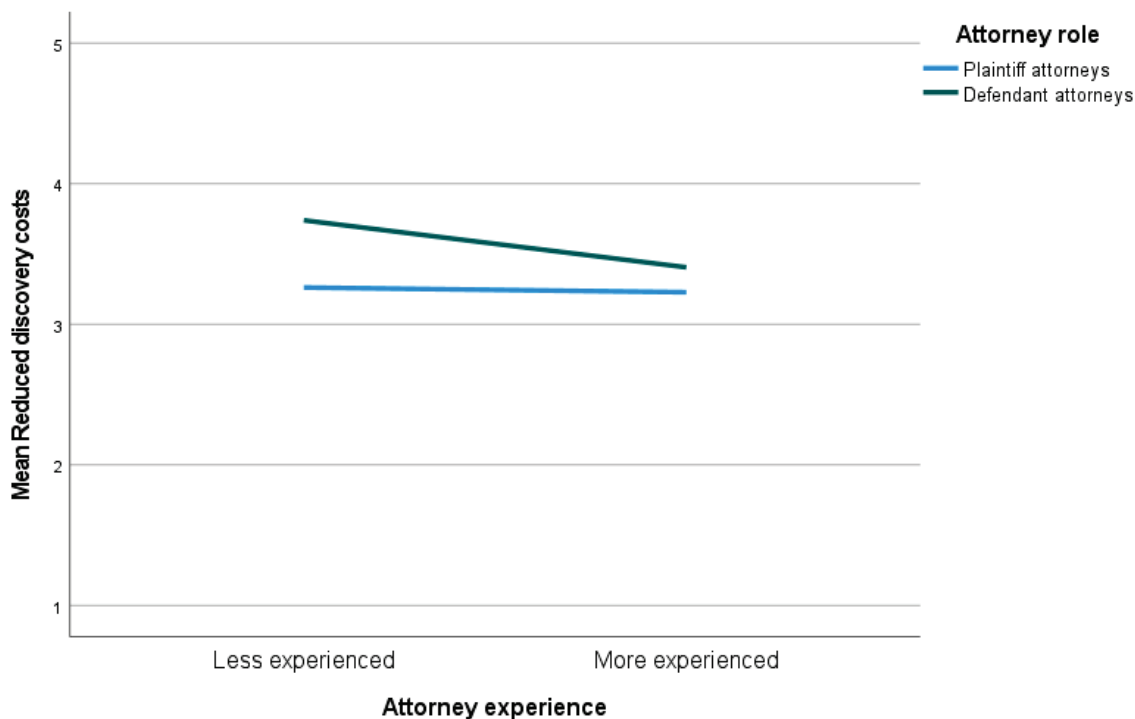


Figure 49: Attorney Experience and Discovery-Cost Question, Illinois Northern ($n = 1,653$)

Another factor that could affect respondents' evaluation of the MIDP's effects on discovery costs is the length of the case in question. One might hypothesize that respondents in shorter duration cases would be more likely to perceive MIDP effects than respondents in longer cases. For example, a judge interviewee suggested that MIDP cases lasting longer than six months are just like any other case; when MIDP responses alone do not lead to a resolution, the parties proceed with discovery as usual, which will cost the usual amount. The results on this are mixed.

To simplify the presentation, the average discovery-cost ratings of respondents in the shorter-than-median-length cases are compared to the ratings of respondents in median-or-longer-length cases in each district. In Arizona (**Figure 50**), plaintiff attorneys in the shorter-duration and longer-duration cases both averaged right at the midpoint, but there is a slight difference among defendant attorneys, with those in longer-duration cases rating the MIDP's effects on discovery costs more negatively, on average. A simple bivariate correlation of respondents' ratings on the five-point scale and case length is positive and statistically significant, for Arizona defendant attorneys. Illinois Northern presents the opposite pattern (**Figure 51**)—shorter case length is correlated with more positive ratings for plaintiff attorneys but not defendant attorneys. It is likely that the effects of case length are interacting with case outcome—summary judgment is a more likely outcome for longer-pending cases. Given the small number of summary-judgment outcomes in the closed-case survey data, however, it is difficult to say.

Figure 50: Case Length and Discovery-Cost Question, Arizona (n = 879)

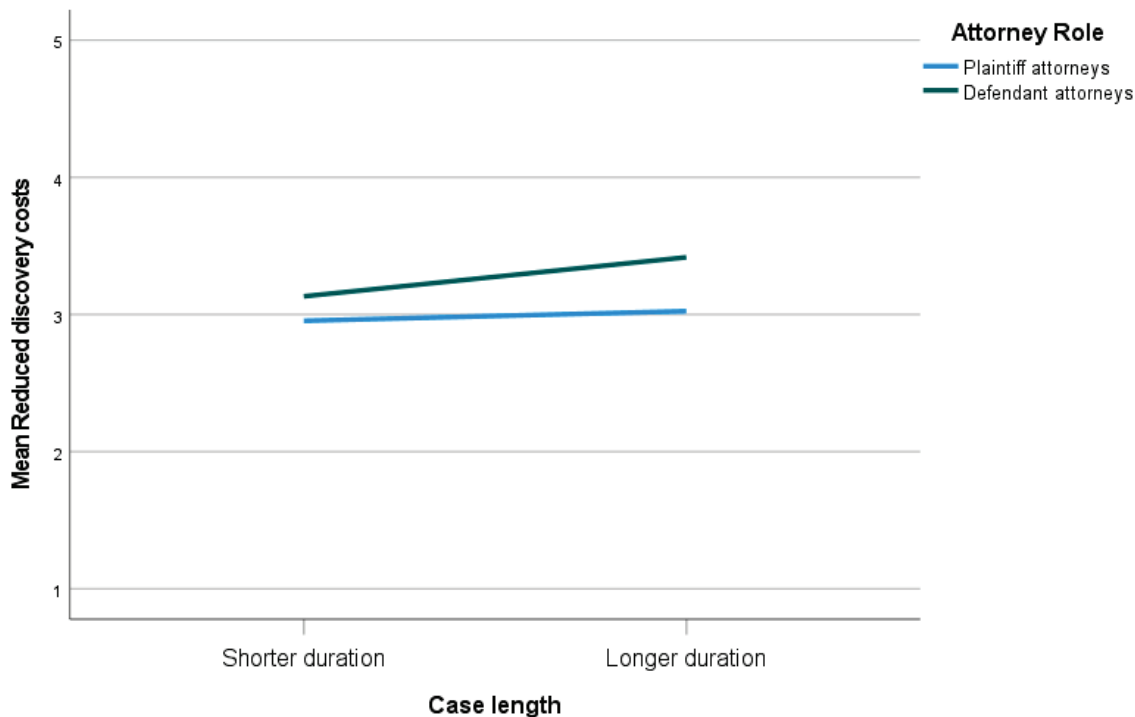
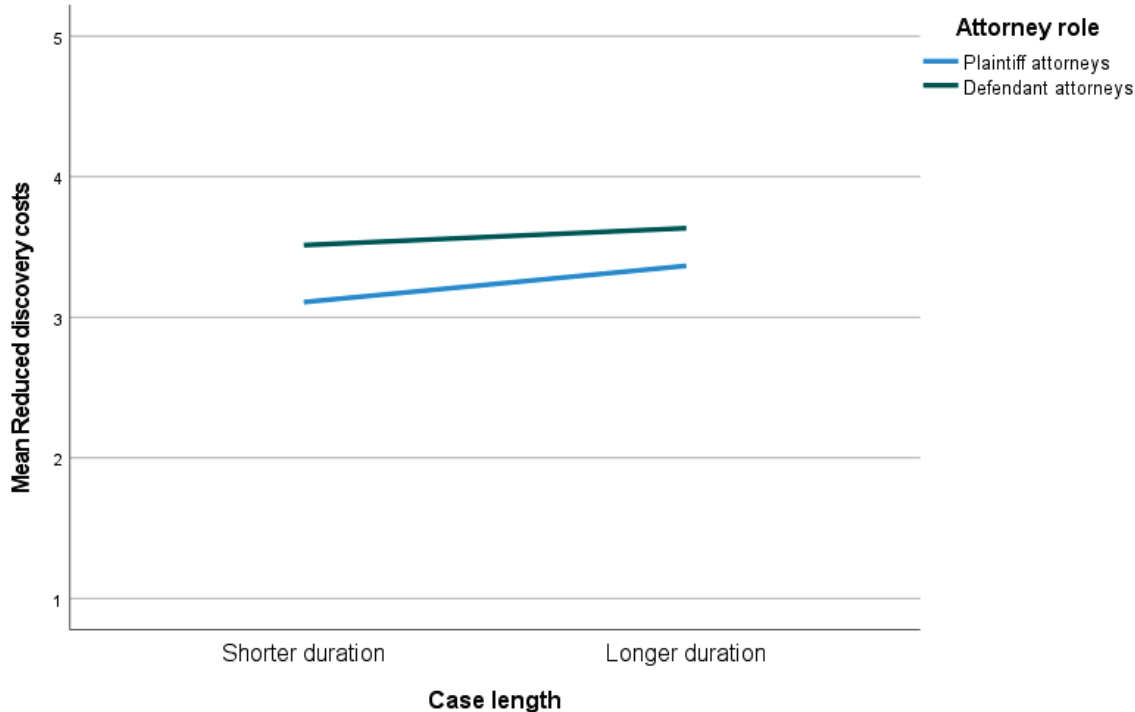


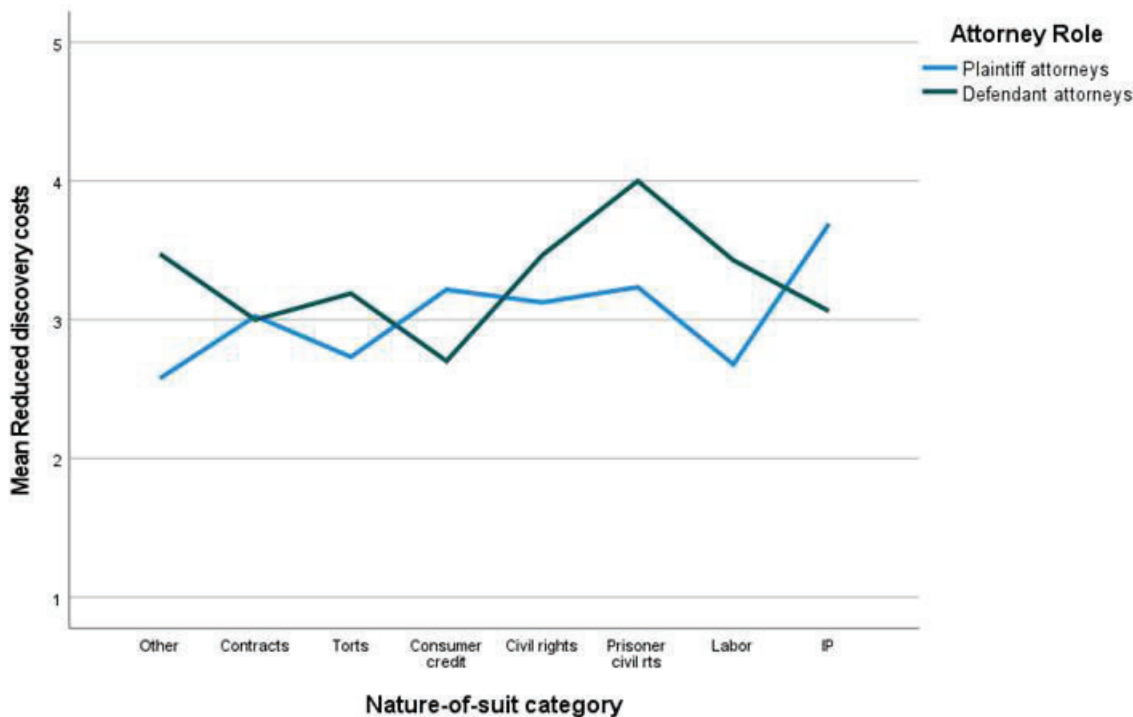
Figure 51: Case Length and Discovery-Cost Question, Illinois Northern (n = 1,674)



