MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 30, 2014

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on October 30, 2014. (The meeting was scheduled to carry over to October 31, but all business was concluded by the end of the day on October 30.) Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Hon. Joyce Branda; Elizabeth Cabraser, Esq.; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Outgoing members Peter D. Keisler, Esq. and Judge John G. Koeltl also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt. Jonathan C. Rose and Julie Wilson represented the Administrative Office. Emery Lee attended for the Federal Judicial Center. Observers included Donald Bivens (ABA Litigation Section); Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Ken Lazarus, Esq. (AMA); Jerome Scanlan (EEOC); Alex Dahl, Esq. (Lawyers for Civil Justice); John Beisner, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Ariana Tadler, Esq.; Henry Kelsen, Esq.; and William Butterfield, Esq.

Judge Campbell opened the meeting by noting that Judge Sutton, Chair of the Standing Committee, was unable to maintain his usual practice of attending the meeting because he is in Australia.

Judge Campbell continued by marking the "comings and goings." Both of the outgoing members, Peter Keisler and John Koeltl, have been kind enough to attend this meeting to lend their help in committee deliberations. Both will be sorely missed.

Judge Koeltl won a rare one-year extension after the conclusion of his second three-year term to enable him to carry through to conclusion in the Standing Committee and Judicial Conference the proposed rules amendments that came to be described as the "Duke package." It would be more honest to describe them as the Koeltl Package. He single-handedly brought the Duke Conference together, and then guided the Duke Conference Subcommittee through an examination of countless possible amendments before settling on the package that is now before the Supreme Court. It is difficult to imagine anyone working harder than he has worked. Judge Koeltl

responded that working with the Committee "has been a wonderful experience." The Duke Rules package "has been a true group production, in Subcommittee and Committee." "I treasure my time on the Committee."

Peter Keisler will be equally missed. "He has a unique ability to clarify complexity, to see purpose and policy beneath the details." Most recently, he has worked hard with both the Duke Conference Subcommittee and the Discovery Subcommittee as it worked through Rule 37(e) on the failure to preserve electronically stored information. The Committee was graced by his presence not only through the six years of his two terms as a member from the bar but also during his earlier years as Assistant Attorney General for the Civil Division. Peter Keisler responded that his first contact with the Rules Committees was when Judge Scirica and Judge Levi visited him at the Department of Justice to urge that the Department actively urge Congress to defer to the Rules Committees as Rule 23 amendments were being developed. At the time, he wondered why Congress should not take up such matters when it wishes. But now the advantages of the Enabling Act process are clear. The Committees are open-minded, impartial, richly experienced in the real world of procedure. "I am glad for term limits on Committee membership. But I am also glad that there are no term limits on friendship."

Two new members were welcomed.

Judge Shaffer has been a magistrate judge in Colorado for many years. "I knew him years ago from reading his opinions." His recent opinions have helped the Committee work through the proposed revisions of Rule 37(e). His earlier career included litigation in private practice, following litigation in the Department of Justice in environmental cases and civil rights cases. He also served as a lawyer in the Navy.

Virginia Seitz is a partner of Peter Keisler. She has recently served as Assistant Attorney General for the Office of Legal Counsel. She has a long-established appellate practice.

Acting Assistant Attorney General for the Civil Division, Joyce Branda, was also welcomed.

Donald Bivens was welcomed as the new liaison from the ABA Section of Litigation.

Judge Campbell reported that the Duke Package and Rule 37(e) proposals went through the Judicial Conference on the consent calendar. The next step is review by the Supreme Court. If the proposals succeed there, they will go on to Congress.

April 2014 Minutes

The draft minutes of the April 2014 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Julie Wilson provided the legislative report for the Administrative Office. It does not seem likely that the remainder of this Congress will enact laws that bear on the rules committees' work. Variations of bills made familiar from past Congresses have been introduced, including a lawsuit abuse reduction act, a sunshine in litigation act, and a job creations act. Patent legislation passed in the House, but it was pulled from the discussion calendar in the Senate. Some form of patent legislation may be introduced in the new Congress. There also have been efforts to federalize some parts of trade secret law through bills that invoke Civil Rule 65, the injunctions rule. These matters are being monitored by the Administrative Office staff.

The Committee was reminded that the recent patent litigation bills would create a lot of work for the Committee. Virtually every version directed the rules committees to write new rules; some of these provisions directed that the rules be prepared within a period of six months.

Forms

Judge Campbell reported that the Forms Working Group in the Administrative Office has already begun deliberating what response they might make if the proposed abrogation of Rule 84 and the Rule 84 Forms is approved by the Supreme Court and Congress. They have begun to think about new forms that might be created. This Committee will keep in touch with the Working Group, perhaps by means as formal as appointing a liaison member.

Rule 67

Judge Diamond reported that Rule 67(b) directs that money paid into court under Rule 67(a) "must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument." Most often, the money paid into court is a relatively modest sum. By statute, the clerk of the district court cannot administer the funds. There must be some other administrator. And the IRS recently decided that quarterly tax forms are required. The burdens of complying with these tax-reporting obligations led some Administrative Office staff to suggest that Rule 67(b) be amended to delete the requirement that money be deposited in an interest-bearing account. But it seemed foolish to forgo interest, whether at present low interest rates or at the rates that may prevail in the future. Working with AO staff, Judge Diamond urged a different approach. The IRS has at last agreed that it will be proper to establish a single general interest-bearing account, administered

by the Administrative Office, to receive all Rule 67 deposits. All can be reported in a single tax form. Any need to consider Rule 67 amendments seems to have passed.

Judge Campbell thanked Judge Diamond for his successful work on this project.

e-Rules

Judge Campbell introduced the e-Rules topic by observing that the Rules straddle the old world of paper and the new e-world. The Standing Committee has established a subcommittee chaired by Judge Chagares and constituted by members from each advisory committee. Judge Oliver and Laura Briggs represent this Committee.

Judge Oliver noted that the subcommittee is looking at all of the sets of rules to determine whether there are common problems that may yield to common solutions. There indeed appears to be some commonality, but it also has been agreed that there is no one-size-fits-all resolution.

All committees have published for comment rules amendments that would eliminate the allowance of "3 added days" to respond to a paper served by electronic means.

Attention has turned to e-filing and e-service.

e-filing: e-filing now is left to local rules. 92 districts have e-filing rules. 85 districts require e-filing, with various exceptions. Rule 5(b)(2)(E) provides for service by electronic means of papers described by Rule 5(a), but only if the person served consented in writing. Despite the requirement for consent, many districts effectively force consent by requiring e-filing and making consent to e-service a condition of entering the e-filing system.

Laura Briggs noted that she, Judge Oliver, and the Reporter agree that mandatory e-filing should be adopted as a general national matter. Mandatory e-service also seems ripe for adoption. So too, it seems time to provide that a Notice of Electronic filing, automatically generated on e-filing, serves as a certificate of service on anyone served through the court's system. The question of what to do about e-signatures, on the other hand, is a mess. A proposal addressing e-signatures was published by the Bankruptcy Rules Committee in the summer of 2013 but has been withdrawn in the face of the comments it generated.

The e-filing draft Rule 5(d)(3) on page 82 of the agenda materials was presented for discussion, with a revision suggested by Laura Briggs and also by the Appellate Rules Committee (the revision is double-underlined):

(d) Filing. * * *

(3) *Electronic Filing, Signing, or Verification.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. Paper filing must be allowed for good cause, and may be required, or may be allowed for other reasons, by local rule. ~~A local rule may require electronic filing only if reasonable exceptions are allowed.~~

Discussion began with the observation that the series "made, signed, or verified" should not be carried over in the disjunctive from the present rule. The question of e-signatures has continued to cause trouble. It may be useful to allow local rules that experiment with e-signatures, as the present rule seems to allow, but it is not yet time to require them. Verification is tightly tied to signatures. Alternative drafting should be found. The drafting will depend on choices yet to be made. If, for example, it is determined that courts should be allowed to experiment with electronic signing or verification, the rule could be recast: "All filings must be made by electronic means * * *. A court may, by local rule, allow papers to be signed or verified by such electronic means. Paper filing must be allowed * * *." This approach is subject to the perennial "cosmic issue" posed by local rules. Do we want 94 approaches to e-signing or verification? But it is hard to establish a uniform rule at this stage of practice. And it is at least possible that there may be geographic or demographic differences that make different approaches suitable in different areas.

Why, it was asked, do 9 districts not require electronic filing? If there are good local reasons, should we defer? Or if it seems likely they will gradually move to require e-filing, should we simply await the outcome? No one could recall any suggestions from the bar that the present rule is not working. But it was answered that a uniform rule will be useful. At the same time, exceptions must be allowed. "Good cause" may not be sufficient to capture the need for exceptions. Local conditions may vary in ways that support categorical exceptions suitable to one district but not others.

e-service: The draft in the agenda book, pages 83-84, adapts present Rule 5(b)(2)(E):

(b) Service: How made. * * *

(2) *Service in General.* A paper is served under this rule by: * * *

(E) sending it by electronic means — unless ~~if~~ the

person ~~consented in writing~~ shows good cause to be exempted from such service or is exempted from electronic service by local rule — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

The first suggestion was that the long phrase set off by em dashes is too long to support easy reading. An easy fix may work by framing this subparagraph as two sentences:

(E) sending it by electronic means, unless the person shows good cause to be exempted from such service or is exempted by local rule. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

The exemption for good cause provoked a question asking who would show good cause? A pro se litigant? A prisoner? Will it be difficult to show good cause? Laura Briggs answered that in her court she had never encountered a request to be exempt. But her court automatically excludes pro se litigants. A judge observed that his court automatically exempts pro se litigants from e-service unless a judge authorizes it. Another judge observed that a "good cause" showing is something separate from a categorical exemption — it implies that a judge will be involved. His court had some requests for exemptions in the early days of e-service.

Notice of Electronic Filing: The Committee on Court Administration and Case Management has suggested that a notice of electronic filing automatically generated by the court's filing system should count as a certificate of service. The simpler of the versions in the agenda materials, set out at pages 84-85, would add this provision at the end of Rule 5(d)(1):

(d) Filing.

(1) *Required Filings; Certificate of Service.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service; a certificate of service also must be filed, but a notice of electronic filing is a certificate of service on any party served through the court's transmission facilities.

It was reported that two districts in the Seventh Circuit have local rules to this effect. The rules also provide that a certificate must be filed to show service on parties that were not served by electronic means.

The circuit clerk representative on the Appellate Rules

Committee surveyed other circuit clerks. A majority of them were comfortable with allowing a notice of electronic filing to stand as a certificate of service. But a minority preferred to require a separate certificate of service because that may prompt the party making service to think about the need to make paper service on parties who are not participating in the e-filing system.

This proposal was not much discussed. The agenda materials opened a further question by asking whether there must be a certificate of service for the certificate of service; Rule 5(a)(1)(E), requiring service of "[a] written notice, appearance, demand, or offer of judgment, or any similar paper," is ambiguous. Discussion was limited to the observation that in one district lawyers include a certificate of service at the end of the document that is served, so that the certificate of service is itself served with the document. There was no interest in addressing this question by rule amendment.