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Additionally, respondents in different types of cases may evaluate the MIDP's effects on discovery costs differently, depending on the kinds of discovery typical in different nature-of-suit categories. In Arizona (**Figure 52**), plaintiff attorneys tended to rate the MIDP's effects on discovery costs more highly than defendant attorneys in every nature-of-suit category except contracts (no difference between plaintiff and defendant attorneys),³⁷ consumer credit, and intellectual property (not including patents). Defendant attorneys in consumer credit cases accounted for 32% of all defendant attorneys strongly agreeing that the MIDP reduced their client's discovery costs while accounting for just 8% of all defendant attorneys answering the discovery-cost question. Defendant attorneys in prisoner civil-rights cases (accounting for 4% of respondents answering the discovery-cost question in Arizona) rated the MIDP most negatively, which is not surprising, and defendant attorneys were more negative in their ratings than plaintiff attorneys in other, torts, civil-rights, and labor cases.

Figure 52: Nature-of-Suit Category and Discovery-Cost Question, Arizona (n = 879)

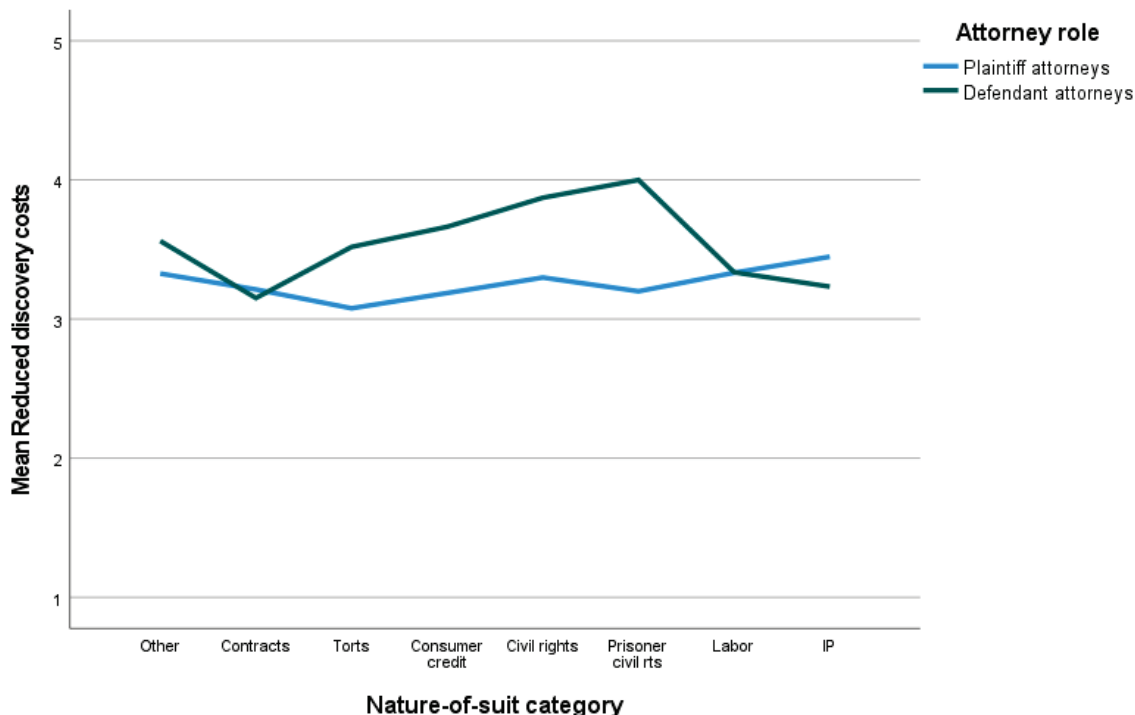


In Illinois Northern (**Figure 53**), plaintiff attorneys tended to rate the MIDP's effects on discovery costs more positively in every nature-of-suit category other than contracts (again, no difference between plaintiff and defendant attorneys), labor, and intellectual property. Defendant attorneys were more negative in the other nature-of-suit categories. Fewer than 1% of Illinois Northern respondents were in prisoner civil-rights cases, which averaged the most negative

37. The contracts nature-of-suit category includes insurance cases as well as "other contract actions," which includes complex commercial disputes.

rating—but in civil-rights cases, accounting for a plurality of respondents, the MIDP was rated quite negatively by defendant attorneys.

Figure 53: Nature-of-Suit Category and Discovery-Cost Question, Illinois Northern ($n = 1,764$)



Qualitative (Open-Ended) Attorney Responses

At the end of the closed-case survey, attorneys were invited to respond to two open-ended questions. The first question was included in all 10 survey rounds and asked about MIDP in the attorney’s closed case; the second question was included in the survey rounds from Spring 2019 through Spring 2022 and allowed all attorneys (whether participating in the MIDP in their closed case or not) to expound upon their views on the MIDP.

First Open-Ended Question (Illinois Northern)

The first question asked attorney respondents to “please provide any additional comments you have regarding the initial discovery in the above-named case.” In response, 480 attorneys provided comments, of which 447 were substantive. These 447 comments were assigned to discrete categories.³⁸ **Table 2** summarizes these comments. Illinois Northern attorneys most often expressed negative views about the MIDP in their case (38%), followed by positive views about

38. The number of categories differed between the Arizona and the Illinois Northern respondent groups. All comments were categorized into only one category. The 33 non-categorized responses were of the nature of “n/a” or “none” or “thank you for the survey.”

the MIDP (21%), and negative comments about another party's actions during the case with limited (or no) reference to the MIDP (11%).

One comment offers an overview of the themes that emerged across attorneys' negative MIDP views: "The mandatory initial discovery front loads the time and cost of discovery, and unfairly benefits an opponent who is unorganized and unknowledgeable." These themes included concerns about front-loading discovery, which could negatively affect timing, cost, and burdens to the parties, and exacerbate inequity between parties, especially when other parties did not follow the MIDP or played games in discovery.

Table 2: Illinois Northern Categorized Open-Ended Responses: Comments on Initial Disclosures in Closed Case

Category	Percentage of Comments (<i>n</i> = 447)
Negative views about the MIDP	38%
Positive views about the MIDP	21%
Negative comments about another party's actions during the case, but nothing about MIDP	11%
Mixed views about MIDP	7%
The case settled early or did not reach discovery	6%
The MIDP made no difference or did not differ from Rule 26 disclosures	5%
Other, outside of these categories	5%
Case information not related to the MIDP or discovery	4%
The MIDP should not have a one-size-fits-all approach	3%
Specific concern regarding judge/enforcement	3%

Thirty-eight percent of the MIDP comments were negative; these comments most often fell into two subcategories. About 18% of the negative comments stated that MIDP was burdensome, onerous, and/or amounted to "doing double discovery," and an additional 18% provided general negative feedback regarding the MIDP. Thirteen percent stated that they did not support the MIDP because it favored plaintiffs (though about 5% of attorneys stated that they did not support the MIDP because it favored defendants), and 8% stated that the MIDP was a "waste of time and money."

On the other hand, 21% of the Illinois Northern comments expressed positive views on the MIDP. For example, one attorney stated that: “[The MIDP] should be done in all cases—the discovery process is enormously expensive and tedious, and this helps alleviate some of those issues.” Many of these comments were generally positive, with 43% of the positive comments providing high-level positive feedback (e.g., “Worked well”). The remaining positive responses varied across many subcategories, including that they personally liked the MIDP but did not believe other parties followed it (19% of the positive comments).

The third most common category, representing 11% of Illinois Northern comments, focused only on the other side’s actions in the case. For example, one attorney responded, “Plaintiff did not comply with the MIDP disclosures and court was reluctant to force the issue.” Another responded: “Plaintiff’s counsel ... essentially send the exact same set of disclosures in all the cases which defeats the purpose of the [MIDP] and flooded our side with irrelevant documents that we still had to sift through to make sure nothing new was added.”

An additional 7% of Illinois Northern comments reflected mixed views on the MIDP. For example, one attorney stated: “The procedures would work well if parties actually followed them. In some cases, I have had defendants flaunt [sic] the rules and discovery actually has taken longer because of them.” (Because this comment included mixed feedback regarding the MIDP, it was categorized as mixed rather than as regarding another side’s actions in the case.)

Only 3% of Illinois Northern comments reflected concerns about the one-size-fits-all approach of the MIDP. These comments generally provided suggestions for how to improve the MIDP. Two examples are:

The one-size-fits-all does not work well, and the tight deadlines increase the expense of the case. Also, requiring ESI discovery so early tends to undermine Rule 26(f)’s goal of any type of agreed ESI discovery process, like agreed search terms.

The effectiveness of MIDP will be found in larger cases where the volume of discovery would be greater. In small to modest cases, the MIDP does not have nearly the effect and at times in those small to modest cases, the MIDP in fact seems to create more work—at least in my employment cases (FLSA).

Additionally, 3% of the comments noted a specific concern regarding the judge or a lack of enforcement in their case. For example, one attorney noted that the “Defense got away with murder; district judge did not enforce sanctions (three times) although warranted.”

Although the first open-ended question regarded initial discovery in the case and the second open-ended question asked about the MIDP generally, there was considerable overlap between the two. In addition, almost twice as many attorneys responded to the second question.³⁹ While comments in response to the first question provided helpful feedback regarding attorneys’ perceptions of initial discovery, this report focuses more on the second question, which more specifically addresses the MIDP.

39. As noted above, starting in 2019 all attorneys were invited to respond to this question even if they reported no mandatory discovery or if they did not know if mandatory discovery was provided.

Second Open-Ended Question (Illinois Northern)

The second question asked respondents to “Please provide any comments you have about the district’s mandatory initial discovery pilot program.” In response, 801 attorneys provided comments, 738 of which were substantive. These comments were assigned to the categories described in **Table 3** below.

While the first open-ended question asked specifically about the MIDP in the closed case, the second question asked about the MIDP more broadly. Still, the most common responses to both were similar: comments most often expressed negative views about the MIDP (38% for the first question; 39% for the second), followed by positive views (21% for the first question; 28% for the second). Attorney responses to the two questions did notably differ in one aspect. Fewer attorneys responded to the second question with “negative comments about other parties/attorneys but limited (no) comment about the MIDP itself” (2%) than in response to the first question (11%). Recall though, as described above, some negative comments about other parties fit better in other categories (such as the mixed category).

Table 3: Illinois Northern Categorized Open-Ended Responses: Comments on MIDP

Category	Percentage of Comments (<i>n</i> = 738)
Negative views about the MIDP	39%
Positive views about the MIDP	28%
Mixed views about the MIDP	11%
The MIDP should not have a one-size-fits-all approach	9%
The case settled early or did not reach discovery	3%
The MIDP made no difference or did not differ from Rule 26 disclosures	3%
Specific recommendation to retain Rule 26 (without mentioning MIDP)	3%
Negative comments about another party’s actions during the case, but nothing about MIDP	2%
Case information not related to the MIDP or discovery	2%
Other, outside of these categories	1%

Thirty-nine percent of comments included negative views about the MIDP. Within these negative comments, they were most often general, negative feedback (28% of negative comments)

(e.g., “The MIDP process is not efficient, and the program should not be continued.”). More specific, negative comments noted that the MIDP was burdensome/onerous/created “double discovery” (21%), increased costs (or front-loaded costs in a way that hurt their client) (10%), was biased toward plaintiffs (10%), or was a “waste of time and money” (8%). For an example of the latter category, one attorney commented:

The mandatory initial discovery program makes little sense and does not help early resolution of cases. It drives up costs and takes energy at the initial stages of a matter that would be better spent on other efforts, e.g., settlement, motion practice, etc. Other districts where I practice have no problem with just the Federal Rules of Civil Procedure, as some judges in the Northern District only use the FRCP and have not signed onto the program. It would be best for the court to put the [mandatory] initial discovery program on the scrap heap where it belongs.

One early concern about the pilot was its original requirement that MIDP responses be filed even while motions to dismiss were pending; halfway through the pilot period, this requirement was relaxed in response to attorney complaints. Comments that addressed motions to dismiss generally did so in two ways. Overall, 8% of negative comments described this MIDP response requirement (e.g., “It does not make sense for defendants to have to answer and engage in [discovery] when they have filed a fully dispositive motion. It is wasteful.”).

Comments about the motion to dismiss requirement were also reflected within the positive comments. About 2% of all comments (7% of positive comments) expressed positive views about a change to the original requirement (e.g., “I’m happy to see that the NDIL moved away from requiring answers simultaneously with 12(b)(6) motions.”). Not every respondent, however, opposed the original MIDP response requirement. One attorney noted that, “I am a fan of this program, and was sad to see the requirement that answers be filed with motions to dismiss go.” Another attorney raised a related concern: “Defendants should not be allowed to avoid disclosures by filing a motion to dismiss. I think that the MIDP has actually pushed more baseless motions to dismiss to be filed so that defendants can avoid having to make disclosures.”

Overall, 28% of the comments expressed positive views about the MIDP in general. More than half of these comments (54%) were generally positive (e.g., “I think it is a good idea and should be continued”). More specifically, comments expressed positive views regarding obtaining information earlier (14% of positive comments), positive views on the MIDP but concern regarding other parties’ actions (11%), or observations that the MIDP helped promote a quicker resolution (including settlement) (11%). For example, one attorney stated that: “The process was straightforward and was helpful in obtaining discoverable information that [led] to the settlement of our matter.”

Another 11% of overall comments expressed mixed views. For example, one attorney noted that: “The program was helpful in front-loading discovery in this and many other cases. However, the requirement of clients['] verification of the MIDP disclosure is burdensome and unnecessary.” Another, more concisely, stated, “The MIDP is well-intentioned but ultimately ineffective.”

In addition, 9% of overall comments expressed concern with the MIDP’s one-size-fits-all approach. These comments were generally split between recommending the MIDP be limited to

smaller cases (“You should keep this to simple, run-of-the-mill cases”) or recommending it be limited to certain types of cases (“Not always helpful in all cases—ERISA cases are often not helped by way of the mandatory initial discovery program”). Comments about specific case types generally concerned ERISA cases and cases involving self-represented litigants. Further, 3% of overall comments recommended that the court “just stick with Rule 26 and leave the MIDP.”

A few respondents expressed concern with how judges enforced the requirements of the MIDP. For example, one respondent commented: “Nonsense. Unenforced by Judges. Defendants do not produce anything. Could have been a useful tool if Judges actually required Defendants to comply.”

Attorney Role

As some readers may have gleaned from the quantitative survey results and from the illustrative comments in the preceding section, attorney views on the MIDP in Illinois Northern varied by attorney role. Overall (see **Table 4**), defendant attorneys were more likely to express negative views than plaintiff attorneys for plaintiffs (47% vs. 31%), less likely to express positive views than plaintiff attorneys (18% vs. 38%), and more likely to express mixed views than plaintiff attorneys (14% vs. 8%).⁴⁰

40. The three differences addressed in the text are statistically significant at the $p < .05$ level; none of the other differences in the table are statistically significant. The statistical tests were performed using Chi-square tests with Bonferroni corrections. Attorneys for plaintiffs and attorneys for defendants significantly differed in three categories: negative, positive, and mixed feedback.

Table 4: Illinois Northern Categorized Open-Ended Responses by Attorney Role

Category	Overall Attorneys (n = 738)	Attorneys for Plaintiffs (n = 368)	Attorneys for Defendants (n = 370)
Negative views about the MIDP	39%	31%	47%
Positive views about the MIDP	28%	38%	18%
Mixed views about the MIDP	11%	8%	14%
The MIDP should not have a one-size-fits-all approach	9%	8%	9%
The case settled early or did not reach discovery	5%	4%	2%
The MIDP made no difference or did not differ from Rule 26 disclosures	3%	2%	3%
Specific recommendation to retain Rule 26 (without mentioning MIDP)	3%	2%	4%
Negative comments about another party's actions during the case, but nothing about MIDP	2%	3%	2%
Case information not related to the MIDP or discovery	2%	3%	1%
Other, outside of these categories	0.5%	0.3%	1%

Years of Experience

One respondent commented, “An experienced attorney would not likely see benefit from mandatory initial discovery. A new member of the bar on the other hand, may see it as beneficial.” To test this assessment, which was also expressed in interviews, attorneys’ qualitative feedback about the MIDP was examined broken out by years of practice. Illinois Northern respondents reported an average of 22 years of practice (mean = 22.4; median = 22) so the file was split into two groups based on the median: attorneys with fewer than 22 years of practice experience and attorneys with 22 years or more.

More experienced attorneys were more likely to express positive views about the MIDP than attorneys with less experience (32% vs. 23%) and less likely to express mixed views about the MIDP than attorneys with less experience (9% vs. 14%).⁴¹ Note, however, that both groups most often expressed negative views about the MIDP. None of the other differences between attorneys based on experience in **Table 5** are statistically significant.

41. These statistical tests were performed using Chi-square tests with Bonferroni corrections.

Table 5: Illinois Northern Categorized Open-Ended Responses by Years of Experience

Category	Overall Attorneys (n = 738)	Fewer than median years of experience (n = 354)	More than or at median years of experience (n = 384)
Negative views about the MIDP	39%	41%	38%
Positive views about the MIDP	28%	23%	32%
Mixed views about the MIDP	11%	14%	9%
The MIDP should not have a one-size-fits-all approach	9%	10%	7%
The case settled early or did not reach discovery	3%	3%	3%
The MIDP made no difference or did not differ from Rule 26 disclosures	3%	2%	3%
Specific recommendation to retain Rule 26 (without mentioning MIDP)	3%	4%	2%
Negative comments about another party's actions during the case, but nothing about MIDP	2%	2%	3%
Case information not related to the MIDP or discovery	2%	1%	3%
Other, outside of these categories	0.5%	0.3%	0.8%

First Open-Ended Question (Arizona)

In response to the first question regarding MIDP responses in the closed case, 277 attorneys provided 264 substantive comments. The 264 comments fell into the eleven high-level categories summarized in **Table 6**.

Table 6: Arizona Categorized Open-Ended Responses: Comments on Initial Discovery in Closed Case

Category	Percentage of Comments (<i>n</i> = 264)
Negative views about the MIDP	31%
Positive views about the MIDP	25%
Negative comments about another party's actions during the case, but nothing about MIDP	15%
The case settled early or did not reach discovery	7%
Case information not related to the MIDP or discovery	7%
Mixed views about the MIDP	5%
The MIDP made no difference or did not differ from Rule 26 disclosures	4%
The federal courts should just fully implement the analogous state court rules	3%
The MIDP should not have a one-size-fits-all approach	2%
Specific concern regarding judge/enforcement	2%
Other, outside of these categories	1%

As in the Northern District of Illinois, the most common comments were negative views about the MIDP (31%), followed by positive views (25%). For the most part, the broad categories of comments did not differ based on district. Because, however, the MIDP parallels already existing rules in the Arizona state courts, the coding scheme for Arizona included a category that the federal court should just implement the Arizona state court version; 3% of the comments fell into this category. But not every reference to Arizona state court was favorable. Some comments critiqued both the MIDP and Arizona rules, for example:

We have had mandatory disclosures in Arizona state court for a very long time. Still, as an individual that sues insurance companies and other large corporations, I find they rarely disclose anything approaching all of the relevant information in a

case and I have learned to not trust their disclosures and always do back up with written discovery and depositions. Accordingly, I think mandatory disclosures do some good, but I also think they deceive some people into thinking they're actually receiving all of the necessary information which might be out there when many large corporations and their defense firms are really gaming the system. Judges still need to be judges and they need to understand we need decisions on discovery issues. Way too much time is wasted on judges who are reluctant to make simple discovery decisions.⁴²

The negative comments about the MIDP (31%) varied and fell into a variety of sub-categories. Most commonly, within the negative comments, 23% expressed concerns about costs (i.e., the MIDP raising or front-loading costs), 19% stated that MIDP was burdensome, onerous, and/or amounted to “doing double discovery,” 19% expressed generally negative views regarding the MIDP, 6% expressed negative views regarding discovery issues related to the MIDP (including concerns involving electronically stored information), and 6% expressed negative views on the MIDP’s effects on the timing of the case. One attorney addressed many of these concerns in a single response:

The standing order, like many such provisions in the Federal Rules, imposes unnecessary time burdens upon plaintiffs’ counsel, who almost always are representing clients on a contingent fee basis. Consequently, the Standing Order is costly and burdensome to plaintiffs’ counsel. On the other hand, the Standing Order gives defense counsel yet another opportunity to bill hours in the case. In my opinion, the Federal Rules . . . are completely adequate to govern discovery in any case. The only perceived problem with discovery under those rules arose because the trial judge would not adequately enforce the provisions of the rule through the use of sanctions. If adverse judgments had been entered, years ago, for parties who were abusing discovery, discovery abuses would have substantially abated, and the now-existing plethora of micro-management discovery rules would never have been enacted—which would have been a glorious boon to the administration of justice for all parties. Sadly, that horse has now been out of the barn for many years.⁴³

While this attorney opined that the MIDP imposes unnecessary burdens on plaintiffs’ attorneys, other attorneys expressed the opposite view, that the MIDP favors plaintiffs. For example, one attorney stated:

The program is unnecessarily time and cost heavy in the initial 60 days and is skewed toward forcing settlement that is based on cost, not substantive issues. In the four cases I have had under this program, the requirements strongly favored plaintiff in that defendant would be required to incur unrealistically high costs for compliance with the MID even if plaintiff’s case was frivolous.