Generic e=paper Rule: The Standing Committee subcommittee has prepared a template rule that in generic terms provides that electrons are equal to paper. The first part provides that a reference in a set of rules to information in written form includes electronically stored information. The second part provides that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each part could include an "unless otherwise provided" qualification.

The "otherwise provided" provision could be adapted to any particular set of rules by either of two approaches. One would list all of the exceptions as part of the generic rule. The other would include only the bland "otherwise provided" provision in the generic rule, but then provide exemptions — with or without a cross-reference to the generic rule — in individual rules. The subcommittee discussions have recognized that different approaches may be suitable in different sets of rules, and that any particular set of rules may raise so many questions about exceptions that it is better to avoid any generic provision.

The Appellate Rules Committee is attracted to the first part, providing that any reference to paper embraces electrons. It is more concerned about the complications of providing that electronic means can be used to effect any act that can be effected with paper.

The questions for the Civil Rules may be distinct from the questions presented by other sets of rules. It is clear that many exceptions are likely to be desirable, beginning with several rules that provide for initiating process — not only the familiar Rule 4 provisions for serving summons and complaint, but also process under Rule 4.1, third-party complaints, warrants in admiralty proceedings, and others. A great many different words in the rules

may imply paper. A simple example, complicated by evolving technology and social mores, is the references to "newspaper" for notice in condemnation proceedings, Rule 71.1(3)(B), and in limitation-of-liability proceedings, Supplemental Rule F(4). What counts as a "newspaper" today? Tomorrow? Sorting through all these words, carefully, will not only be a lengthy chore. It may tax understanding of present and evolving realities in an ever more complex network world.

Discussion began with the observation that Evidence Rule 101(b)(6) already includes a generic provision: "a reference to any kind of written material or any other medium includes electronically stored information." But the Evidence Rules deal with a totally different set of problems. The Civil Rules, for example, embody due process notions of notice. The Civil Rules, further, include a great many different words that would have to be studied as possible occasions for exceptions from the equation of electrons with paper.

The discussion turned to an open question put to the judge and lawyer members: are there actual problems in practice caused by uncertainties about what can be done by electronic means? No committee member had encountered such problems. No one knew of any local rules that address this question, apart from Local Rule 5.1 in the Northern, Eastern, and Western Districts of Oklahoma: "Any paper filed electronically constitutes a written paper for purposes of applying these rules and the Federal Rules of Civil Procedure." It would be possible to ask the Federal Judicial Center to do a study, but their research capacities are finite and may be better devoted to more important topics. It also was observed that no matter what the form of service, the common problem arises when a party protests "I did not get it."

The Committee concluded that the very complex and time-consuming task of reviewing and revising the Civil Rules to reflect modern e-developments is not warranted in the absence of actual problems. Because no one has encountered such problems and the rules seem to be working well in the modern electronic world, the Committee concluded that the time has not yet come for the Civil Rules to adopt either part of the generic template.

Other Civil Rule e-issues: The agenda materials, pages 89-93, list a number of rules that might include specific provisions equating electrons with paper. Brief discussion narrowed the list to Rule 72(b)(1), which directs that the clerk must promptly "mail" to each party a copy of a magistrate judge's recommended disposition. "No one mails." Changing it to a direction that the clerk "serve" a copy is an easy and quite safe change. But this may be an illustration of a gradual phenomenon in which it will come to be accepted that "mail" embraces both postal and electronic delivery. This rule change might be included at a time when other e-rule

changes are proposed. But there is no urgent need to bless what clerks are doing now.

A particular example was discussed briefly. Rule 7.1 requires that 2 copies of a disclosure statement be filed. The apparent purpose was to provide one copy for the court file and one copy for the judge assigned to the case. In an era of electronic court records, there is no apparent need for 2 copies. But the Appellate Rules Committee is considering possible substantive changes in their disclosure rule, Rule 26.1. Changes in one disclosure rule will require reconsideration of other disclosure rules — the rules were adopted in common, through joint deliberations. It is better to hold off on a minor amendment today when there is a real prospect of more serious amendments in the near future.

It was concluded that the "other civil rules" changes to embrace electronic practice should be deferred.

Rule 81: Signatures on Notice of Removal

The general removal provision, 28 U.S.C. § 1441(a), provides for removal "by the defendant or the defendants." Section 1446(b)(2)(A) provides that "When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." Several circuits have taken different approaches to a simple question: can the attorney for one party file a notice of removal on behalf of all, expressly stating that all other defendants join in or consent to the removal?

It has been suggested that it might be useful to resolve this circuit split by amending Rule 81(c)(2). Either answer could be given: each defendant must separately sign, or one could sign on behalf of all with an express statement that all others consent or join in the removal. Drafting would have to resolve a particular question. Some removal statutes clearly provide that any defendant can remove the entire action. Others are, by their terms, ambiguous. Section 1442 provides that an action against United States officers "may be removed by them." It is said that this statute, and the similar provisions in §§ 1442a and 1443, allow removal by any one defendant. But it is not clear that it would be wise to assume this answer in drafting Rule 81. Beyond that, there is a split in the circuits with respect to removal under the § 1452 provision for claims related to bankruptcy cases — some hold that all defendants must join in removing, while others allow any one defendant to remove. If a Rule 81 provision were drafted to apply only to removals under § 1441(a), reflecting § 1446(b)(2)(A), it would at least leave the question of § 1452 removal in limbo. But it would hardly do to take sides on this question of statutory interpretation. An alternative might be to draft a rule that applies to any removal that requires joinder of all defendants who

have been properly joined and served. That approach would be neutral on the questions of statutory interpretation.

Discussion began with an expression of hesitancy. Should the Committee become involved in resolving a circuit split in interpreting, not a Civil Rule, but a statute, and a statute that deals with jurisdiction at that? A parallel example is provided by an issue that has divided members of this judge's court — what to do when a defendant who has diversity of citizenship with the plaintiff removes before diversity-destroying defendants are served. Should we try to address questions like that?

A lawyer observed that when the question of consent by all arises, the practice is to make sure that everyone in fact joins in the notice.

Another observation was framed as a question whether anyone had encountered a situation in which a case was remanded because one party had attempted to sign on behalf of all, with an express statement that all had agreed? Removal tends to be approached with care to meet all requirements. Lawyers are likely to find out how the local circuit interprets the statute. This question probably does not lead to "gotcha" problems.

A further observation was that it is wise to show caution in using § 2072 to approach statutory problems. "The preemption power is precious," and should be jealously protected by sparing use.

It was agreed that this question will be tabled.

Pending Docket Matters

Judge Campbell introduced a long series of pending docket matters by noting that it is important to undertake periodic surveys of public proposals that have accumulated during periods of intense work on other matters. It is important to provide close attention to every proposal.

Third-Party Litigation Financing: Dkt. 14-CV-B

This proposal would add automatic initial disclosure of third-party litigation financing agreements to Rule 26(a)(1)(A).

Third-party litigation financing is, or seems to be, a relatively new phenomenon. It is not clear just what forms of financial assistance to a lawyer or to a party might be included under this label, nor is it clear whether the label itself should be adopted. Many ads offering financial support to lawyers seem to involve general loans to the firm, or to be ambiguous on the relationship between possible financing terms and specific individual litigation.

The proposal seeks to exclude contingent-fee agreements from the disclosure requirement, referring to "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, or otherwise." This language could include assignments. If work proceeds, the rule language will require careful attention to capturing the arrangements that seem fair subjects for mandatory disclosure, excluding others.

The proposal has been supplemented in the few days before this meeting by submissions from opponents and proponents of disclosure addressing some issues raised in the Committee's agenda memo.

The proponents of disclosure may be concerned more with generating information to support careful examination of third-party litigation financing in general than with the impact on disclosure in any particular action.

Supporters of disclosure invoke the provision for initial disclosure of liability insurance. This disclosure provision grew out of 1970 amendments that resolved a disagreement among district courts by allowing discovery of liability insurance. The idea was that liability insurance plays an important role in the practical decisions lawyers make in determining whether to settle and in preparing to litigate. Permission for discovery was converted to initial disclosure in 1993, making it routine. But the analogy is not perfect. Long before 1970, liability insurance had come to play a central role in supporting actual effectuation of general tort principles. Litigation financing is too new, and experience with it too limited, to come squarely within the same principle. The effect on settlement negotiations, for example, may be rather different. The 1970 Committee Note recognized that discovery of insurance terms and limits might encourage settlement, but in other cases might make settlement more difficult. The role of insurers in settlement negotiations is familiar, and in many states has led to rules of liability for bad-faith refusal to settle. What role litigation financing firms may play in settlement decisions, properly or otherwise, is a thorny question.

The settlement question is one example of a broader range of questions. Some third-party financing arrangements may, by their terms or in operation, raise questions of professional responsibility. How far may the lender intrude on the client's freedom to decide whether to accept a settlement — for example, an offer on terms that would reward the lender but leave very little for the client? How far may the lender, either in making the arrangement initially or as the action progresses, ask for disclosures that intrude on confidentiality — and what protections may there be to ensure truly informed client consent?

The proponents offer several policy reasons for disclosure.

First, it is urged that disclosure will help ensure that judges do not have conflicts of interest arising from the judge's stake in an enterprise that, directly or indirectly, is providing the litigation financing. Present Rule 7.1 does not seem to extend this far. Third-party litigation financing, further, may be provided for the first time pending appeal, when the case is no longer in the district court. Should a disclosure rule attempt to reach this far, or should the Appellate Rules be revised in parallel?

Another argument is that a defendant should know who is really on the other side of the action. This can affect settlement decisions, for example by knowing that the plaintiff has financial support to stay in the litigation for the long haul. But is it desirable to facilitate settlement at lower values when the defendant knows there is no outside support and that it may be easier to wear out the plaintiff's reserves? Third-party financing firms, moreover, assert that they are always interested in quick, sure payment through settlement.

Disclosure also is supported by arguing that it may be important in deciding motions that seek to shift the burden of litigation expenses. Even before the current pending proposals, the rules provide that a court determining the proportionality of discovery should consider the parties' resources. The pending proposals would amend Rule 26(c) to include an express reference to allocating the expense of discovery as part of a protective order, reflecting established practice. The argument is that it would be unfair, or worse, to allow a party to pretend to have no more than the party's own resources to bear the expenses of discovery. But cost-shifting does not seem to happen often, and an inquiry into third-party financing can always be made at the time of a cost-shifting motion.

Finally, it is argued that information about third-party financing can be useful in determining sanctions. Support is found in a case from a Florida state court.

These questions are interesting. There is much to learn. DePaul Law School held a conference on third-party financing last year, generating more than 500 pages of articles. They provide a fascinating introduction, but not a complete picture.

Discussion after this introduction began with the observation that the question is not whether third-party financing agreements are discoverable. They might — or might not — be discoverable as an incident to settlement negotiations. The question whether to provide for automatic initial disclosure may be premature. Whether characterized as a range of phenomena or a broad phenomenon that

includes many variations, there are too many things involved to justify adopting a disclosure requirement now. "This is too much different from insurance." These views were echoed by others.

Another member offered an analogy to Supreme Court Rule 37.6, which requires disclosures for briefs amicus curiae. The lawyer who files the brief must reveal "whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief," and identify contributors other than the identified friend. The Court's interest in knowing who may be masquerading as an amicus is perhaps different from third-party financing of litigation as a whole, but suppose the identified plaintiff has actually been paid off and is as much a shell as a purported amicus?

A different member stated that he deals with third-party financing in about half his cases, often in representing plaintiffs in patent cases. The cost of litigating patent actions is ever increasing. Simple out-of-pocket expenses can run into the millions of dollars. Fewer lawyers are able to take these cases on contingent-fee agreements alone. "Third-party litigation financing makes it possible to bring cases that deserve to be brought." At the same time, the ethical issues are real. Attention has been paid to these issues, and more attention will be paid to them. It is not clear that initial disclosure will advance consideration of these questions. And, although it seems clear that knowledge of third-party financing can advance decision of specific issues in an individual case — cost-shifting is an example — that is better dealt with in the case than by adopting initial disclosure. So too, the analogy to insurance disclosure is not close. It is hard to follow the argument that disclosure will remove a deterrent to settlement. Knowing the specific terms of the financing agreement will not contribute to that. There are, moreover, many different forms of financing: it may be as simple as a loan, with contingent repayment, that leaves the lender entirely out of the conduct of the litigation. But some funders want to be involved in developing and pursuing the case, and in settlement. These arrangements bear on attorney-client privilege, and may lead to divided loyalties as between lender and client. Again, those problems do not have much to do with the disclosure proposal.

A judge expressed doubts about the need for disclosure. He routinely requires the person with settlement authority to be present at conferences; "I can get the information I need." Similarly, the information can be got if it is relevant to cost-shifting.

Another judge agreed that the proposal is premature. We do not yet know enough about the many kinds of financing arrangements to be able to make rules.

A member noted that the ABA 20/20 Commission on Ethics produced a white paper on alternative litigation funding. The paper noted that these practices are evolving. The paper expressed a hope that work would continue toward studying the impact of funding on counsel's independence, candor, confidentiality, and undivided loyalty.

A third judge thought third-party funding "is like ghost-writing; I like to know who's writing what I read." The judges on her court have not yet agreed whether they can compel disclosure of third-party financing. But this belongs in the array of things that judges should be aware of.

A fourth judge agreed with a different analogy. Professional-looking filings appear in pro se cases. It is useful to know whether the party has had professional help in order to decide whether to measure a pleading by the more forgiving standards that apply to pro se parties. "I do ask questions at status hearings; some of my colleagues are more aggressive." His court is considering a local rule to address this question. The third judge agreed — she has a standing order that requires identification of the actual author.

A fifth judge suggested that the concern about potential conflicts extends beyond judges to include opposing counsel. But this is not a study for this Committee to undertake.

And a sixth judge agreed that courts have the tools to get the information needed to rule on discovery issues, and to order appearance by a person with settlement authority, and so on. The task of determining the author of nominally pro se papers presents a different question.

Discussion concluded with the observation that no one has argued that these questions are unimportant. Nor has it been argued that they should be ignored. But third-party financing practices are in a formative stage. They are being examined by others. They have ethical overtones. We should not act now.

Another member agreed that the question is premature. There has been a flurry of articles. "The authors are all over the place." Some, highly respected, have suggested that the concerns reflected by this proposal are premature.

The Committee decided not to act on these issues now.

Nonparty Rule 30(b)(6) Depositions: Dkt. 13-CV-E

The Committee on Federal Courts of the New York City Bar submits proposals to address problems they believe arise from notices to take Rule 30(b)(6) depositions of entities that are not

parties to the underlying litigation. The central problem is that notices set the deposition at a time too early to enable the nonparty to properly educate the witnesses who will appear to provide testimony for the nonparty named as the deponent. The response to this problem takes two forms: Objections are advanced as to the scope of the subpoena, and the witnesses are prepared only on subjects within the scope accepted by the nonparty entity. The nonparty also may move for a protective order, and take the position that it need not appear for the deposition before the court rules on the objections.

The proposal rejects one possible remedy, adaptation of the Rule 45(d)(2)(B) procedure that allows an objection to a subpoena to produce and suspends the subpoena until the court orders enforcement. This approach is thought too severe for depositions, because a deposition is a discrete event and does not provide the opportunities for negotiation that occur in the course of a "rolling" response to a subpoena to produce. Instead, it is urged that the rules should require a minimum 21-day notice of the deposition. In addition, the proposal would require that a subpoena addressed to a nonparty entity for a Rule 30(b)(6) deposition state the reasons for seeking discovery of the matters identified in the notice. Finally, the suggestion would amend Rule 30, probably by adding a new subdivision, to provide that a motion for a protective order or to quash or modify the subpoena voids the time stated for the deposition.

Reasons for caution were sketched. This proposal is the first indication of the problem it describes. Rule 30(b)(6) was explored in some depth a few years ago in response to suggestions made by a committee of the New York State Bar Association; the question of inadequate notice to a nonparty Rule 30(b)(6) deponent was not even mentioned then. Nor have there been any other suggestions of this problem.

Discussion began with a similar observation that the Committee recently engaged in an in-depth exploration of Rule 45. The work began with identification of 17 possible topics that might be addressed, and narrowed the list to the changes that became effective less than a year ago. This proposal comes as describing a surprise set of issues.

Judge Koeltl said that any suspicion that the proposal may reflect problems unique to practice in the Southern or Eastern Districts of New York should be laid to rest. "I do not see it as a problem." He expressed enormous respect for the City Bar's Federal Courts Committee. It did wonderful work for the Duke Conference, and again in its comments on the Duke Rules Package. But this should not be a problem in the Southern District. Local rules require a conference with the court before making a discovery motion. "I've never seen this as a problem."

Another judge observed that if the nonparty deponent is in another state, enforcement of the subpoena will be in the court where compliance is expected. And the party serving the subpoena is required to take steps to avoid imposing unreasonable burdens on the deponent. Rule 45(d)(3)(A) provides further protection, requiring the court to quash or modify a subpoena that fails to allow a reasonable time to comply. "The rules provide pretty good protection" now.

A third judge suggested that generally the Committee seeks to frame rules of general application. "This seems a very specific problem; a rule addressed to it could create collateral problems. If there's a problem, it arises from judges who are not tending to their cases."

A fourth judge thought that the problem reflects the kinds of concerns that underlie the pending proposal to amend Rule 1 to include the parties in the obligation to construe and administer the rules to achieve the just, speedy, and inexpensive determination of the action. The deponent's lawyer should describe the problem to the lawyer who issued the subpoena, and they should work out a suitable time for the deposition. It is in no one's interest to have an ill-prepared witness.

Still another judge observed that in some circumstances a lawyer may have strategic reasons to hope for an ill-prepared witness testifying under Rule 30(b)(6) for an entity that is a party — that was the subject of the earlier Rule 30(b)(6) inquiry. But there is no similar potential for strategic advantage when the witness testifies for a nonparty entity. "Lawyers should be able to resolve this."

A member noted that the ABA Litigation Section Pretrial Task Force has Rule 30(b)(6) on its agenda, and may eventually bring forward proposals for revision. The question of setting the time for a nonparty Rule 30(b)(6) deposition too soon has not been on its list.

It was concluded that this proposal should be set aside.

Attorney-Client Privilege Appeals: Dkt. 10-CV-A

Professor Marcus introduced this proposal, which would amend Rule 37 to authorize a court of appeals to grant a petition for immediate interlocutory review of a ruling that grants or denies a motion to compel discovery of information claimed to be protected by attorney-client privilege. The revision would be drawn on lines that parallel permissive Rule 23(f) appeals from orders granting or denying class certification. A similar provision has been submitted to the Appellate Rules Committee, which has decided not to pursue it. Their view is that existing opportunities for review suffice,

although they are not often invoked. The traditional remedy is to disobey the order to produce, be held in contempt, and appeal the contempt order — and even that approach is limited by the rule that a party can appeal only a criminal contempt order, not a civil contempt order. Another remedy is by extraordinary writ; mandamus may be somewhat more freely available to test questions of privilege and other confidentiality concerns, but still is carefully limited. Extending beyond the limits of these remedies — and recognizing the possible availability of § 1292(b) appeals by permission of both the district court and the court of appeals — will create difficult problems of drawing lines that promote desirable opportunities for appeal without stimulating many ill-founded attempts.

The question arises from the decision in Mohawk Industries, Inc. v. Carpenter, 130 S.Ct. 599 (2009). The Court ruled that the collateral-order doctrine supports "finality" only as to all cases within a described "category," or as to none of them. An order compelling production of materials found to have been initially protected by attorney-client privilege, but to have lost the protection by waiver, was in a category that did not fit the criteria for collateral-order appeal in all cases. Alternative means of review provide adequate protection. At the same time, the Court suggested that if it is desirable to provide somewhat greater opportunities for interlocutory review, it is better that they be established through the Rules Enabling Act than by judicial elaboration of § 1291 or other judicial doctrines.

Invocation of the Rule 23(f) analogy helps to frame the question. Grant or denial of class certification can have an enormous impact on the case — denials were once held appealable as the "death knell" of actions that could not be expected to survive if only individual claims remained to be litigated (another example of collateral-order appeal doctrine rejected by the Supreme court), while grants can exert a hydraulic pressure to settle when facing the great costs of defending a class action and the risks of "bet-the-company" judgments. The stakes are high. And, although there are many class actions and no small number of requests for Rule 23(f) appeals, the occasions for potential appeals remain finite. Even if the categories of appeal were limited to attorney-client issues, these issues arise far more often, and are likely to be much less momentous.

A judge observed that the opportunities for appellate review that remain available after the Mohawk decision "are not much help." But attorney-client privilege is invoked in an overwhelming number of cases. And it often is raised without even attempting to comply with the requirements of Rule 26(b)(5)(A) to describe the nature of the matters objected to in a way that will enable other parties to assess the claim of privilege. "The potential applications are enormous."

A lawyer noted that if the problem involves waiver of the privilege, Evidence Rule 502(d) and the proposed Civil Rules amendments that provide express reminders of Rule 502(d) "reflect a big effort to reduce the occasions for waiver." Judges, moreover, generally do a really good job in ruling on privilege issues. These issues come up far more often than reported cases might suggest. The Appellate Rules Committee seems to have got it right.

Another judge noted that there are many privileges apart from the attorney-client privilege beloved by lawyers. Why should a special appeal provision be limited to just this one privilege? And what of work-product protection? We should stay away from these issues.

The Committee concluded that this subject should be removed from the agenda.

Rule 41: Dkt. 14-CV-D; 10-CV-C

Docket item 14-CV-D was the submission of a law review article by Professor Bradley Scott Shannon, "Dismissing Federal Rule of Civil Procedure 41," 52 U. of Louisville L.Rev. 265 (2014).

The article advances two basic packages of suggestions. The first identifies several well-known shortcomings in Rule 41. The second bewails the reliance of Rule 41 on the often-criticized terms "with prejudice," "without prejudice," and "on the merits."