42. This comment was coded into the “mixed feedback” category.

43. This comment was coded as a general negative response given the number of different topics presented.

About 25% of the overall comments expressed positive views about the MIDP. Unlike the negative views, which tended to be specific, 60% of the positive comments provided general, high-level positive feedback. For example, one attorney commented:

Keep the pilot program. Mandatory affirmative disclosure (like Arizona Rule 26.1) reduces discovery games played by lawyers. The federal bench should have adopted it years ago and the fact that lawyers from other states think it's crazy to require [everyone] to put their cards on the table at the beginning of the lawsuit is not a valid reason to avoid implementing such procedures.

Positive feedback varied across many subcategories, including that attorneys liked the MIDP but did not believe other parties followed it (12% of positive comments), that the MIDP helped lead to a quicker resolution (including settlement) (12%), or that they liked it, but had a suggestion that it could be made simpler or easier to follow (8%).

About 15% of overall comments were negative comments specifically about another side's actions in the case, with limited (or no) feedback about the MIDP itself. These comments were kept separate from the negative category. For example, one attorney commented, "The Defendant did what it always does. It produced a lot of material, but embargoed information required for class certification, provided non-responsive information and a lot of it, piecemealed responses, objected to all written discovery, required extensive meet and confers."

An additional 5% of overall comments expressed mixed views. For example, one attorney commented, "MIDP is very effective at expediting cases, although it can make less complicated cases more expensive to litigate."

Finally, 2% of overall comments noted a specific concern regarding the judge or judges more generally. Comments in this category generally expressed concern that the MIDP rules were not being enforced by judges, or that the judges were not enforcing them equally. For example, one attorney said that the MIDP is "Not a bad idea, but until Judges hold Plaintiffs to the same standard as Defendants, largely useless."

Unlike in the Northern District of Illinois, attorneys in Arizona did not generally comment on the one-size-fits-all approach of the MIDP or comment on which types of cases should be included or excluded.

Second Open-Ended Question (Arizona)

District of Arizona attorneys provided 321 substantive comments in response to the second question, which requested attorneys' thoughts about the MIDP; these comments were assigned to the nine high-level categories shown in **Table 7**.

Table 7: Arizona Categorized Open-Ended Responses: Comments on MIDP

Category	Percentage of Comments (<i>n</i> = 321)
Positive feedback about the MIDP	43%
Negative feedback about the MIDP	32%
Mixed feedback about the MIDP	13%
Negative comments about another party's actions during the case, but nothing about MIDP	3%
Feedback that the federal courts should fully implement the analogous state court rules	2%
Case information not related to the MIDP or discovery	2%
Other feedback outside of these categories	2%
Feedback that MIDP should not have a one-size-fits-all approach	1%
Feedback that the case settled early or did not reach discovery	1%

Arizona attorneys were more likely to express positive views about the MIDP in general than negative views, which is different from the pattern observed in Illinois Northern—likely due to respondents' greater familiarity with similar rules in the Arizona state courts. Overall, 43% of comments reflected positive views about the MIDP. More than half of these positive comments (63%) were generally positive. More specifically, attorneys expressed positive views regarding its similarity to rules in the state courts (9% of positive comments), positive views about the MIDP but concern regarding other parties' actions (9%), that the MIDP helped quicker resolution (including settlement) (7%), or the benefits of obtaining information earlier (5%). Compared to Illinois Northern, more Arizona comments explicitly suggested that the MIDP should be permanently implemented. Two examples of this view:

This is an important and valuable tool. It helps avoid gamesmanship and it focuses all the parties on the facts and areas of dispute earlier rather than later. I hope the district decides to make it part of the normal process.

The MIDP program was a big step in the right direction to streamlining discovery and resolution of civil cases. It will improve the efficiency and just resolution of cases if permanently implemented.

Among the 32% of comments expressing negative views about the MIDP, attorneys most often provided general negative feedback about the MIDP (25% of negative comments). More specific negative views noted that the MIDP was burdensome/onerous/created “double discovery” (13%), increased costs (or front-loaded costs in a way that hurt their client) (13%), was biased toward plaintiffs (13%), or negatively affected timing (9%). For example, one respondent commented:

The program creates a much higher burden for defendants in employment cases. It also increases costs early in the case, making settlement more difficult. It also creates the potential for an increase in discovery disputes where parties claim the other party has not fully complied with the MIDP order.

Within the positive and negative categories, some attorneys expressed views about the original MIDP order’s provisions regarding motions to dismiss. Four percent of overall comments expressed positive views about the MIDP though noted a concern with how pending motions to dismiss were treated under MIDP (e.g., “I like it with one MAJOR exception: To require MIDP disclosure before an answer is filed (when a Rule 12 Motion is pending) is nonsensical and unhelpful. Many cases are filed that are frivolous or do not belong in that court. In those instances, the MIDP does nothing but compound costs unnecessarily. There is no purpose.”). An additional 2% of overall comments expressed negative views focused on MIDP duties while motions to dismiss were pending.

About 13% of overall comments expressed mixed views. For example:

Overall, I am in favor of the MIDP. I think it goes a long way to minimizing the effort and expense (not to mention the horrible games) of discovery. However, it may need some claws to aid parties in finding information not disclosed. I recommend a mechanism for discovery sanctions, in the discretion of the Court, for discovery that later turns out to be relevant but was not timely disclosed.

About 3% of comments expressed concern with how judges implemented or enforced the MIDP. For example, one attorney commented: “It’s too paternalistic, but that’s the way the federal courts have become the last 10–15 years. They act like they’ve forgotten what’s it like to be lawyers, and they’re using inflexible, heavy-handed rules and attitudes as a crutch, when the better solution would be early, interactive case management.”

Attorney Role

In Arizona, plaintiff attorneys were significantly more likely to express positive views about the MIDP (55% vs. 32%) and significantly less likely to express negative views about the MIDP (21% vs. 43%) than defendant attorneys (see **Table 8**).⁴⁴

Table 8: Arizona Categorized Open-Ended Responses by Attorney Role

Category	Overall Attorneys (n = 321)	Attorneys for Plaintiffs (n = 170)	Attorneys for Defendants (n = 151)
Positive feedback about the MIDP	43%	55%	32%
Negative feedback about the MIDP	32%	21%	43%
Mixed feedback about the MIDP	13%	12%	13%
Negative comments about another party's actions during the case, but nothing about MIDP	3%	3%	3%
Feedback that the federal courts should fully implement the analogous state court rules	2%	1%	2%
Case information not related to the MIDP or discovery	2%	3%	1%
Other feedback outside of these categories	2%	3%	2%
Feedback that MIDP should not have a one-size-fits-all approach	1%	1%	2%
Feedback that the case settled early or did not reach discovery	1%	1%	1%

Years of Experience and Views on MIDP

The median number of years of practice experience among respondents was slightly lower in Arizona (20 years; mean = 21.6 years) than in Illinois Northern (22 years; mean = 22.4 years). Respondents were split into two groups based upon the median: attorneys with fewer than 20 years of experience and attorneys with 20 or more years of experience.

44. The difference addressed in the text was statistically significant at the $p < .05$ level; none of the other differences in the table are statistically significant. The statistical tests were performed using Chi-square tests with Bonferroni corrections.

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As in Illinois Northern, attorneys with more years of experience were more likely to provide positive feedback about the MIDP than those with fewer years of experience (47% vs. 39%) (see **Table 9**). However, none of the differences in Table 5 were statistically significant.⁴⁵

Table 9: Arizona Categorized Open-Ended Responses by Years of Experience

Category	Overall Attorneys (n = 321)	Fewer than median years of experience (n = 158)	Above or at median years of experience (n = 163)
Positive feedback about the MIDP	43%	39%	47%
Negative feedback about the MIDP	32%	34%	31%
Mixed feedback about the MIDP	13%	14%	11%
Negative comments about another party's actions during the case, but nothing about MIDP	3%	4%	3%
Feedback that the federal courts should fully implement the analogous state court rules	2%	3%	1%
Case information not related to the MIDP or discovery	2%	1%	4%
Other feedback outside of these categories	2%	2%	2%
Feedback that MIDP should not have a one-size-fits-all approach	1%	3%	0%
Feedback that the case settled early or did not reach discovery	1%	1%	2%

45. These statistical tests were performed using Chi-square tests with Bonferroni corrections. There was a significant difference that attorneys with less experience were more likely to provide feedback that the MIDP should not have a one-size-fits-all approach, but this was expressed by a small number of attorneys.

Docket Study

Many civil cases are resolved in the district court with little or no discovery activity. This docket analysis was designed to collect information on cases in which some discovery (including initial disclosures) was likely to occur. For this reason, the sampling frame excluded cases resolved within 90 days of case filing—either because they were resolved by the parties or in some other way (e.g., default judgments). Including such cases without discovery in the sample would not shed much light on the operation of the disclosure and discovery rules. For this reason, the sampling frame was limited to terminated cases when:

- The case, now terminated, had taken at least 90 days to resolve in the district court.
- The case had one of the following disposition codes: consent (5); dismissal on motion (6); jury verdict (7); directed verdict (8); court trial (9); voluntary dismissal (12); settlement (13); other dismissal (14); or other judgment (17).
- The pilot standing order was docketed in the case. “Pilot cases” in what follows is defined as civil cases in which the pilot standing order was docketed.