Among the perceived shortcomings are these: (1) The unilateral right to dismiss without prejudice should be terminated by a motion to dismiss as well as by an answer or a motion for summary judgment. There is an obvious analogy to the right to amend a pleading once as a matter of course under Rule 15(a)(1)(A) — Rule 15 was recently amended to cut off this right 21 days after a motion under Rule 12(b), (e), or (f). (2) Rule 41(a)(1)(A) addresses dismissal of "an action." Provision should be made for dismissing part of an action, whether it be one of several claims or one of several parties. Dismissal of a claim might better be accomplished by Rule 15 amendment of the pleading — Rule 15 covers not only an initial period when amendment does not require court permission but also later times in the action when leave is required but is freely granted. Addressing dismissal of a "claim" without prejudice, further, might invite confusion about the various approaches that define what is a "claim" according to the context of inquiry. There is a risk of confusing what is a "claim" for the claim-preclusion aspect of res judicata with what might suitably be treated as a "claim" for voluntary abandonment. Dismissal of all claims against a party also can be accomplished through Rule 15, but Rule 41 might be amended to address this. (3) Rule 41(c) addresses voluntary dismissal of a counterclaim, crossclaim or third-party claim; other claims are not addressed. As

just one example, a third-party defendant may file a claim against the original plaintiff. The suggestion is that Rule 41(c) should be amended to provide that it "applies similarly" to dismissal of any type of claim not enumerated. (4) A related possibility would be to add a motion for summary judgment (or a Rule 12 motion) to the events that cut off unilateral dismissal without prejudice of a counterclaim, crossclaim, or third-party claim under Rule 41(c). (There is a respectable view that "summary judgment" was omitted from Rule 41(c) by simple absent-mindedness.)

The difficulties that inhere in the concepts of "prejudice," "on the merits," and the like also are well known. For example, Rule 41(b) provides that a dismissal for lack of jurisdiction is not on the merits. But the dismissal in fact establishes issue preclusion on any matter necessarily decided in finding a lack of jurisdiction. The claim, on the other hand, is not precluded if a subsequent action is brought in a court that does have jurisdiction. The proposed remedy is to amend Rule 41 to refer directly to preclusion consequences — "does not preclude," "precludes," and so on. Reasons for caution on this score begin with the proposition that the intricacies of applying present Rule 41 are well known and have been thoroughly addressed by the courts and in the literature. So there is a real prospect that abandoning the familiar and familiarly interpreted phrases in favor of open-ended invocations of general preclusion law could invite new confusions and unsettling arguments. There is little reason to believe that better preclusion results would be reached.

Discussion began by asking the Committee whether they see these problems in practice.

A judge said that these problems are easily worked out in practice. For example, a motion may be made for default judgment against one defendant when another defendant has not been properly served. To get to and through a hearing on damages, the plaintiff may amend the complaint to dismiss the defendant not served. Or on a motion to review a proposed settlement under the Fair Labor Standards Act, the parties may discover that they have unresolved issues as to attorney fees and prefer to dismiss so they can work out a full settlement.

The conclusion was that Professor Shannon has pointed to ways in which Rule 41 can be improved. But the Committee operates in the instinctive belief that it is better to resist the temptation to make abstract improvements in the rules. The risk of unintended consequences counsels caution. Amendments to address real-world problems are more important. For Rule 41, that holds for these proposals. They will be put aside.

Rule 48: Non-Unanimous Verdicts in Diversity Cases: Dkt. 13-CV-A

This proposal would amend Rule 48 to adopt state majority-verdict rules for diversity cases. The suggested reason is that defendants commonly view majority-verdict rules as something that favors plaintiffs. When an action that could be brought in federal diversity jurisdiction is brought in a state court that has a majority-verdict rule, a defendant has an incentive to remove for the purpose of invoking the federal unanimity requirement. Cases are brought to federal courts that would not come there if the federal courts adhered to the state-court majority-verdict rule.

The first issues raised by this proposal are whether majority-verdict rules are better than a unanimity requirement, and, if so, whether the Seventh Amendment permits a majority-verdict without the parties' consent. If majority verdicts are better, and if the Seventh Amendment permits — almost certainly a requisite even for a rule limited to diversity cases — then Rule 48 should provide for majority verdicts in all cases, or at least for all diversity and supplemental jurisdiction cases. Otherwise, the question is whether it is better to defer to state practice either from a pragmatic desire to reduce removals or from an Erie-like sensitivity to the prospect that majority verdicts are sufficiently "bound up" with state substantive principles to deserve relief from the general Rule 48 command for uniformity.

The majority-verdict question may intersect the question of jury size. A couple of decades ago the Committee explored restoration of the 12-person civil jury, expressly deferring consideration of majority-verdict rules pending resolution of that issue. That attempt failed. But the underlying questions remain: how far do the dynamics of deliberation in a 12-person jury differ from those in a 6-person jury? How far are the dynamics of deliberation affected by allowing a majority verdict? How do these effects interact if a verdict can be reached by a majority of a 6-person jury?

Discussion began with the observation that many considerations affect a defendant's decision whether to remove an action, whether it is a diversity action or a federal-question action. "If we are to start addressing the reasons defendants have for removing, it will be a daunting task. The premise is troubling."

Agreement was expressed as to strategic concerns. A variety of strategic factors may lead to removal. But "this one is significant." Generally plaintiffs like majority verdicts, which may facilitate horsetrading between damages and liability. There are sound Erie-like reasons to honor state rules on jury size and unanimity. "We should not distrust state policymaking on this." There is no important federal policy to be served by deferring to defendants' strategic choices. The proposal can be drafted easily. But it will generate a lot of controversy. It is not clear whether the value of the change will be worth enduring the controversy.

The problem of supplemental jurisdiction was raised. Many cases present federal questions and state-law questions that involve many of the same issues of fact. There may be diversity jurisdiction as well as federal-question jurisdiction, or there may be only supplemental jurisdiction over the state-law questions, or — in a particularly convoluted area of jurisdiction — there may be federal-question jurisdiction over a state-created claim that centers on a federal question. Should the majority-verdict rule that would apply to the state-law questions extend to the federal questions as well, so as to avoid the grim spectacle of telling the jury it must answer common questions unanimously as to part of the case, but can answer the same questions by majority verdict as to other parts?

Professor Coquillette recalled an article he wrote with David Shapiro on the fetish of jury trials. The majority-verdict question is a complicated one.

Another member agreed with the view that clear drafting can be achieved. She also agreed with the view that it is a good thing to reduce the strategic use of diversity jurisdiction. Courts and others are interested anew in the importance of jury trials. Any proposal will be controversial, but this is a matter of genuine interest to the present and future of jury trials. We ask juries to apply different standards of persuasion to different issues in a single trial, and expect them to perform this feat. They could likewise manage to apply majority-verdict rules to some elements, and a unanimity requirement to others. Or we could draft a compromise rule that gives the court discretion whether to apply a majority-verdict rule.

Brief discussion found no confident answer to the question of how many states permit majority verdicts.

Doubts about adopting state practice were expressed by noting that "this is not like service of process," a purely technical matter. There may be substantial federal interests involved in the unanimity requirement.

The question turned to other aspects of jury practice. Some states are beginning to follow Arizona, which has been a leader in relaxing many traditional practices. Jurors can ask questions. They can take notes. They can deliberate throughout the trial. Should a federal court follow these practices in diversity cases that would be tried in such a state, even if it would not do so in a federal-question case? Or, to take a nonjury example, cases have been removed by defendants because they like the expert-witness report requirements of Rule 26(a)(2), or because they like the Daubert approach to expert witnesses. Do we want to eliminate all federal practices that may affect the outcome?

A similar question asked whether the federal court should be required to draw the jury from the same area that would supply jurors to the state court. An example was offered of experience in criminal cases, where state authorities may cede the lead to federal prosecutors in order to draw the jury from a broader area than would supply the state-court jurors. There are areas where it is appropriate to follow federal-court jury practices; it is difficult to see why the unanimity issues should be different.

Turning back to reasons that may support the proposal, it was noted that a defendant's hope for a unanimity requirement may be different from other strategic concerns. Majority-verdict rules reflect long-held state policies. The federal unanimity requirement can be seen as archaic, even odd.

A related phenomenon was noted. A case is removed, dismissed by the plaintiff, then filed again in state court with an added defendant that destroys diversity. If removal is attempted again, the federal court does not evaluate the plaintiff's strategic choices; it asks only whether the new party is properly joined.

A judge observed that under Rule 81(c), federal procedures apply after removal. We should adhere to that principle here.

Discussion turned to the policies that underlie the grant of diversity jurisdiction in § 1332. It would be difficult to attribute any intent to Congress with respect to jury unanimity — § 1332 goes back to the First Judiciary Act, and its perpetuation by successive Congresses in confronting periodic attempts to revise or eliminate the jurisdiction leaves too many uncertainties to support any attribution of relevant intent. Nor does it seem that the question can be usefully approached as an attempt to rebalance strategic motivations. The purpose of § 1332 "is to alleviate perceived unfairness." The change "would be a large move."

A related suggestion was that diversity jurisdiction was established "to avoid hometown advantage." This purpose is difficult to apply across the wide range of practices that can affect outcome. Maryland, for example, does not have individual judge case assignments. The District of Maryland does. That can have a strong influence on the cost and speed of bringing the case to a conclusion. Or, for a different example, the summary-judgment rules in state and federal court look the same on paper. But there are significant differences in actual practice.

The question whether to take up this proposal was put to a voice vote. A clear majority voted to remove it from the docket.

Rule 56: Summary-Judgment Standards: Dkt. 14-CV-E

Professor Suja A. Thomas submitted for the docket her article

on Rule 56, "Summary Judgment and the Reasonable Jury Standard," 97 Judicature 222 (2014). The article suggests that it is not really possible for a single trial judge, nor even a panel of three appellate judges, to know or imagine what facts a reasonable jury might find with the benefit of reasoning together in the dynamic process of deliberation. That part of it ties to her earlier writing, which casts doubt on the constitutionality of summary judgment under the Seventh Amendment. The conclusion, however, is that the standard for summary judgment "is ripe for reexamination. The rules committee, if so inclined, would be an appropriate body to engage in this study with assistance from the Federal Judicial Center, and such study would be welcome."

The suggestion for study goes beyond work of the sort the Federal Judicial Center has already done. A broad study of pretrial motions is now underway. But these studies count such things as the frequency of motions; the rate of grants, partial grants, and denials; variations along these dimensions according to categories of cases; variations among courts; and other objective matters that yield to counting. There has not been an attempt to evaluate the faithfulness of actual decisions to the announced standard. Consultation with the Federal Judicial Center staff suggests that there are good reasons for this. The only way to appraise the actual operation of the summary-judgment standard in the hands of judges would be to provide an independent redetermination of a large number of decisions. To be fully reliable, the redetermination would have to be made by judges believing they were actually resolving a real motion in a real case — a determination made without that pressure might be reached casually because it is only for research, not real life. Substituting lawyers or scholars or other researchers would lose not only the reality but also the training and experience of judges. It has not seemed possible to frame such a study.

Discussion began with a statement that Professor Thomas believes that summary judgment violates the Seventh Amendment. "The idea that judges cannot determine the limits of reasonableness is wrong." Even in a criminal case, a judge may refuse to submit a proffered defense to the jury if it lacks evidentiary support.

Another judge observed that experience with Professor Thomas while she was in practice showed her to be a wonderful lawyer. Rule 56 is a subject that has concerned the plaintiff's bar because of the ways in which it is administered. Professor Arthur Miller is another who thinks that summary judgment is at times granted unreasonably, leading to dismissal without trial. "There are too many Rule 56 motions that should not be made." "I try to discourage some of them in pre-motion conferences, but they get made." But it is difficult to know what could be done to improve application by changing the rule language.

Still another judge suggested that "the problem is with judges, not the rule." Motions invoking qualified immunity provide an example — we regularly entrust to judges the determination of what a reasonable officer would know. No doubt judges bring their own biases to bear. "We can educate judges about this, but we cannot dehumanize judges."

Similar observations were offered by another judge. Judges make determinations of reasonableness all the time. They decide motions for judgment as a matter of law. They decide motions for acquittal in criminal cases. They make determinations under the Evidence Rules.

A member said that the article was entertaining, but left an uncertain impression as to what the Committee should do, apart from undertaking a study.

This discussion turned to the question whether judgment as a matter of law violates the Seventh Amendment. The summary-judgment standard is anchored in judgment as a matter of law. The 1991 amendments of Rule 50, indeed, were undertaken in part to emphasize the continuity of the standard between Rules 50 and 56. But if we were to take literally the general statement that the Seventh Amendment measures the right to jury trial by practice in 1791, it would be difficult to support judgment as a matter of law. In 1794, a unanimous Supreme Court instructed a jury in an original-jurisdiction trial that although the general rule assigns responsibility for the law to the court and responsibility for the facts to the jury, still the jury has lawful authority to determine what is the law. If a jury can determine that the law is something different from what the judges think is the law, it would be nearly impossible to imagine judgment "as a matter of law." But by 1850 the Supreme Court recognized the directed verdict, and the standard has evolved ever since. Professor Coquillette added that there were many differences among the colonies-states in jury-trial practices as of 1791. A member added that it is clear a court may direct acquittal in a criminal case, a power that exists for the protection of the defendant.

The Committee unanimously agreed to remove this proposal from the agenda.

Rule 68: Dockets 13-CV-B, C, D; 10-CV-D; 06-CV-D; 04-CV-H; 03-CV-B; 02-CV-D

Rule 68, dealing with offers of judgment, has a long history of Committee deliberations followed by decisions to avoid any suggested revisions. Proposed amendments were published for comment in 1983. The force of strong public comments led to publication of a substantially revised proposal in 1984. Reaction to that proposal led the Committee to withdraw all proposed revisions. Rule 68 came

back for extensive work early in the 1990s, in large part in response to suggestions made by Judge William W Schwarzer while he was Director of the Federal Judicial Center. That work concluded in 1994 without publishing any proposals for comment. The Minutes for the October 20-21 1994 meeting reflect the conclusion that the time had not come for final decisions on Rule 68. Public suggestions that Rule 68 be restored to the agenda have been considered periodically since then, including a suggestion in a Second Circuit opinion in 2006 that the Committee should consider the standards for comparing an offer of specific relief with the relief actually granted by the judgment.

Although there are several variations, the most common feature of proposals to amend Rule 68 is that it should provide for offers by claimants. From the beginning Rule 68 has provided only for offers by parties opposing claims. Providing mutual opportunities has an obvious attraction. The snag is that the sanction for failing to better a rejected offer by judgment has been liability for statutory costs. A defendant who refuses a $80,000 offer and then suffers a $100,000 judgment would ordinarily pay statutory costs in any event. Some more forceful sanction would have to be provided to make a plaintiff's Rule 68 offer more meaningful than any other offer to settle. The most common proposal is an award of attorney fees. But that sanction would raise all of the intense sensitivities that surround the "American Rule" that each party bears its own expenses, including attorney fees, win or lose. Recognizing this problem, alternative sanctions can be imagined — double interest on the judgment, payment of the plaintiff's expert-witness fees, enhanced costs, or still other painful consequences. The weight of many of these sanctions would vary from case to case, and might be more difficult to appraise while the defendant is considering the consequences of rejecting a Rule 68 offer.

Another set of concerns is that any reconsideration of Rule 68 would at least have to decide whether to recommend departure from two Supreme Court interpretations of the present rule. Each rested on the "plain meaning" of the present rule text, so no disrespect would be implied by an independent examination. One case ruled that a successful plaintiff's right to statutory attorney fees is cut off for fees incurred after a rejected offer if the judgment falls below a rejected Rule 68 offer, but only if the fee statute describes the fee award as a matter of "costs." It is difficult to understand why, apart from the present rule text, a distinction should be based on the likely random choice of Congress whether to describe a right to fees as costs. More fundamentally, there is a serious question whether the strategic use of Rule 68 should be allowed to defeat the policies that protect some plaintiffs by departing from the "American Rule" to encourage enforcement of statutory rights by an award of attorney fees. The prospect that a Rule 68 offer may cut off the right to statutory fees, further, may generate pressures on plaintiff's counsel that might be seen as

creating a conflict of interests with the plaintiff. The other ruling is that there is no sanction under Rule 68 if judgment is for the defendant. A defendant who offers $10,000, for example, is entitled to Rule 68 sanctions if the plaintiff wins $9,000 or $1, but not if judgment is for the defendant. Rule 68 refers to "the judgment that the offeree finally obtains," and it may be read to apply only if the plaintiff "obtains" a judgment, but the result should be carefully reexamined.

The desire to put "teeth" into Rule 68, moreover, must confront concerns about the effect of Rule 68 on a plaintiff who is risk-averse, who has scant resources for pursuing the litigation, and who has a pressing need to win some relief. The Minutes for the October, 1994 meeting reflect that "[a] motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view * * *." Abrogation remains an option that should be part of any serious study.

Finally, it may be asked whether it is better to leave Rule 68 where it lies. It is uniformly agreed that it is not much used, even in cases where it might cut off a statutory right to attorney fees incurred after the offer is rejected. It has become an apparently common means of attempting to defeat certification of a class action by an offer to award complete relief to the putative class representative, but those problems should not be affected by the choice to frame the offer under Rule 68 as compared to any other offer to accord full relief. Courts can work their way through these problems absent any Rule 68 amendment; whether Rule 23 might be amended to address them is a matter for another day.

Discussion began with experience in Georgia. Attorney-fee shifting was adopted for offers of judgment in 2005, as part of "tort reform" measures designed to favor defendants. "It creates enormously difficult issues. Defendants take advantage." And it is almost impossible to frame a rule that accurately implements what is intended. Already some legislators are thinking about repealing the new provisions. If Rule 68 is to be taken up, the work should begin with a study of the "enormous level of activity at the state level."

Any changes, moreover, will create enormous uncertainty, and perhaps unintended consequences.

Another member expressed fear that the credibility of the Committee will suffer if Rule 68 proposals are advanced, no matter what the proposals might be. Debates about "loser pays" shed more heat than light.

A judge expressed doubts whether anything should be done, but asked what effects would follow from a provision for plaintiff offers? One response was that the need to add "teeth" would likely

lead to fee-shifting, whether for attorneys or expert witnesses.

It was noted that California provides expert-witness fees as consequences. But expert fees are variable, not only from expert to expert but more broadly according to the needs for expert testimony in various kinds of cases.

The value of undertaking a study of state practices was repeated. "I pause about setting it aside; this has prompted several suggestions." State models might provide useful guidance.

Another member agreed — "If anything, let's look to the states." When people learn he's a Committee member, they start to offer Rule 68 suggestions. Part 36 of the English Practice Rules — set in a system that generally shifts attorney fees to the loser — deals with offers in 22 subsections; this level of complication shows the task will not be easy. There is ground to be skeptical whether we will do anything — early mediation probably is a better way to go. Still, it is worthwhile to look to state practice.

A member agreed that "studies do little harm. But I suspect a review will not do much to help us." It is difficult to measure the actual gains and losses from offers of judgment.

One value of studying offers of judgment was suggested: Arguments for this practice have receded from the theory that it increases the rate of settlement — so few cases survive to trial that it is difficult to imagine any serious gain in that dimension. Instead, the argument is that cases settle earlier. If study shows that cases do not settle earlier, that offers are made only for strategic purposes, that would undermine the case for Rule 68.

Another member suggested that in practice the effect of Rule 68 probably is to augment cost and delay. In state courts much time and energy goes into the gamesmanship of statutory offers. "Reasonable settlement discussion is unlikely. The Rule 68 timing is wrong; it's worse in state courts."

It also was observed that early settlement is not necessarily a good thing if it reflects pressure to resolve a case before there has been sufficient discovery to provide a good sense of the claim's value. This was supplemented by the observation that early mediation may be equally bad.

Another member observed that a few years ago he was struck by the quagmire aspects of Rule 68, by the gamesmanship, by the fear of unintended consequences from any revision. There is an analogy to the decision of the Patent Office a century ago when it decided to refuse to consider any further applications to patent a perpetual motion machine. "The prospect of coming up with something that will be frequently utilized to good effect is dim." There is

an unfavorable ratio between the probability of good results and the effort required for the study.

A judge responded that the effort could be worth it if the study shows such a dim picture of Rule 68 that the Committee would recommend abrogation.

The Department of Justice reported little use of Rule 68, either in making or receiving offers. When it has been used, it is at the end, when settlement negotiations fail. In two such cases, it worked in one and not the other.

A member observed that if Rule 68 is little used, it is essentially inconsequential, "we don't gain much by abrogating it." He has used it twice.

The discussion closed by concluding that the time has not come to appoint a Subcommittee to study Rule 68, but that it will be useful to undertake a study of state practices in time for consideration at the next meeting.

Rule 4(c)(1): "Copy" of Complaint: Dkt. 14-CV-C

Rule 4(c)(1) directs that "[a] summons must be served with a copy of the complaint." Rule 10(c) provides that "a copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." A federal judge has suggested that it may be useful to interpret "copy" to allow use of an electronic copy, on a CD or other computer-readable medium. The suggestion was prompted by a case brought by a pro se prisoner with a complaint and exhibits that ran 300 pages and 30 defendants. The cost of copying and service was substantial.

The suggestion is obviously attractive. But there will be defendants who do not have access to the technology required to read whatever form is chosen, no matter how basic and widespread in general use. This practice might be adopted for requests to waive service, and indeed there is no apparent reason why a plaintiff could not request waiver by attaching a CD to the request. Consent to waive would obviate concerns for the defendant's ability to use the chosen form.

A more general concern is that this proposal approaches the general question of initial service by electronic means, although it seems to contemplate physical delivery of the storage medium. These issues may be better resolved as part of the overall work on adapting the Civil Rules and all other federal rules to ever-evolving technology.

A practical example was offered. In the Southern District of Indiana, the court has an agreement with prison officials who agree

to accept e-copies on behalf of multiple defendants. It works. But it works by agreement, a simpler matter than drafting a general rule.