Even applying these filters, in about one in six cases in the two samples, no defendant ever filed any type of responsive pleading (answer or Rule 12 motion). This section of the report will focus on four aspects of the pretrial process: responsive pleadings, including Rule 12 motions to dismiss; discovery planning (Rule 26(f) reports and case-management orders); discovery and discovery disputes; and summary judgment motions. The findings presented in this section of the report are intended to inform the advisory committee’s discussions with respect to the time required to plan and carry out discovery and motions practice.

Arizona Docket Data

The final sample included 1,170 District of Arizona pilot cases filed during the Arizona pilot period (May 1, 2017–April 30, 2020) that terminated between August 4, 2017, and September 30, 2021. **Table 10** summarizes the findings discussed in this section.

Table 10: Procedural Summary (Arizona)

Litigation Stage	Findings	Notes
Pilot Standing Order	100% of sampled cases	Sampling frame defined by standing order
Responsive Pleadings	Median, 48 days after filing Answers were filed in 87% Rule 12(b)(6) motions in 24% Rule 12(b)(1) motions in 10%	There is limited overlap of answers and Rule 12 motions, e.g., 145 cases with both an answer and a Rule 12(b)(6) motion
MIDP Responses	Filed in 77% of sampled cases with a responsive pleading Median, 32 days after filing of responsive pleading	Both parties noticed responses in 87% of participating cases
Rule 26(f) Reports	Filed in 62% of sampled cases Median, 95 days after filing	7% of Rule 26(f) reports included MIDP dispute
Case-Management Orders	Filed in 60% of sampled cases Median, 105 days after filing	Median discovery cutoff 271 days from date of case-management order
Summary Judgment Motions	Filed in 15% of sampled cases Median, 391 days after filing	More than one motion for summary judgment filed in 5% of sampled cases
Summary Judgment Rulings	Motion granted in full Median, 220 days after motion Motion granted in part Median, 166 days after motion Motion denied Median, 110 days after motion	70 sampled cases (6%) resolved on summary judgment Summary judgments averaged 630 days from filing to termination
Trial	11 trials in the sample (0.9%)	Trial cases averaged 883 days from filing to termination

Types of Responsive Pleadings (Arizona)

Responsive pleadings are a logical starting point for the analysis because the parties' obligation to make MIDP responses is triggered by the filing of a responsive pleading (answer or Rule 12 motion). Responsive pleadings were filed in 84% of sampled pilot cases (978). No responsive pleading was filed in 1 in 6 pilot cases in the sample (with disposition time of at least 90 days).

As seen in **Table 11**, the most common responsive pleading was an answer, filed in 87% of the cases in which a responsive pleading was filed (851 cases), followed by a Rule 12(b)(6) motion

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to dismiss for failure to state a claim, filed in 24% of cases in which a responsive pleading was filed (233 cases). The only other responsive pleading filed with any frequency was a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, filed in 10% of the cases in which a responsive pleading was filed (100 cases).

There is, of course, overlap with respect to types of responsive pleadings. It is relatively common for a motion to dismiss to rely on more than one subpart of Rule 12(b). The overlap is limited in that, in most pilot cases, no Rule 12(b) motion was filed. The most common forms of Rule 12(b) motion are (b)(6) and (b)(1) motions, which will be discussed in this section. In 83% of pilot cases in which an answer was filed, no Rule 12(b)(6) motion was filed (706 cases). In 94% of pilot cases in which an answer was filed, no Rule 12(b)(1) motion was filed (804).

In 12% of sampled pilot cases (145), however, both an answer and a Rule 12(b)(6) motion were filed, which accounts for 62% of the Rule 12(b)(6) cases (233 cases total). In 38% of Rule 12(b)(6) cases (88), the motion to dismiss was filed without an answer being filed. Among those cases, the court granted the motion to dismiss, terminating the entire case, 59% of the time (52 cases).

Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction were less common than Rule 12(b)(6) motions but present a similar pattern. In 53% of the sampled pilot cases in which a Rule 12(b)(1) motion was filed, no answer was filed (53 cases). In 64% of those cases, the court granted the motion to dismiss, terminating the entire case (34 cases).

Table 11: Incidence of Responsive Pleadings in Sampled Cases (Arizona)

Type of Responsive Pleading	Percentage of Sampled Cases with Responsive Pleading	Percentage Filed in Cases with an Answer
Answer	87%	100%
Rule 12(b)(6) failure to state a claim	24%	62%
Rule 12(b)(1) subject-matter jurisdiction	10%	47%
Rule 12(b)(2) personal jurisdiction	4% (40)	58%
Compel arbitration	3% (27)	59%
Rule 12(c) judgment on the pleadings	2% (23)	96%
Rule 12(b)(3) improper venue	1% (12)	50%
Rule 12(b)(5) insufficient service of process	1% (11)	27%
Rule 12(e) more definite statement	1% (11)	73%
Rule 12(b)(7) failure to join party	< 1% (6)	50%
Rule 12(b)(4) insufficient process	< 1% (3)	67%

Amended Complaints (Arizona)

The study collected limited information on amended complaints, recording instances in which a complaint was amended in response to the filing of a motion to dismiss (whether or not the motion to dismiss was granted without prejudice). The District of Arizona disfavors the filing of Rule

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12(b)(6) motions to dismiss when the defects in the complaint can be cured by amendment, requiring the moving party to certify that it has raised the defects with opposing counsel prior to filing the motion.⁴⁶ In 61% of the cases in which a Rule 12(b)(6) motion was filed, no amended complaint was filed. But in 39%, an amended complaint was filed *after* the filing of a Rule 12(b)(6) motion to dismiss—92 sampled cases. The renewed motion to dismiss was granted in whole in 29% of those cases (27) and in part in 43% (40).

Overall, complaints were amended after the filing of a motion to dismiss in 9% of sampled pilot cases (105 cases).

Self-Represented Parties

There were lawyers on both sides in 88% of sampled pilot cases (88%). But in 140 sampled cases (12%), there was a party that was self-represented for the entire time the case was pending in district court.

Responsive Pleadings and MIDP Responses (Arizona)

At least one notice of pilot responses was docketed in 77% of cases in which a responsive pleading was filed (775 cases). Responsive pleadings were filed in almost all participating cases. In nine cases, however, pilot responses were made by at least one party without a responsive pleading having been docketed. As can be seen in **Table 12**, participating cases account for a majority (65%) of pilot cases in the Arizona sample.

Table 12: Participating Cases (Arizona)

MIDP Responses Made by	Responsive Pleading Filed (n)	No Responsive Pleading Filed (n)	Total (n)
Both	68% (661)	1% (2)	57% (663)
Plaintiff only	4% (43)	3% (5)	4% (48)
Defendant only	5% (51)	1% (2)	5% (53)
Participating cases	77% (755)	5% (9)	65% (764)
Neither	23% (223)	95% (183)	35% (406)
<i>n</i>	978	192	1,170

46. See District of Arizona LR12.1(c), available at <https://www.azd.uscourts.gov/sites/default/files/local-rules/LRCiv%202021.pdf#page=42>. The same local rule applies to Rule 12(c) motions for judgment on the pleadings, but these motions are uncommon.

Timing of Initial MIDP Responses (Arizona)

In general, initial MIDP responses were exchanged about **two-and-a-half months** after the docketing of the pilot standing order and about **one month** after the first responsive pleading in the case; a responsive pleading was filed about one-and-a-half months after the filing of a case.

From the date of the pilot notice (standing order) to the filing the initial MIDP responses:

- Plaintiffs' first MIDP responses, median 76 days, mean 92 days ($n = 711$)
- Defendants' first MIDP responses, median 76 days, mean 94 days ($n = 716$)

From the first responsive pleading to filing the initial MIDP responses (excluding cases in which the MIDP response preceded the responsive pleading):

- Plaintiffs' first MIDP responses, median 32 days, mean 49 days ($n = 669$)
- Defendants' first MIDP responses, median 32 days, mean 50 days ($n = 699$)

Note that some MIDP responses were made before the filing of a responsive pleading and have been excluded from these calculations. The median time from case filing to the first responsive pleading is 48 days, mean 57 days ($n = 942$) (this includes cases in which no MIDP responses were docketed).

Rule 26(f) Reports (Arizona)

Federal Rule of Civil Procedure 26(f) requires the parties to meet and confer to formulate and submit to the court a discovery plan. The MIDP additionally required the parties to discuss their MIDP obligations at the Rule 26(f) conference and to include a “a concise description of their discussions of the mandatory initial discovery responses” in their report to the court.⁴⁷ Rule 26(f) reports were filed in 62% (730) of the sampled pilot cases (including non-participating cases). The District of Arizona, it should be noted, clearly labels Rule 26(f) reports in its civil dockets. The median time from case filing to the docketing of the Rule 26(f) report was 95 days; the average was 114 days.

Contents of Rule 26(f) Reports

Researchers collected limited information from Rule 26(f) reports. For purposes of this study, the most important issue was whether the parties raised a dispute about the scope or timing of their MIDP obligations in their report to the court. In the District of Arizona, 7% of Rule 26(f) reports (54 out of 730) brought a dispute about MIDP obligations to the attention of the court. The extent to which the parties were unclear or at odds on their MIDP obligations in the other 93% of cases in which Rule 26(f) reports were filed is unknown.

In 25% of Rule 26(f) reports (180 out of 730), the parties indicated to the court that they had engaged in settlement negotiations prior to the filing of the report. For study purposes, “settlement negotiations” was defined broadly; even so, 75% of Rule 26(f) reports do not indicate to the court that the parties have discussed settlement. In 21% of Rule 26(f) reports (156 out of 730), the parties

47. Arizona Amended General Order 17-08, ¶ 9, available at <https://www.fjc.gov/sites/default/files/materials/35/17-08.pdf>.

requested a settlement conference with a magistrate judge at the present time (as opposed, for example, to expressing an interest in a conference after conducting some discovery). In only 3% of Rule 26(f) reports (20 out of 730), the parties reported potential problems with respect to the discovery of electronically stored information in the case.

Researchers also recorded, when available, the proposed discovery deadline from the Rule 26(f) reports; these are discussed in a later section.

Case-Management Orders (Arizona)

For purposes of this study, the case-management order is defined as the first one entered after the filing of a joint Rule 26(f) report by the parties; ideally the order sets the discovery cutoff. There were 700 pilot cases in which a first case-management order was issued in Arizona (60% of sampled cases). The median time from case filing to entry of the first case-management order was 105 days; mean, 128 days ($n = 700$). In other words, in Arizona, the median case in which party-driven discovery is expected to occur is subject to a court-ordered discovery deadline about 3.5 months after filing. This is consistent with setting the sampling criterion at 90 days, which assumes that most cases that terminate in less than 90 days will not have completed the discovery planning phase.