It was concluded that no action should be taken on this matter.

Rule 30(b)(2): Adding "ESI": 13-CV-F

Rule 30(b)(2) addresses service of a subpoena duces tecum on a deponent, and provides that the notice to a party deponent may be accompanied by a request under Rule 34 to produce "documents and tangible things at the deposition." This suggestion would add "electronically stored information" to the list of things to produce at a deposition.

This suggestion revisits a question that was deliberately addressed during the course of developing the 2006 amendments that explicitly recognized discovery of electronically stored information. It was decided then that ESI should not be folded into the definition of "document," but should be recognized as a separate category in Rule 34. At the same time, it was decided that references to ESI might profitably be added at some points where other rules refer to documents, but that other rules that refer to documents need not be supplemented by adding ESI. Rule 30(b)(2) was one of those that was not revised to refer to ESI.

Professor Marcus noted that there may be room to argue that it would have been better to add references to ESI everywhere in the rules that refer to documents, or at least to add more references to ESI than were added. But those choices were made, and it might be tricky to attempt to change them now. Rule 26(b)(3), protecting trial materials, is an example: on its face, it covers only documents and tangible things. Surely electronically generated and preserved work product deserves protection. But any proposal to amend Rule 26(b)(3) might stir undesirable complications. So for other rules.

There is no indication that the omission of "ESI" from Rule 30(b)(2) has caused any difficulties in practice.

Discussion began with the observation that the 2006 amendments have created a general recognition that "documents" includes ESI. This judge has never seen a party respond to a request to produce documents by failing to include ESI in the response. An attempt to fix Rule 30(b)(2) would start us down the path to revising all the rules that were allowed to remain on the wayside in generating the 2006 amendments. This concern was echoed by another member, who asked whether undertaking to amend Rule 30(b)(2) would require an overall effort to consider every rule that now refers to documents but not to ESI.

Another judge suggested that rather than refer to documents, ESI, and tangible things, Rule 30(b)(2) could be revised to refer simply and generally to "a request to produce under Rule 34."

A lawyer observed that the 2006 Committee Note says that a request to produce documents should be understood to include ESI. Most state courts have followed the path of defining "documents" to include ESI.

Discussion concluded with the observation that no problems have been observed. There is no need to act on this suggestion.

Rule 4(e)(1): Sewer Service: Dkt. 12-CV-A

This proposal arises from Rule 4(e)(1), which provides for service on an individual by following state law. State law may provide for leaving the summons and complaint unattended at the individual's dwelling or usual place of abode. The suggestion is that photographic evidence should be required when service is made by this means. Apparently the photograph would show the summons and complaint affixed to the place.

The proposal does not address the more general problem of deliberately falsified proofs of service. Nor does it explain how a server intent on making ineffective service would be prevented from removing the summons and complaint after taking the picture. The picture requirement might serve as an inducement to actually go to the place, alleviating faked service arising from a desire to avoid that chore, but that may not be a great advantage.

Discussion began with a suggestion that this proposal is unnecessary.

Another member agreed that the suggestion should not be taken up. But he recounted an experience representing a pro bono client who had lost a default judgment in state court and who could not remember having been served or having learned about the lawsuit by any other means. State court records were of no avail, because the state practice is to discard all records after judgment enters. The matter was eventually resolved without needing to resolve the question whether service had actually been made, but he remains doubtful whether it was.

Another member said that "the problem is very real. It bothers me a lot. Paper service can be difficult and costly. Process servers cut corners." But it is difficult to do anything by rule that will correct these practical shirkings. What we need is a technology for cost-effective service. "I don't know that this Committee is the body to fix it." Another member agreed that advancing technology may eventually provide the answer. That is better suited to the agenda of the e-rules subcommittee.

This proposal was set aside.

Rule 15(a)(3): Any required response: Dkt 12-CV-B

Rule 15(a)(3) sets the time for "any required response" to an amended pleading. Before the Style Project, the rule directed that "a party shall plead in response" within the designated times. The question is whether an ambiguity has been introduced, and whether it should be fixed.

The earlier direction that a party "shall plead in response" relied on the tacit understanding that there is no need to plead in response to an amended pleading when the original pleading did not require a response. A plaintiff is not required to reply to an answer absent court order, and is not required to reply to an amended answer. The same understanding should inform "any required response," but that may not end the question. What of an amendment to a pleading that does require a response? If there was a response to the original pleading — the most common illustration will be an answer to a complaint — must there always be an amended responsive pleading, no matter how small the amendments to the original pleading and no matter how clearly the original responsive pleading addresses everything that remains in the amended pleading?

There is something to be said for a simple and clear rule that any amendment of a pleading that requires a responsive pleading should be followed by an amended response, even if the only effect is to maintain a tidy court file. But is this always necessary?

A judge opened the discussion by stating that the need for an amended responsive pleading depends on the nature of the amendment to the original pleading. If it is something minor, it suffices to put it on the record that the answer stands. There is no need for a rule that requires that there always be an amended answer. But generally he asks for an amended answer to provide a clear record.

Another judge noted that when lawyers are involved in the litigation, they virtually always file an amended response.

A lawyer recounted a current case with a 400-page complaint and, initially, 27 defendants. "One defendant has been let out. We reached a deal that our 45-page answer would stand for the remaining 26 defendants. Everyone was happy."

It was agreed that no further action should be taken on this suggestion.

Rule 55(b): Partial Default Judgment: Dkt. 11-CV-A

This proposal arises from a case that included requests for declaratory, injunctive, and damages relief on a trademark. The

defendant defaulted. The apparent premise is that the clerk is authorized to enter a default judgment granting injunctive and declaratory relief, while the amount of damages must be determined by the court. And the wish is for a way to make final the judgment for declaratory and injunctive relief, in the expectation that if the defendant does not take a timely appeal the plaintiff may decide to abandon the request for damages rather than attempt to prove them. The problem is that Rule 55(b)(1) allows the clerk to enter judgment only if the claim is for a sum certain or a sum that can be made certain by computation. The court must act on a request for declaratory or injunctive relief. Since it is the court that must act, the court has whatever authority is conferred by Rule 54(b) to enter a partial final judgment. Since Rule 54(b) requires finality as to at least a "claim," there may be real difficulty in arguing that the request for damages is a claim separate from the claim for specific relief. But that question is addressed by the present rule and an ample body of precedent.

It was concluded without further discussion that this suggestion should not be considered further.

New Rule 33(e): 11-CV-B

This suggestion would add a new Rule 33(e) that would embody specific language for an interrogatory that would not count against the presumptive limit of 25 interrogatories and that would ask for detailed specific information about the grounds for failing to respond to any request for admission with an "unqualified admission." The suggestion is drawn from California practice.

Brief discussion suggested that adopting specific interrogatory language in Rule 33 seems to fit poorly with the current proposal to abrogate Rule 84 and all of the official forms that depend on Rule 84. Apart from that, there are always risks in choosing any specific language.

The Committee decided to remove this proposal from the docket.

Rule 8: Pleading: Dkt. 11-CV-H

This proposal would amend Rule 8 to establish a general format for a complaint. There should be a brief summary of the case, not to exceed 200 words; allegations of jurisdiction; the names of plaintiffs and defendants; "alleged acts and omissions of the parties, with times and places"; "alleged law regarding the facts"; and "the civil remedy or criminal relief requested."

Pleading has been on the Committee agenda since 1993. The Twombly and Iqbal cases, and reactions to them, brought it to the forefront. Active consideration has yielded to review of empirical studies, particularly those done by the Federal Judicial Center,

and to anticipation of another Federal Judicial Center study that remains ongoing. There has been a growing general sense that pleading practice has evolved to a nearly mature state under the Twombly and Iqbal decisions. The time may come relatively soon to decide whether there is any role that might profitably be played by attempting to formulate rules amendments that might either embrace current practice or attempt to revise it.

The Committee concluded that the time to take up pleading standards has not yet come, and that this specific proposal does not deserve further consideration.

Rule 15(a)(1): Dkt. 10-CV-E, F

These proposals, submitted by the same person, address the time set by Rule 15(a)(1) for amending once as a matter of course a pleading to which a responsive pleading is required. The present rule allows 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. The concern is that the time to file a motion may be extended. The nature of the concern is not entirely clear, since the time to amend runs from actual service. The initial proposal sets the cutoff at 21 days before the time to respond to any of the listed Rule 12 motions. The revised proposal sets the cutoff at 21 days after the time to respond after service of one of the Rule 12 motions.

It was agreed that no action need be taken on this proposal

Rule 12(f): Motion to strike from motion: Dkt 10-CV-F

This proposal would expand the Rule 12(f) motion to strike to reach beyond striking matters from a pleading to include striking matters from a motion.

The Committee agreed that there is no apparent need to act on this proposal. It will be removed from the docket.

Discovery Times: Dkt. 11-CV-C

This proposal, submitted by a pro se litigant, suggests extension of a vaguely described 28-day time limit to 35 days. It touches on the continuing concerns whether the rules should be adapted to make them more accessible to pro se litigants. Those concerns are familiar, and until now have been resolved by attempting to frame rules as good as can be drawn for implementation by professional lawyers. This proposal does not seem to provide any specific occasion to rethink that general position.

The Committee agreed that there is no need to act on this proposal. It will be removed from the docket.

e-Discovery: Dkts. 11-CV D, E, G, I

All of these docket items address questions that were thoroughly examined in preparing the discovery rules amendments that are now pending in the Supreme Court. They were carefully evaluated, and were often helpful, in that process. Only one issue was raised that was put aside in that work. That issue goes to "the current lack of guidance as to reasonable preservation conduct (and standards for sanctions) in the context of cross-border discovery for U.S. based litigation." That issue was found complex, difficult, and subject to evolving standards of privacy in other countries, particularly within the European Union. The time does not seem to have come to take it up.

The Committee agreed that there is no need to act further on these proposals. They will be removed from the docket.

Rule 23 Subcommittee

Judge Dow presented the report of the Rule 23 Subcommittee. The Subcommittee is in the stage of refining the agenda for deeper study of specific issues. All Subcommittee members appeared for a panel at the ABA National Class Action Institute in Chicago on October 23 to seek input on the subjects that might be usefully included in ongoing work. It was emphasized at the outset that the first question is whether it is now possible to undertake changes that promise more good than harm. Many interesting suggestions were advanced and will be considered.

The Appellate Rules Committee is considering proposals to address the problems of settlement pending appeal by class-action objectors. The Subcommittee will continue working with the Appellate Rules Committee in refining those efforts.

A miniconference will be planned for some time in 2015.

It may prove too ambitious to attempt to present draft proposals for discussion in 2015. The target is to present polished proposals for discussion in the spring meeting in 2016.

The Chicago discussions helped to give a better sense that some potential problems "are not real, or are evolving in ways that may thwart any opportunity for present improvement."

One broad category of issues surround settlement classes. Not even Arthur Miller could have predicted in 1966 what could emerge as settlement-class practices. The questions include the criteria for certifying a settlement class as compared to certification of a trial class, and whether the rule text should include specific criteria for evaluating a settlement.