Discovery Deadlines (Arizona)

The coding scheme captured the agreed discovery deadlines in the Rule 26(f) reports, including dates for expert discovery, if any; the last jointly proposed discovery deadline was used in the following analyses to estimate the length of the discovery period proposed by the parties. Measured from the date of the first case-management order, the average agreed discovery deadline (prior to any extensions) was 271 days, or 8.9 months, with a median of 259 days, just about 8.5 months ($n = 547$). Measured from the date of the Rule 26(f) report, the average agreed discovery period was slightly longer, averaging 280 days, or about 9.2 months, with a median of 270 days, or 8.9 months ($n = 579$). Measured from filing date to agreed discovery deadline, the average time was 393 days, about 12.9 months, with a median of 364 days (12 months) ($n = 579$). The study did not attempt to capture information about extensions of the discovery period, but it likely that the average discovery period extends beyond the agreed discovery deadline in the Rule 26(f) report.

In the median pilot case in the Arizona sample in which a Rule 26(f) report is filed, the parties have agreed to a discovery plan about three months after the case is initiated in federal court. Based on the Rule 26(f) reports, then, the median pilot cases would be scheduled to complete planned discovery about one year after case initiation, barring any extension of the discovery deadline. To the extent the parties need to complete most or all of the planned discovery to resolve the case, the median case should come in at around a year in length. As will be discussed below, cases in which motions for summary judgment are filed will take longer than the median case in which discovery takes place.

Discovery Disputes (Arizona)

Discovery disputes that rise to the court's attention are relatively uncommon in civil cases, and contested discovery motions are more uncommon. By far the most common type of discovery motion is a stipulated (agreed) motion for a protective order. But some discovery disputes were observed among the participating cases (i.e., cases in which at least one party made MIDP responses).

Judges in the District of Arizona disfavor the filing of discovery motions, requiring parties instead to address discovery disputes with the court in a telephonic conference before the filing of a motion (even before coronavirus). The coding identified 55 participating cases—about 7% of participating cases—in which a telephonic discovery conference occurred.

Some Arizona judges permit the filing of discovery motions only with leave of the court, so, unsurprisingly, discovery motions were relatively rare in the sampled cases. Motions to compel pilot responses were filed in 0.4% of participating cases (3 cases), and motions to compel (anything other than pilot responses) were filed in 4% (31). Motions to compel were also filed in two non-participating cases. Motions for protective order were filed in 26% of participating cases (197); in 91% of those cases (180), the first motion for a protective order was stipulated by the parties. Motions for protective orders were also filed in five non-participating cases, 3 stipulated. Motions for discovery sanctions were filed in 2% of participating cases (16), and in one non-participating case.

Motions Count: No discovery dispute (motion or telephonic conference) was recorded in 69% of participating cases (527). Again, Arizona disfavors discovery motions and likely has much lower rates of the filing of such motions in general than other districts, including Illinois Northern. Only one motion (likely a stipulated motion for protective order) was filed in 22% of participating cases (165), and two were filed in 6% (45). More than two discovery motions (including telephonic conferences) were docketed in 4% of sampled cases (27). The largest number of discovery motions observed in an Arizona participating case was 11 (in one particularly contentious case).

Incidence and Timing of Summary Judgment Motions (Arizona)

At least one summary judgment motion was filed in 15% of sampled Arizona pilot cases (176), and more than one summary judgment motion (e.g., cross motions for summary judgment) was filed in 5% of sampled pilot cases (54). Seventy sampled pilot cases were resolved on a motion for summary judgment; in other words, 40% of cases in which a motion for summary judgment was filed were resolved by summary judgment. Overall, however, summary judgment accounted for only 6% of terminations among the sampled cases.

The first motion for summary judgment was filed an average of 391 days, or 12.9 months, after case filing, with a median of 388 days, or 12.8 months, after case filing ($n = 172$). The observed average time from case filing to the first summary judgment motion, 391 days, is very similar to the observed average time from case filing to the agreed discovery deadline, 393 days, as these two dates are typically related to one another in case-management orders.

Incidence and Timing of Rulings on Summary Judgment (Arizona)

No ruling was recorded for 42 motions for summary judgment (e.g., the case settled while the motion was pending). For first motions for summary judgment only:

- From filing of motion to order granting motion in full, median 220 days, or 7.2 months, mean 224 days, 7.4 months ($n = 63$)
- From filing of motion to order granting motion in part, median 166 days, or 5.5 months, mean 200 days, 6.6 months ($n = 33$)
- From filing of motion to order denying motion, median 110 days, or 3.6 months, mean 150 days, 4.9 months ($n = 35$)

Settlement Conferences with Magistrate Judges (Arizona)

The court referred 14% of sampled cases to a magistrate judge to conduct a settlement conference (168); a settlement conference with a magistrate judge (including those conducted by remote means because of the coronavirus pandemic) was conducted in 68% of those cases (114); 92% of those cases resulted in a settlement (105). There were referrals in 20% of participating cases (155); a settlement conference was held in 67% of those cases (105); 91% of those cases resulted in a settlement (96). The average settlement conference occurred 317 days, or 10.4 months, after case filing, median 283 days, or 9.3 months ($n = 114$).

Disposition Times of Sampled Cases (Arizona)

The average for all pilot cases was 346 days, or 11.4 months, from filing to termination with a median of 280 days, or 9.2 months ($n = 1,170$). Cases in which a responsive pleading was filed averaged 378 days, or 12.4 months, from filing to termination, with a median of 322 days, or 10.6 months ($n = 978$). Cases without a responsive pleading averaged 180 days, or 5.9 months, with a median of 144 days, or 4.7 months ($n = 192$).

Participating cases averaged 412 days, or 13.6 months, with a median of 357 days, or 11.7 months ($n = 764$), while non-participating cases averaged 221 days, or 7.3 months, with a median of 161 days, or 5.3 months ($n = 406$). Of course, because participating cases were likely to be cases in which a responsive pleading was filed, the longer disposition times for participating cases is not a result of the MIDP; the non-participating cases include many cases resolved before the obligation to make MIDP responses would have arisen.

Case length varies greatly by type of disposition. Cases that are resolved by summary judgment or trial take the longest—these two disposition types each averaged more than two years in length. These two disposition types are also the least common (among these broadly defined categories).

Mean case length by disposition type (largest category to smallest)

- Settlements: 352 days, or 11.6 months, from filing to termination ($n = 671$)
- Voluntary dismissals: 259 days, or 8.5 months, from filing to termination ($n = 223$)
- Rule 12 dismissals: 303 days, or 10 months, from filing to termination ($n = 113$)
- Other dispositions: 269 days, or 8.8 months, from filing to termination ($n = 80$)
- Summary judgments: 630 days, or 20.7 months, from filing to termination ($n = 70$)
- Trials (bench and jury): 883 days, or 29 months, from filing to termination ($n = 11$)

Illinois Northern Docket Data

The final sample included 1,909 Illinois Northern pilot cases filed during the Illinois Northern pilot period (June 1, 2017–May 31, 2020) that terminated between October 3, 2017, and September 30, 2021. **Table 13** summarizes the findings discussed in this section.

Table 13: Procedural Summary (Illinois Northern)

Litigation Stage	Findings	Notes
Pilot Standing Order	100% of sampled cases	Sampling frame defined by standing order
Responsive Pleadings	Median, 62 days after filing Answers were filed in 84% Rule 12(b)(6) motions in 35% Rule 12(b)(1) motions in 8%	There is limited overlap of answers and Rule 12 motions, e.g., 294 cases with both an answer and a Rule 12(b)(6) motion
MIDP Responses	Filed in 62% of sampled cases with a responsive pleading Median, 32 days after filing of responsive pleading	Both parties noticed responses in 75% of participating cases
Rule 26(f) Reports	Filed in 58% of sampled cases Median, 68 days after filing	3% of Rule 26(f) reports included MIDP dispute
Case-Management Orders	Filed in 51% of sampled cases Median, 83 days after filing	Median discovery cutoff 213 days from date of case-management order
Summary Judgment Motions	Filed in 8% of sampled cases Median, 432 days after filing	More than one motion for summary judgment filed in 4% of sampled cases
Summary Judgment Rulings	Motion granted in full Median, 210 days after motion Motion granted in part Median, 254 days after motion Motion denied Median, 165 days after motion	79 sampled cases (4%) resolved on summary judgment Summary judgments averaged 790 days from filing to termination
Trial	7 trials in the sample (< 1%)	Trial cases averaged 816 days from filing to termination

Types of Responsive Pleadings (Illinois Northern)

The filing of a responsive pleading triggers the obligation to make pilot responses. Responsive pleadings were filed in 70% of sampled pilot cases (1,340 cases). The average time between case initiation and the filing of a responsive pleading (of any type) was 75 days, with a median of 62 days ($n = 1,339$).

As can be seen in **Table 14**, the most common type of responsive pleading was an answer (in 1,125 pilot cases, 84% of pilot cases in which a responsive pleading was docketed), followed by Rule 12(b)(6) motions to dismiss for failure to state a claim (in 473 pilot cases, 35%). As discussed previously, there was some controversy over the need to file MIDP responses in cases in which defendants planned to file a motion to dismiss the entire action, and the MIDP obligations were adjusted halfway through the pilot period to conform more closely to non-pilot practice. In Illinois Northern, there was considerable overlap between the filing of answers and Rule 12(b)(6) motions. Answers were filed in 62% of cases in which a Rule 12(b)(6) motion was filed (294 out of 473). But there were plenty of answer-only cases in the sample. No Rule 12(b)(6) motion was filed in almost three-quarters of the cases in which an answer was filed (74%, or 831). It is interesting to note that the sample does not include a single case with a responsive pleading that does not include at least one of these two types of responsive pleadings.

In pilot cases in which a Rule 12(b)(6) motion was docketed without an answer, the first motion to dismiss was granted, terminating the case, in 46% (83 out of 179). In pilot cases in which a Rule 12(b)(6) motion was docketed with an answer, the first motion was granted, terminating the case, in 14% (42 out of 294). Other types of Rule 12 motions were less common than Rule 12(b)(6). Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction were the next most common responsive pleading—filed in 88 of the cases in which a responsive pleading was filed, 8%. In exactly half of these cases (44) an answer was also filed.