Cy pres recoveries have generated a lot of interest. A conference of MDL judges this week prompted many questions on this topic.

The Chicago discussion also reflected widespread objections to objectors among lawyers who represent plaintiffs, lawyers who represent defendants, and academics.

Discussions of notice requirements regularly raise questions whether more efficient and effective notice can be accomplished by electronic means.

And there has been a lot of attention to issues classes, and the relationship between Rule 23(c)(4) and Rule 23(b)(3).

Beyond these front-burner issues, a few side-burner issues remain open. Can anything be done to address consideration of the merits at the certification stage? There has been a lot of concern about the newly emerging criterion of the "ascertainability" of class membership, focused by recent Third Circuit decisions. The use of Rule 68 offers of judgment to moot individual representatives has prompted a practice that may be specific to the Seventh Circuit's views — plaintiffs file a motion for certification with the complaint to forestall a Rule 68 offer designed to moot the representatives, and then ask that consideration of the motion be deferred. Courts in the Seventh Circuit work around the problem; perhaps it need not be addressed in the rules.

What other questions might offer promising opportunities for consideration? What is missing from this tentative set of issues?

Professor Marcus noted that the work will either desist, or will proceed down the paths that seem promising. It is important to identify those paths now, because it becomes increasingly difficult to forge off in new directions after traveling a good way along the paths initially chosen.

The Administrative Office will establish some form of repository to gather and retain suggestions from all sources.

A Subcommittee member suggested that the ABA group showed a good bit of agreement that it will be useful to consider objectors, notice, and settlements. There is a lot of disagreement on other issues.

A Committee member suggested that settlement-class issues are difficult. We know that the standard for certification is different, but we do not know how or why.

This suggestion was followed by the observation that one set

of settlement issues goes to how many criteria for reviewing a proposed settlement might be written into the rule. Another goes to certification criteria, a question addressed by advancing and then withdrawing a "Rule 26(b)(4)" settlement-class provision in 1996. A Federal Judicial Center study undertaken after the Amchem decision asked whether settlement classes had been impeded. Settlement classes seem to continue, but there may be complicated relationships to the continually growing number of MDL consolidations.

Another Subcommittee member noted that settlement-class issues had presented real challenges to the ALI Principles of Aggregate Litigation work, but that they managed to work through to unanimous agreement.

Another suggestion was that partial settlements should be part of the process. In MDL consolidations, some defendants settle on a class basis. Does that pre-decide class certification as to other defendants? Some settlements include a most-favored-nations clause that expands the definition of the class with respect to the settling defendant upon each successive settlement with another defendant.

A new issue was suggested by the observation that the 14-day time limit to seek permission for an interlocutory appeal under Rule 23(f) is not long enough for the Department of Justice. The rule should be amended to provide a longer period in cases that include the United States (etc.) as a party.

The question of cy pres settlements came on for discussion. The issues include the perception that an increasing number of cases settle on terms that provide only cy pres recovery; other cases where cy pres recovery is a significant part of the original settlement terms; and still others where cy pres recovery is provided only for a residuum of funds that cannot be effectively distributed to class members. Another issue asks whether the recipient of a cy pres award should be closely aligned in interest with the class members. Cy pres seems a useful option. Some defendants like it because it supports a fixed dollar limit on liability, and a way to distribute the dollars.

The ALI proposal on cy pres recovery is linked to the proposal on settlement classes. The Principles collapse the criteria for reviewing a proposed settlement from the 14 or 16 factors that can be identified in the cases to a shorter, more manageable number. For certification, they establish that there is no need to consider either manageability (as recognized in the Amchem decision) or predominance. The Principles that address cy pres recovery have been more often cited and relied on by courts than any other of the Principles. They establish an order of preference: first, distribute to as many class members as possible; second, if funds

remain, make a second distribution to class members who have already participated in the first distribution; and finally, when that is exhausted, try to distribute to a recipient that is closely aligned with class interests.

The ALI cy pres provisions were said to have gained traction in the early going. "But there are problems with views of what class actions are designed to do." Different states have different policies. California, with its civil-law heritage, is predisposed to embrace cy pres awards more eagerly than most states.

A related suggestion was made: it is important to seek real value through the claims process. The defendant may have an incentive to have undistributed settlement funds revert to the defendant. Cy pres recovery can address that.

California practice provides a means of avoiding review of cy pres recipients by approving distribution of unclaimed settlement funds to Legal Aid. "There is a cycle that relates cy pres to the question of undistributed funds." And this ties to settlement review: will the defendant actually wind up paying what seems to be a fair amount, or will the fair amount provided by the overall figure be diminished by reversion to the defendant. There can be a surprise surplus. But usually that is dealt with in the settlement agreement. And it can be resolved in proceedings to approve the settlement. But there may be a growing problem when, in response to increasing uneasiness about cy pres recoveries, the parties seek to avoid the issue by not addressing cy pres in the settlement terms. There may, moreover, be suits in which only a group remedy is appropriate — it may be enough that the amount is fair, reasonable, and adequate even though none of it goes to individual class members.

Cy pres recoveries also figure in determining attorney fees. The question is whether cy pres distributions should be counted in the same way as actual distributions to class members.

It was urged that cy pres issues can be profitably addressed through rules amendments.

An observer suggested that cy pres practices depend on the jurisdiction. It is common to address cy pres recovery in general terms in the settlement, but delaying identification of the recipient until distribution to class members has been accomplished. This is appropriate because the choice of recipient may depend on how much money is left for cy pres distribution.

Turning to objectors, it was asked whether there is "a bar of objectors." If there is, the Committee should learn their views before framing rules for objections. A response was that there are objectors who seek to improve the settlement, and to gain a share

of the fee in return, while other objectors act for principle — Public Citizen is an example. We do not want to discourage useful objections. It was noted again that the Appellate Rules Committee has been considering the subset of issues that arise from settlement with an objector pending appeal. That work included hearing from two professors "who had different views." No objectors appeared at that meeting. It also was noted that the 2013 ABA National Institute had a panel that featured a "repeat objector."

An observer suggested that the question of awarding damages incident to a (b)(2) class deserves consideration. Rule 23(b)(2) is a perfect vehicle for certifying low-dollar consumer claims, but it is tied to "equitable relief. There is no real reason to maintain this tie to equity. Due process is satisfied by adequate representation. We could establish a mandatory class without the cost of notice. The origins of class actions are very practically oriented."

A response noted that a professor at the recent ABA National Institute said that she would be making suggestions on other (b)(2) issues. The question of the "ascertainability" of class membership ties to this. The Carrera case in the Third Circuit is an illustration of small-stakes consumer classes. But it should be remembered that (b)(2) speaks of injunctive relief or corresponding declaratory relief, not equity. It can be invoked for traditional legal claims. A further response suggested that due process may require notice and an opportunity to opt out when money damages are at issue. But the observer rejoined that the Committee should study this question — he believes that due process allows a no opt-out class, and that individual notice can be discarded when there is no opportunity to act on it by opting out.

A look to the past recalled that in 2001 the Committee proposed mandatory notice for (b)(1) and (b)(2) classes, but retreated in face of protests that the cost would defeat some potential civil-rights actions before they are even brought. But the ABA National Institute reflected the growing sense that due process may allow notice by social media and other internet means that work better, at lower cost, than mail or newspaper publication. "Perhaps we should remember there are a lot of balls in the air."

Judge Campbell expressed thanks to the Subcommittee for its ongoing work.

Pilot Projects

Judge Campbell opened the discussion of pilot projects by praising the panelists and papers at the Duke Conference for teaching many good lessons about current successes and failures of the Civil Rules. But these lessons were based on the experience of

the participants more often than solid empirical measurement. And some empirical work that looks good still may not be complete enough to support heavy reliance. Carefully structured pilot projects may be a better means of providing information. The employment protocols are a good example. So what would a pilot project look like if it is to provide reliable information?

Emery Lee began by observing that "'Data' is a plural that we use a lot. No one uses 'datum.' A datum is a piece of information. Data are plural pieces of information." What we need to do is to organize pieces of information into useful information. That task has to be addressed during the design phase of a project. The first question is what information can be collected that will be helpful in considering reforms? What will the end product look like? What are the questions to be answered? It can be important to enlist the help of the Federal Judicial Center at this initial point. "Call me. I can get the ball rolling."

Lee further observed that he met with some of the architects of the SDNY Complex Case pilot project at its inception. That is helpful. For the Seventh Circuit e-discovery project, the FJC did two surveys. "Judges always evaluate a program higher than the attorneys do." The world is complicated. Attorneys see a lot more of the case than the judges see. And "parties have interests. Cases that go to trial are weird cases — someone does not want to settle." And a pilot project cannot address differences that arise from the level of litigation resources available to the parties. Nor can a pilot project tamper with the law.

Surveys can be a really useful way of gathering information. But the FJC has become concerned that too many surveys from too many sources may have worn out the collective welcome, partciularly from judges. "Surveys will be dead in 10 years. No one wants to respond."

Docket-level data are available in employment cases. That may provide a secure foundation for evaluating the employment protocols.

Turning to pilot projects, the first question was whether they should be voluntary. If parties have a choice whether to participate on the experimental side of the project, is there a risk that self-selection will skew the results? But if cases are assigned on a random but mandatory basis, is the implementation invalid whenever the terms of the pilot are inconsistent with the national rules?

Emery Lee replied that opt-out programs are a problem. IAALS did a survey of a Colorado program for managed litigation and found that parties represented by attorneys tended to opt out. So a large percentage of the cases involved in the first round wound up as

defaults. And the lawyers opted out because they thought the program unattractive.

Judge Dow noted that there are 35 judges in the Northern District of Illinois. Many are dead set against cameras in the court room. But they agreed to participate in a pilot program "so we could be heard, not because we like it."

Another suggestion was that it is possible to imagine pilot programs on such things as cameras in the courtroom or initial disclosure. But is it possible to have a pilot that addresses "standards"? Emery Lee replied that it is possible to do empirical work on standards, but not in the form of a pilot project. It would take the form of comparing different regimes. And there are different problems. With the survey of final pretrial conferences, for example, the FJC found only a small number of cases that actually had final pretrial conferences. That makes it difficult to draw any sustainable conclusions.

A different form of research was brought into the discussion by asking whether interviews establish data? The FJC closed-case survey of discovery relied on interviews. Is it possible to get hard data? Emery Lee replied that the question can be viewed through the prism of Rule 1. It is easy to measure speed. So for cost, it is easy enough to measure cost, and to measure costs incurred by different parties and in different types of cases. But how do you count "just"? "We can count motions filed. We can look at discovery disputes in a broad swath of discovery cases. We can compare protocol data with cases that do not use the protocol." But for other things, we need interviews. The greater the number of sources, the better. "Interviews can shed light on the numbers." In like fashion the Committee looks at the numbers and helps the researchers understand what the numbers mean, or may mean.

Judge Koeltl described three projects.

The employment discovery protocols developed out of the Duke Conference. A group of lawyers engaged for plaintiffs or for defendants in individual employment cases worked to define core discovery that should be provided automatically in every case. The protocol directs what information plaintiffs should provide to defendants, and what defendants should provide to plaintiffs, 30 days after the defendant files a response. For this initial stage there is no need for Rule 34 requests, or initial disclosures under Rule 26(a)(1). The Southern District of New York has mandatory mediation in employment cases; lawyers say the protocols are helpful for that. Some 14 judges in the District have adopted the protocols; nationwide, some 50 judges use them. It is hard to imagine a more attractive way of beginning an employment case than by providing automatic disclosure of information that otherwise will be dragged out through costly and time-consuming discovery.

Judge Koeltl implements them by a uniform order entered in each case to which the protocols apply; that seems suitable. He has never had an objection. Some judges incorporate the protocols as part of their individual rules so that parties are aware of them and use the protocols in applicable cases.

SDNY also has a pilot project for § 1983 cases that involve false arrest, unreasonable use of force, unlawful searches, and the like. Mandatory disclosure of core discovery is required. The plaintiff is required to make a settlement demand and the defendant is required to respond. The case goes automatically to mediators; this ties to settlement. Either plaintiff or defendant can opt out of the program; parties often opt out in cases that are unlikely to settle. And judges can remove a case from the program, as may be done when they think a case will settle early. This program is established by local rule. 70% of the cases in the program have settled without any intervention by the assigned judge. It is not clear whether a judge can override a party's choice to opt out of the program. Plaintiffs may opt out if they think the process takes too long. The City opts out when it takes the position that it will not settle a particular case.

Finally, SDNY has a complex case pilot project. After the Duke Conference the Judicial Improvements Committee put together a set of best practices for complex cases. It was adopted by the court as a whole. It was designed to last for 18 months. It was renewed for an additional 18 months. Now it has met its sunset limit. But it is on the SDNY website, and the court has a resolution encouraging attorneys and judges to consider the best practices. "It covers all steps." There is a detailed checklist for what should be discussed at the parties' conferences. There is an e-discovery checklist. And a checklist for the pretrial conference itself. It includes a limit of 25 requests to admit, not counting requests to admit the genuineness of documents. Furthermore, a request to admit can be no longer than 20 words. There are procedures for motion conferences, and encouragement for oral argument on motions. The local rules call for a "Rule 56.1 statement" and a response in similar form, like the published but then withdrawn proposal to add a "point-counterpoint" procedure to Rule 56 itself. Some SDNY lawyers think the Rule 56.1 statement is more trouble than it is worth; so the best practices provide that the parties can ask the judge to let them dispense with this procedure. It has proved hard to define what is a complex action. Class actions are included, for example, in terms that reach collective actions under the Fair Labor Standards Act, but those cases are less complex than most class actions; some judges take FLSA cases out of the project

Thirty-six months is not a long time to study complex cases. It is hard to say that there has been enough experience to evaluate the best practices. "But there is a value in generating experiences to discuss even if their actual effect cannot be measured

statistically." As a small and unrelated illustration, one judge of the court came back from a conference enthusiastic about what he had heard about the "struck juror" procedure for selecting a jury. "We tried it, and most of us came to prefer it even without any empirical data."

Judge Dow reported on the Seventh Circuit e-discovery project. All districts in the Circuit are covered. It is "an enormous, ongoing project." The first year recruited a few judges and magistrate judges to attempt to identify cases that would involve extensive e-discovery. The second phase drew in many more judges. The third phase is ongoing. The web site includes a lot of reports, and orders, and protocols. "This changed the culture in our Circuit." Great expertise in e-discovery has developed, especially among the magistrate judges. The early focus on complex cases helped. Judge Dow was led to introduce proportionality, aiming to first discover the important 20% of information as a basis for planning further discovery. One particularly successful idea is to require each side to appoint a "technology liaison." These technologists work together to solve problems, not to try to spin problems to partisan advantage as lawyers do. Getting them in to deal with the judge as problem solvers has been a great change in culture. The program has anticipated many of the provisions in the discovery rules amendments that are now pending in the Supreme Court. "Judges love it. The lawyers do the work and may not love it as much. The culture change is very valuable." The work has been sustained by volunteers: all sorts of people "wanted in." A Committee member who has participated in some parts of developing the Seventh Circuit program, although he does not practice there, agreed. The initial work of drafting principles was done by volunteer lawyers — he was one of them. No cost was involved.

Discussion turned to more general approaches that might advance the cause of more effective procedure.

A historic note was sounded by quoting from an article by Charles Clark written in 1950, appearing a 12 F.R.D. 131. He noted that the 1938 Federal Rules, drawing from many sources, established a discovery regime more detailed and sweeping than anything that had been before. But he also noted that as of 1950, there was not yet any clear picture of its actual operation, not even in all experience and with 1948 surveys and interviews in five circuits. Nothing has really changed.

The Seventh Circuit pilot project was noted as something designed to enforce cooperation, to urge lawyers to work together and to authorize sanctions when they agree to adhere to the principles. This is of a piece with the current proposals to emphasize in Rule 1 that the parties are charged with construing and administering the rules to achieve the goals of Rule 1.

It also may be useful to expand the Seventh Circuit approach to technology liaisons by establishing a position for technology experts on court staffs. These experts could come to the help of parties who need it.

Other suggestions will be submitted for Committee consideration.

It was observed that there are categories of cases that may have discrete characteristics that yield to routinized discovery. Individual employment cases seem to have these characteristics. The same may be true of police-conduct cases under § 1983. But it should be asked how many more such categories of cases can be identified. It is not clear how many will fit this paradigm. It was agreed that the issue is to get plaintiffs and defendants to work together to establish a protocol acceptable on all sides. It has been suggested that employment class actions may be suitable, but work has not started. "It takes enthusiasm and impetus to bring them together." It was suggested that other categories of cases that would be ideal candidates include actions under the Individuals with Disabilities Education Act and actions under the Fair Credit Reporting Act.

The nationwide pilot project for patent cases was noted. It was established by Congress, and is designed to last for 10 years. Without knowing a lot about it, it can be described as relying on designating judges who are willing to do patent cases, and providing them with training packages and model local rules that can be used as orders. But patent cases are still assigned at random; the assigned judge can transfer the case to a designated patent judge, but some assigned judges do not give up their cases. The idea of identifying judges who volunteer to learn and develop best practices is intriguing.

A judge asked how do you get buy-in from lawyers for experimental programs? The employment protocol experience was described as an example. The plaintiff side was led by Joseph Garrison, a past president of the National Employment Lawyers Association. The defense side was led by Chris Kitchel, the liaison from the American College of Trial Lawyers to the Civil Rules Committee. Encouragement was provided by Judges Kravitz, Rosenthal, and Koeltl. The IAALS promoted it. "It almost fell apart." It was like a labor negotiation, in which the sides took turns at walking out of the negotiations and then returning to the table. The judges who were involved then actively promoted the protocols in their own courts.

A judge suggested that many judges revel in being generalists, and believe that they can do anything. Programs to provide special training to some judges may not work if they depend on voluntary transfer by judges who draw cases by random selection. But it was

noted that one benefit of the pilot project for patent cases is that the specialized judges become a resource for other judges on the same court.

The IAALS is tracking innovative practices in the states, mostly innovations in discovery. Their report will be available for consideration at the April meeting.

Discovery problems may be affected by the observation offered by many participants at the Duke Conference. "We live in a discovery-centered world." Lawyers do not ask — indeed, too often do not know how to ask — for information that will be needed at trial. They think about, and get paid for, vast discovery. Criminal trials without discovery of this kind seem to be just as effective as civil trials, at about a tenth of the cost. "Surely there must be cases where the parties want trial." But an experiment to test this failed. In every case this judge offered a trial within 4 months, with minimal or no discovery and no motions for summary judgment. The order directed the lawyers to discuss this option with their clients, and to provide a budget for proceeding with this option and an alternative budget for proceeding without taking it up. The experiment was abandoned after using the order in more than 1,100 cases. The option was picked up in 3 cases, and then rejected within a week in one of them. Neither of the other 2 went to trial. "How is it that we have come to depend so much on discovery"?

It was noted that the same fate had met the expedited trial project in the Northern District of California. It died for want of takers. And it was wondered whether perhaps these outcomes could be changed by getting "buy-in" from insurers who bear the costs of defending.

A judge suggested that "lawyers are trained to do discovery, and get paid for it. It has got to the point of too much."

Another judge observed that "we don't have a chance to talk to the clients. Should I require them to come to the Rule 16 conference? If not to require attendance, to invite them"?

Another observation was that most young lawyers to not get any training in trial, unlike earlier days when many were given many small trials to develop trial competence.

The comparison to criminal cases was taken up by the observation that the prosecution has "discovery" through investigators and then a grand jury. Some or all of this information makes its way to the defendant at some point. And criminal lawyers have more trial experience. Together, these phenomena may help to explain the relative success of criminal trials as compared to civil trials that follow vast civil

discovery. But another judge countered that federal prosecutors on average try less than one case per year per lawyer in the office. On the state side, however, there are trials in low-dollar, low-significance cases. A young lawyer who wants trial experience can go to a district attorney's office, or a solicitor's office for misdemeanor cases, or a 2-person personal injury firm trying low-dollar cases.

A lawyer suggested that it is premature to despair of expedited trial programs. In MDL cases there are bellwether trials that are expensive and protracted, in part because they are symbolic. But the post-bellwether trials tend to be much more compact; they can be tried in a few days or even hours.

These problems will continue to be part of the Committee agenda.

Pending Rules Amendments

Important amendments are now pending in the Supreme Court. If the Court decides to adopt them, and if Congress allows them to proceed, they will go into effect on December 1, 2015. "We as a Committee should try to spearhead an effort to get word out about what they are intended to do, and what not."

Judge Fogel has brought the Federal Judicial Center on board with efforts to educate judges in the new rules should they take effect. Experience shows that simply adopting new rules does not automatically transfer into prompt implementation in practice.

Beyond FJC programs aimed at judges, the word can be got out through conferences, articles, and related efforts. Circuit conferences seem to be reviving — they would be a good focus. Inns of Court will be another good forum. A prepared packet of materials for use by these and other groups, such as Federal Bar Associations, could be useful.

An observer noted that programs are already being offered to explore the proposed amendments. She attended one in which discovery hypotheticals were presented to magistrate judges with arguments on both sides. The judges then addressed the outcome under present rules and under the proposed rules. It was effective.

Once it becomes clear that the proposed rules will go into effect — a desirable outcome that cannot be presumed — the Administrative Office may find some role to play in getting out the word.

Subcommittee Projects

Judge Campbell noted ongoing Subcommittee work in addition to

the Rule 23 Subcommittee.

The Appellate and Civil Rules Committees have formed a joint subcommittee to explore two topics. Judge Matheson and Virginia Seitz are the Civil Rules members. The Subcommittee will study manufactured finality devices that are treated differently by the circuits. It also will study a number of problems that seem to affect stays and appeal bonds under Rule 62.

The Discovery Subcommittee will begin work on a proposal that it expand the use of "requester pays" in discovery.

Future Meetings

The next meeting will be on April 9-10, 2015, at the Administrative Office. The fall meeting will be at the University of Utah Law School.

Respectfully submitted,

Edward H. Cooper
Reporter