Table 14: Incidence of Responsive Pleadings in Sampled Cases (Illinois Northern)

Type of Responsive Pleading	Percentage of Sampled Cases with Responsive Pleading	Percentage Filed in Cases with an Answer
Answer	84%	100%
Rule 12(b)(6) failure to state a claim	35%	62%
Rule 12(b)(1) subject-matter jurisdiction	8%	50%
Compel arbitration	3% (35)	51%
Rule 12(b)(2) personal jurisdiction	3% (34)	56%
Rule 12(b)(3) improper venue	2% (30)	60%
Rule 12(c) judgment on the pleadings	2% (24)	13%
Rule 12(b)(5) insufficient service of process	1% (10)	60%
Rule 12(e) more definite statement	< 1% (5)	0%
Rule 12(b)(7) failure to join party	< 1% (3)	67%
Rule 12(b)(4) insufficient process	< 1% (1)	0%

Amended Complaints (Illinois Northern)

The study collected limited information on amended complaints, recording instances in which a complaint was amended in response to the filing of a motion to dismiss (whether or not the motion to dismiss was granted without prejudice). Overall, complaints were amended after the filing of a motion to dismiss in 211 sampled cases. In 41% of cases in which a defendant filed a Rule 12(b)(6) motion to dismiss, an amended complaint was filed *after* the motion, 196 sampled cases. A renewed motion to dismiss after the amended complaint was granted in whole in 27% of those cases (53) and in part in 26% (51).

Self-Represented Parties (Illinois Northern)

There were lawyers on both sides in most of the sampled pilot cases (94%). But in 108 sampled cases (6%), there was a plaintiff who was self-represented for the entire time the case was pending in district court. The coding scheme did not account for the limited-purpose appointment of counsel for settlement conferences, a common practice in Illinois Northern; for purposes of this report, those cases are coded as represented cases.

Responsive Pleadings and MIDP Responses (Illinois Northern)

At least one notice of pilot responses was docketed in 62% of pilot cases in which a responsive pleading was filed, 823 cases (“participating cases”). As can be seen in **Table 15**, almost all the participating cases were cases in which a responsive pleading was filed. In nine cases, however, pilot responses were made by at least one party without a responsive pleading having been docketed.

Table 15: Participating Cases (Illinois Northern)

MIDP Responses Made by	Responsive Pleading Filed (<i>n</i>)	No Responsive Pleading Filed (<i>n</i>)	Total (<i>n</i>)
Both	46% (625)	1% (3)	33% (628)
Plaintiff only	6% (83)	1% (6)	5% (89)
Defendant only	9% (115)	0% (0)	6% (115)
Participating cases	61% (823)	2% (9)	44% (832)
Neither	39% (517)	98% (560)	56% (1,077)
<i>n</i>	1,340	569	1,909

Note that less than half of sampled pilot cases, 44%, were participating cases (832 cases). It is likely that parties failed to docket notices of their pilot responses in some pilot cases, so the participation rate is probably higher than 44% of pilot cases. It is difficult to say for certain how much higher, but the estimated participation rate in the closed-case surveys was 55–56%.

Timing of Initial MIDP Responses (Illinois Northern)

In general, initial MIDP responses were exchanged about three months after the docketing of the pilot standing order and about one month after the filing of the first responsive pleading in the case; a responsive pleading is filed about two months after the filing of a case. From pilot notice to filing the initial MIDP responses:

- Plaintiffs' first MIDP responses, median 91 days, mean 110 days ($n = 715$)
- Defendants' first MIDP responses, median 91 days, mean 116 days ($n = 740$)

From first responsive pleading to filing the initial MIDP responses (excluding cases in which the MIDP response preceded the responsive pleading):

- Plaintiffs' first MIDP responses, median 32 days, mean 53 days ($n = 687$)
- Defendants' first MIDP responses, median 32 days, mean 54 days ($n = 734$)

Note that some MIDP responses were made before the filing of a responsive pleading and have been excluded from these figures. The median time from case filing to the first responsive pleading is 62 days, mean 75 days ($n = 1,340$) (this includes cases in which no MIDP responses were docketed).

Rule 26(f) / Joint Initial Status Reports (Illinois Northern)

Illinois Northern docketing practices with respect to Rule 26(f) reports varied more than those in Arizona, which created some ambiguity in the data-collection process. The coding rules specified that, to be included in the analysis, the initial status report required by Rule 26(f) had to be jointly filed (typically docketed as a "joint initial status report"). Joint initial status reports were filed in 58% of the sampled cases (1,111, including non-participating cases). It is important to remember that the sampling rules omitted many civil cases in which a joint initial status report would not be filed (for example, default judgment cases). Thus, the percentage of all civil cases in which the parties file a joint initial status report is lower than 58%. The median time from case filing to docketing of a joint initial status report was 68 days; the mean was 89 days. In summary:

- The sample included 1,111 joint initial status reports (Rule 26(f) reports).
- Median time, 68 days after case filing; mean, 89 days ($n = 1,111$).

Contents of Joint Initial Status Reports ($n = 1,111$)

About half of joint initial status reports, 536 (48%) informed the court of ongoing settlement negotiations among the parties. Relatively few joint initial status reports requested a settlement conference with a magistrate judge (77, 7%) or informed the court of a dispute concerning MIDP responses (35, 3%).

Timing of (First) Case-Management Orders (Illinois Northern)

There is a great deal of variation in Illinois Northern in terms of the timing and content of case-management orders. Case-management orders may issue prior to the filing of an initial joint status report—for example, setting a new deadline for the defendant's answer. For purposes of this report, a first case-management order is issued after the filing of a joint initial status report and

(preferably) sets a discovery cutoff date (or some other relevant deadline). In some cases, however, a case-management order that sets relevant deadlines is entered in the absence of a joint initial status report; for example, when the parties are unable to agree on a joint report. Among the sampled cases, 980 case-management orders were determined to meet the coding criteria. This means that case-management orders were docketed in 51% of sampled cases.

The median time from case filing to issuance of the first case-management order is 83 days; the mean, 109 days after case filing.

Discovery Deadlines (Illinois Northern)

The coding scheme captured the agreed discovery deadlines, including dates for expert discovery, if any, in the joint initial status reports. The length of the discovery period proposed by the parties can be estimated using these dates. Measured from the date of the first case-management order, the average discovery period ordered (prior to any extensions) was 235 days, or 7.7 months, with a median of 213 days, just about 7 months ($n = 719$). Measured from the date of the joint initial status report, the agreed discovery period was slightly longer, averaging 245 days, or about 8 months, with a median of 226 days, 7.4 months ($n = 795$). The study did not attempt to capture information about extensions of the discovery period, but it is safe to say that the average discovery period probably extends beyond the agreed discovery cutoff in the joint initial status report.

Measured from filing date to agreed discovery cutoff, the average was 333 days, about 11 months, with a median of 313 days (10.3 months) ($n = 797$). About three months after case filing, a discovery plan was in place in about half of sampled cases. The discovery planning process, however, was not completed in about half of pilot cases. It is important to remember that many civil cases are resolved without the parties engaging in discovery at all. Then the “typical” discovery period, in a case with discovery, would run 7–8 months (or longer if the discovery period was extended). This process can be delayed by motions practice. Measured from filing date, the “typical” pilot case would be slated to complete discovery in 10–11 months after the first case-management order, subject to extensions in the discovery deadline.

Discovery Disputes (Illinois Northern)

Discovery disputes rising to the court’s attention, especially motions to compel, were more common in Illinois Northern than in Arizona, likely because of the latter district’s local practices discouraging the filing of discovery motions. Arizona’s practices may even result in fewer discovery disputes being brought to the court’s attention (without the filing of a motion). In the closed-case survey, Illinois Northern survey respondents, especially plaintiff attorneys, were more likely to report a discovery dispute brought to the attention of the court (plaintiff attorneys, 30%) than Arizona respondents (plaintiff attorneys, 20%).

Motions to compel pilot responses were filed in 3% of participating cases (23 cases).⁴⁸ Oddly enough, there are three cases in which neither side docketed a notice of MIDP responses with one of these motions, indicating that parties sometimes failed to docket such notices. Motions to

48. In the words of one Illinois Northern interview subject: “There was remarkably little litigation about compliance.”

compel (other than to compel pilot responses) were filed in 14% of participating cases (116). (Motions to compel were also filed in 35 non-participating cases.) Motions for protective order were again the most common form of discovery motion, filed in 43% of participating cases (356); in 82% of those cases (293), the first motion for a protective order was stipulated by the parties. Motions for protective orders were also filed in 71 non-participating cases, 60 of which were stipulated. Motions for discovery sanctions were filed in 3% of participating cases (25, and in 10 non-participating cases). A reference to “a discovery dispute” (not in a motion) appeared in the dockets of 3% of participating cases (27, and in 5 non-participating cases).

Motions Count: No discovery motion was filed in 51% of participating cases ($n = 422$). One discovery motion (likely an agreed motion for protective order) was filed in 31% of participating cases (262), and two discovery motions were filed in 10% of participating cases (81). More than two discovery motions were filed in 8% of participating cases (67). The largest observed number of discovery motions in an Illinois Northern participating case was 13 (in one particularly contentious case).

Incidence and Timing of Summary Judgment Motions (Illinois Northern)

At least one motion for summary judgment was filed in 8% of sampled Illinois Northern pilot cases (162), and more than one motion for summary judgment in 2% (40). Seventy-nine pilot cases were resolved by summary judgment; 49% of cases in which a motion for summary judgment was filed were resolved by summary judgment. But overall, only 4% of sampled Illinois Northern pilot cases were resolved by summary judgment.

The average time from case initiation to filing of the first motion for summary judgment was 432 days, or 14.2 months, with a median of 425 days, or 14 months ($n = 161$).

Incidence and Timing of Rulings on Summary Judgment (Illinois Northern)

No ruling was recorded for 19 motions for summary judgment (e.g., the case settled while the motion was pending). For first motions for summary judgment only:

- From filing of motion to order granting motion in full, median 210 days, or 6.9 months, mean 219 days, 7.2 months ($n = 89$)
- From filing of motion to order granting motion in part, median 254 days, or 8.3 months, mean 286 days, 9.4 months ($n = 20$)
- From filing of motion to order denying motion, median 162 days, or 5.3 months, mean 165 days, 5.4 months ($n = 34$)

Settlement Conferences with Magistrate Judges (Illinois Northern)

The court referred 23% of sampled cases to a magistrate judge to conduct a settlement conference (including remote conferences) (436 cases), which was conducted in 73% of those cases (319); 91% of those cases resulted in a settlement (289). There were referrals in 37% of participating cases (311), a settlement conference was held in 77% of those cases (222); 91% of those cases resulted in a settlement (201). The average settlement conference occurred 367 days, or 12.1 months, after case filing, median 322 days, or 10.6 months ($n = 319$).

Disposition Times for Sampled Cases (Illinois Northern)

The average for all pilot cases was 343 days, or 11.3 months, from filing to termination with a median of 265 days, 8.7 months ($n = 1,909$). Cases with a responsive pleading (issue joined) averaged 402 days, or 13.2 months, from filing to termination with a median of 332 days, 10.9 days ($n = 1,340$). Cases without a responsive pleading averaged 205 days, 6.7 months, from filing to termination with a median of 156 days, 5.1 months ($n = 569$).

Case length varies greatly by type of disposition. Cases that are resolved by summary judgment or trial take the longest—these two disposition types each averaged more than two years in length. These two disposition types are also the least common (among these broadly defined categories).

Average case length by disposition type (largest category to smallest):

- Settlements: 379 days from filing to termination ($n = 1,030$)
- Voluntary dismissals: 227 days from filing to termination ($n = 550$)
- Rule 12 dismissals: 354 days from filing to termination ($n = 129$)
- Other dispositions: 290 days from filing to termination ($n = 114$)
- Summary judgments: 707 days from filing to termination ($n = 79$)
- Trials (bench and jury): 816 days from filing to termination ($n = 7$)

Discussion

The findings of the Center study are mixed. With respect to disposition times, pilot cases were resolved in less time, all else equal, than non-pilot cases. Still, to the extent the pilot did result in shorter disposition times, neither attorneys for plaintiffs nor those for defendants were particularly enthusiastic about the pilot in their responses to the surveys.

On the scaled survey questions, respondents tended to be neutral with respect to most potential effects of the MIDP. On the open-ended questions, particularly the question regarding views of the MIDP, Illinois Northern attorneys were more likely to express negative views than positive views, while Arizona plaintiff attorneys were more likely to express positive views.

Still, some attorneys in both districts expressed positive views on the pilot, and on some of the scaled questions, the MIDP's effects were rated positively. Most notably, respondents in both participating districts and on both sides of the v tended to strongly agree or agree that the MIDP achieved one of its key goals: providing relevant information earlier in the case than disclosures under Rule 26. To many attorneys, however, it seems that discovery is discovery, for good or bad. And, either way, many of them would prefer that it not be front-loaded.

The MIDP changes the timing of certain kinds of discovery, but some amount of time in the litigation process cannot be reduced. It is beyond the scope of this report to say how much of case disposition time is nonreducible, but its findings shed some light on how long litigation activities took in the participating districts. For example, in both participating districts, in participating pilot cases, it took around three months from case filing for the court to enter a case-management order setting a discovery deadline, and the typical discovery period runs at least seven months after that,

before any extensions.⁴⁹ It takes, then, about 10 months to plan and carry out discovery in the median case in which discovery is completed.⁵⁰ The median pilot case in the sample—after applying the 90-day filter—was resolved in about 11 months or, in short, about the time one would expect it would take to complete most or all of the discovery planned in the sampled case.

There is the old chestnut that cases won't settle before a ruling on summary judgment, but as this and many other empirical studies have shown, most settlements occur before any party files a motion for summary judgment. In the docket study, the median case in both participating districts was resolved before one would expect a motion for summary judgment to be filed. Typically filed after the completion of discovery, summary judgment motions in the sampled cases were, at the median, filed more than one year after case filing. To the extent a ruling on summary judgment is necessary to move the case forward, it should be expected to last several more months. But the typical case is resolved earlier, without summary judgment.

This discussion of the amount of time various tasks take to complete helps put the survey responses into context. It seems likely that, in cases in which discovery proceeded after the exchange of MIDP responses—most pilot cases in which the responses are made—the positive benefits of the pilot were less obvious (focusing subsequent discovery, for example) than the familiar frustrations of ordinary civil litigation (discovery disputes, motions practice, settlement negotiations) to attorneys answering the closed-case surveys.

This study of the MIDP has several limitations—most notably, the sweeping effects of the coronavirus pandemic on court operations and procedures. Given this timing, the pilot study has less than three years of pre-pandemic MIDP data to work with. This is probably most important in the analysis of disposition times, which does attempt to control for the pandemic in the multivariate analysis. But it is difficult to control for all pandemic effects. Moreover, the pandemic is ongoing, and it is unlikely that its full effects will be understood for quite some time.

Another limitation of the pilot is that only two districts came forward to participate. The lack of volunteers was not for lack of trying—several members of the Rules committees worked very hard to recruit more districts, without success. The MIDP data analyzed in this report comes from two large districts, with Illinois Northern one of the largest, in terms of civil caseloads. These districts are not representative of all districts. Ideally, a few medium- or small-sized districts would have also participated.⁵¹

A limitation of every pilot project is the question of its scalability. Sometimes pilots work when they are conducted in a small setting, with enthusiastic participants, but not when implemented more broadly, with personnel compelled to implement the new rules. The scalability of the MIDP is an open question. In terms of implementation, neither Arizona nor Illinois Northern seems to

49. An earlier study of discovery deadlines found similarly that the average time from the case-management order to discovery deadline in 11 districts was 6.5 months, with a mean of 6.2 months. *See* Emery G. Lee III, Federal Judicial Center, *The Timing of Scheduling Orders and Discovery Cut-Off Dates 1* (2011).

50. In the 2011 study of discovery deadlines, the average time from the case initiation to the discovery deadline was 10.7 months—similar to what was observed in the sampled cases—with a median of 10.2 months. *See id.*

51. The original plan was to include “at least three to five districts.” Report of the Proceedings of the Judicial Conference of the United States, Sept. 2016, at 30, available at https://www.uscourts.gov/sites/default/files/2016-09_0.pdf.

have had any difficulties putting the MIDP into practice. Interview subjects within the two courts generally agreed that attorneys understood the pilot procedures. MIDP responses were filed within 30 days of a responsive pleading in the median case. There was little satellite litigation through motions practice in either district over pilot obligations. To the extent the MIDP was a demonstration project, it was feasible to implement, even in one of the busiest courts in the federal system, with the enthusiastic leadership of Judges St. Eve and Dow.

Illinois Northern attorneys, though, were not particularly enthusiastic, which raises another limitation of the findings of this report. Interview subjects in Illinois Northern suggested that attorneys were sometimes complying with the letter of the MIDP rather than proceeding in the spirit of Wayne Brazil-style full disclosure of relevant information. There was a sense that plaintiff and defendant attorneys in some cases colluded to avoid pilot disclosures—what one judge described as a kind of “mutually assured destruction,” in which neither party fully complied with the pilot and neither party raised the other side’s non-compliance with the court. The actual extent of this kind of collusive evasion of pilot obligations is unknown. But overt participation in the pilot was lower in Illinois Northern than in Arizona, as measured by the filing of notices of MIDP responses and by responses provided in the closed-case surveys.

The observed shorter case lengths in pilot cases are ambiguous in this regard. On the one hand, it seems to weigh against the conclusion that evasion of the MIDP was widespread. But it is also consistent with the view that parties sometimes settled cases early to avoid having to make MIDP responses, another possibility raised by interview subjects in Illinois Northern. Which is to say, again, that the study’s findings are mixed. But perhaps something to build upon. A three-year pilot is too short a time to work a change in the culture—a change like that envisioned by Wayne Brazil and that embodied in the Arizona state court rules. One judge interviewed as part of this project said that, as a lawyer in Arizona, he had been resistant to the disclosure rules when they had first been put in place, but that over time those rules had become an integral part of the courts’ culture.

Appendix 1: Selection of Comparison Districts

Given the number of considerations involved, the selection of comparison districts is more art than science. Districts vary on multiple dimensions—the volume and nature of their civil caseload, the volume and nature of their criminal caseload, number of filings per authorized judgeship, and so on. No two districts are the same, and even districts in the same state can differ greatly. Illinois Northern, for example, is a very different district than either the Central or Southern District of Illinois. Moreover, both Arizona and, especially, Illinois Northern are relatively large districts, which reduces the pool of potential comparison districts. Illinois Northern is one of the five largest districts on almost every civil metric, meaning that any comparison must be made to another very large district. Arizona is the second largest district encompassing an entire state; the District of New Jersey is larger, and the District of Colorado is slightly smaller.

For purposes of this report, Arizona is compared to California Eastern, and Illinois Northern is compared to New York Southern. As was discussed, the comparison districts were chosen based on similarities in caseload and other factors that existed *prior to* the MIDP program. California Eastern also provides a comparison of Arizona to another district in the same circuit; no such comparison opportunity presented itself for Illinois Northern.

A major consideration is the size of the districts' respective caseloads. The second column in **Table 16** shows the total number of civil filings in these four districts in calendar years 2014–2016. Arizona and California Eastern had similar numbers of filings during this four-year period,⁵² and Illinois Northern about 15% more than New York Southern. The similarity in number of civil filings persists when various filters are applied to the data. The third column of **Table 16** shows the percentage of all civil cases in the four districts in the nature-of-suit codes in which discovery is likely to occur (“civil-heartland” cases). The civil caseloads in both Illinois Northern and New York Southern, in particular, are weighted more heavily toward civil-heartland cases than is the caseload in either Arizona or California Eastern. As for cases outside of the civil heartland, civil cases filed by prisoners account for the largest share. The relative volume of prisoner litigation is also an important consideration in selecting a comparison district in any study of civil cases. California Eastern receives the bulk of the federal prisoner litigation in California. Because the State of Arizona is a single district, the District of Arizona receives all the prisoner litigation in Arizona. As can be seen in the fourth column of **Table 16**, Arizona and California Eastern both have much higher prisoner caseloads (42% of civil filings) than either Illinois Northern or New York Southern (less than 20%).

52. Though the filing numbers are similar, it should be noted that California Eastern has only 6 authorized judgeships, compared to Arizona's 13.

Table 16: Comparison Districts, 2014–2016

District	Total Civil Filings (2014–2016) <i>n</i>	Civil-Heartland Filings (2014–2016) (% Civil)	Prisoner Litigation (2014–2016) (% Civil)
Arizona	14,965	46%	42%
California Eastern	14,555	40%	42%
Illinois Northern	35,269	58%	16%
New York Southern	30,537	70%	14%

For non-MDL original proceedings and removals in the civil heartland, filed in calendar years 2014–2016, the median disposition time in Arizona was 6.5 months (197 days) ($n = 5,415$), about a month shorter than the median disposition time in California Eastern, 7.4 months (224 days) ($n = 5,573$). For non-MDL original proceedings and removals in the civil heartland, filed in calendar years 2014–2017, the median disposition time in Illinois Northern was 6.2 months (188 days) ($n = 17,478$), shorter by more than a month than the median disposition time in New York Southern, 7.4 months (226 days) ($n = 18,912$). For cases in which any defendant filed a responsive pleading, “issue-joined” cases, the disposition times for the paired comparison districts are also very similar (non-MDL, original proceedings and removals, civil heartland only, filed in calendar years 2014–2016): Arizona, 9.8 months (298 days) ($n = 3,556$), compared to California Eastern, 10.2 months (313 days) ($n = 3,015$); and Illinois Northern, 11.2 months (340 days) ($n = 8,563$), compared to New York Southern, 11.4 months (346 days) ($n = 11,229$).

In sum, prior to the MIDP program, Arizona processed a similar number of cases, with similar numbers of civil-heartland cases with similar processing times, compared to California Eastern, and Illinois Northern processed a similar number of cases, with similar numbers of civil-heartland cases with similar processing times, compared to New York Southern.